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A HEART-FELT APPRECIATION OF A. I. R. FROM A RETIRED HIGH COURT JUDGE, AND SUBSCRIBER FOR NEARLY 50 YEARS.

I may avail myself of this opportunity to express my appreciation of the service that your Journal has been rendering to the profession. I started subscribing to it in 1924 when I was practising in the District Courts at Jullunder (Punjab). I continued to subscribe to it when I shifted to Lahore for practice in the High Court. I suspended subscribing to it for a period of well-nigh five years on my appointment as a Judge of the High Court of the Punjab because I could then get it at Government cost. However on resuming practice in the Supreme Court after my retirement, I had not only to resume subscribing to it but also to buy the Volumes for the intervening years. During the period of well-nigh fifty years that I was subscribing to it, I always found the reporting to be careful and uptodate. I was particularly impressed with the care and precision with which the headnotes were, by and large, prepared.

In the end, let me both thank and congratulate the management and the editorial staff for the service they have been rendering to the profession since its inception. During this period, many mushroom Law periodicals started publication, but like mushrooms they disappeared.

It is in the fitness of things to be enabled to give expression to my feelings on the termination of a connection extending well-nigh over half-a-century.

Sd/- Achhru Ram

(Retired Judge, High Court of Punjab and
Senior Advocate, Supreme Court of India.)

COMMENCEMENT OF AN ACT OF PARLIAMENT (or its provision)

Bihar and West Bengal (Alteration of Boundaries) Act, 1968 (24 of 1968), Section 2(c) — Appointed date for purposes

of — 10-6-1970 appointed as the day for the purposes of that Act.—Gaz. of India, 9-6-1970, Pt. II, S. 3(i), Ext. p. 543.

NOTABLE CASE LAW

Act of State

1. Whether principles of act of State applies in the case of liability incurred in respect of public property of erstwhile State which successor State has taken over and retained as part of its public property? (Yes)

AIR 1970 SC 1430

Constitutional Law

2. Whether Art. 131 of the Constitution covers a suit where a private individual is a party either jointly or alternatively with State? (No)

AIR 1970 SC 1446

3. Whether the provisions of S. 29, Kerala General Sales Tax Act, 1963 and R. 35 framed thereunder are violative of Arts. 14, 19(1) (f) and (g) and Art. 301 of the Constitution of India? Yes, they are ultra vires and unconstitutional as offending Art. 19(1) (f) and

Constitutional Law (contd.)

(g) and Art. 301 but they do not violate Art. 14

AIR 1970 Ker 218 (FB)

Labour and Industrial Disputes Legislation

4. Can a hospital or nursing home be treated as an industry for purposes of Industrial Disputes Act, 1947? Is the decision in Hospital Mazdoor's Case (1968) 2 SCR 866 rightly decided? (See H. N.)

AIR 1970 SC 1407

5. Can the gratuity scheme provide for forfeiture of gratuity in cases of gross misconduct? (Yes)

AIR 1970 SC 1421

Tort

6. (1) Whether release of one joint tort-feasor amounts to accord and satisfaction? (No)
- (2) Whether other joint tort-feasors are released? (No)

AIR 1970 SC 1468

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—S. 38 — Simultaneous execution in more places than one S C 1525 B (C N 321)

—S. 38 — Court executing decree — Cannot go behind decree even if it is erroneous SC 1475 B (C N 310)

—S. 39 — Section does not impose any limitation on power of transferor Court to send decree for execution to another Court — See Civil P. C. (1908), O. 21 R. 5 Andh Pra 307 (C N 49)

—S. 47 — Question relating to execution — Objection to validity of decree — Decree of Small Cause Court — Objection to its jurisdiction cannot be raised for first time in execution if question depends on investigation of facts — Spl. Civil Appln. No. 371 of 1965, D/- 10-9-1966 (Gui) Reversed SC 1475 C (C N 310)

—S. 48-A (Rajasthan) (as modified by Council Resolution dated 1-12-1914) — Bar of execution — Decree of 1885 A. D. — Period of 24 years, how to be computed Raj 204 A (C N 44)

—S. 64 and O. 38, R. 11 — Waiver of attachment before judgment must be proved by clear cut intention — Property under attachment sold after suit was decreed — One of the decree-holders endorsing the sale deed — No evidence to show that the consideration was either paid or deposited in Court — Inference of waiver cannot be made — There cannot be partial raising of attachment by consent of parties outside Court — Release of attachment is illegal Orissa 164 B (C N 55)

Civil P. C. (contd.)

—S. 64, O. 21, Rr. 59 and 58 (Pat.) — Attachment before judgment — Only such persons who had interest on the date on which either the attachment was effected or the decree was passed can object

Orissa 164 C (C N 55)
—S. 92 — Settlement of scheme — Necessity of modification due to change of circumstances — Procedure

Cal 378 A (C N 68)
—S. 92 — Suit under S. 92(1) — Settlement of scheme by Court — Order allowing an application for varying and altering scheme is decree and as such appealable — See Civil P. C. (1908), S. 96

Cal 373 B (C N 68)
—S. 92 — O. 32 does not in terms apply to representation of deity in suits under S. 92 — See Civil P. C. (1908), O. 32

Cal 373 D (C N 68)
—S. 92 — Public charities — See Civil P. C. (1908), O. 1 R. 8

Cal 373 E (C N 68)
—Ss. 96, 92, 2 (2) and 115 — Suit under Section 92(1) — Order allowing an application for varying and altering scheme is decree and is appealable — Contrary view expressed in Mukherjee's Tagore Law Lectures that propriety of such order can be challenged by way of revision under Section 115 held to be no longer good law in view of the Supreme Court decision in AIR 1965 SC 231 Cal 373 B (C N 68)

—Ss. 96, 2 (2) and 92 — Suit under Section 92(1) — Settlement of scheme by Court — Application for setting aside election of certain members of temple committee and for amendment of scheme — Court rejecting application — Such determination is decree and as such appealable

Cal 373 C (C N 68)
—S. 100 — Consent to marriage whether obtained by fraud is finding of fact — See Hindu Marriage Act (1955) S. 12(1)(c)

Bom 312 A (C N 56)
—S. 100 — Schizophrenia — Concurrent finding as to — Not open to challenge in second appeal — See Hindu Marriage Act (1955) S. 13 (1) (iii)

Bom 312 B (C N 56)
—Sections 100-101 — Second appeal — New point — Secondary evidence — Failure to take objection as to its production — Such objection cannot be taken in second appeal Raj 190 C (C N 41)

—S. 113 — Appeal pending before District Judge against an order of eviction under S. 4, Public Premises (Eviction of Unauthorised Occupants) Act, 1958 — Application for reference to High Court under Section 113, Civil P. C. challenging validity of Ss. 4, 5 and 7 of that Act — District Judge while declining to make a reference deciding that those sections were valid and constitutional — District Judge exceeds his jurisdiction under S. 113

Punj 407 B (C N 63)
—S. 114 — Review — State claiming privilege in respect of certain documents — De-

Civil P. C. (contd.)

cision by Court at stage of interrogatories is premature — Decision liable to review at stage of recording of evidence

Bom 306 B (C N 54)

—S. 115 — Revision against interlocutory order — High Court cannot in revision try other issues arising in the case, even if the parties conceded — Action of the High Court cannot be justified under S. 24, when it has not purported to withdraw suit and try the same: C. R. 325 of 1957, D/- 5-1-1960 (All), Reversed

S C 1468 A (C N 309)

—S. 115 — Revision — Suit under Section 92 (1) — Settlement of scheme by Court — Order allowing an application for varying and altering scheme cannot be challenged in revision — See Civil P. C. (1908), S. 98 Cal 373 B (C N 68)

—S. 115 — Revision — High Court will interfere if order under S. 145, Criminal P. C. does not show existence of apprehension of breach of peace

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—S. 115 — Mode of service of summons — Objections to, raised for first time in revision — High Court will not interfere — See Civil P. C. (1908), O. 5 R. 10 (Punjab)

Punj 393 (C N 61)

—O. 1, R. 8 and Section 92 — Public Endowment — Election to management body — Person interested in the endowment can challenge election — He need not be a candidate or elector for the election — Doctrine of Representation of the People Act (1951) cannot be applied — Representation of the People Act (1951), S. 81

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—O. 1, R. 9 — Suit for rent by holder of succession certificate — Not bad for non-joinder of other legal heirs of deceased

Assam 102 A (C N 24)

—O. 1, R. 10 — Suit for ejectment of tenant on basis of compromise decree can be maintained by reversioner without suing for declaration of his title — Other heirs of widow are not necessary parties — See Registration Act (1908) S. 17 (2) (vi)

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—O. 2, R. 2 — Identity of parties necessary for application of rule — Suit for personal decree to recover balance against one mortgagor — Dismissal of application to implead the other mortgagor — Application for personal decree against the latter mortgagor not barred by reason of dismissal of application so long as their liability remains undischarged

Mad 337 B (C N 97)

—O. 2, R. 2 — Relinquishment of part of claim — Not applicable to execution proceedings

Raj 204 C (C N 44)

—O. 5, R. 10 (Punjab), 20 and 20-A and S. 115 — Mode of service of summons — Objections to, raised for first time in revision — High Court will not interfere

Punj 393 (C N 61)

—O. 5, R. 20 — Mode of service of summons — Objections to, raised for first time in revision — High Court will not interfere

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— See Civil P. C. (1908), O. 5, R. 10 (Punjab)

Punjab 393 (C N 61)

—O. 5, R. 20A — Mode of service of summons — Objections to, raised for first time in revision — High Court will not interfere — See Civil P. C. (1908), O. 5, R. 10 (Punjab)

Punj 393 (C N 61)

—O. 7, R. 1 and Order 20, Rule 15 — Dissolution of partnership — Suit for accounts — Agreement outside Court to pay amount found due — Suit to recover maintainable — Section 69 of Partnership Act is not applicable — Partnership Act (1932), Section 69

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—O. 11, R. 13 — Production of documents — Privilege — Affairs of State — Privilege, claim of — Claim should be decided at the stage of recording of evidence — If decided earlier, decision is open to review at stage of recording of evidence

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—O. 20 R. 15 — Dissolution of partnership — Suit for accounts — Agreement outside Court to pay amount found due — Suit to recover is maintainable — See Civil P. C. (1908), O. 7, R. 1

J and K 140 (C N 28)

—O. 21, R. 5 and S. 39 — Transfer of decree for execution to another Court — Transmission of copy of decree through District Court is immaterial for taking out execution — AIR 1940 Lah 394, Dissented from

Andhra Pra 307 (C N 49)

—O. 21, R. 16 — Application for execution by transferee of decree — Assignee of part of decree — His share was defined — Assignee could execute decree in respect of his share

Raj 204 B (C N 44)

—O. 21, R. 57 — Attachment before judgment — Even after suit is decreed attachment enures for all successive execution applications — Dismissal of an execution application does not affect such attachment — O. 21, R. 57 does not apply — See Civil P. C. (1908), O. 38 R. 11

Orissa 164 A (C N 55)

—O. 21, R. 58 (Pat) — Attachment before judgment — Who can object — Attachment made prior to passing of decree — Sale later — Purchasers being neither in possession on date of attachment or of decree cannot initiate proceedings under O. 21, R. 58 — See Civil P. C. (1908), O. 38 R. 11

Orissa 164 C (C N 55)

—O. 21, R. 59 (Pat) — Attachment before judgment — Who can object — Attachment made prior to passing of decree — Sale later — Purchasers being neither in possession on date of attachment or of decree cannot initiate proceedings under O. 21, R. 59 — See Civil P. C. (1908), O. 38 R. 11

Orissa 164 C (C N 55)

—O. 21, R. 66 and 90 — Notice of alteration in upset price contained in sale proclamation — Failure to give notice does not constitute material irregularity or fraud within meaning of O. 21, R. 90

Mad 357 (C N 105)

Civil P. C. (contd.)

—O. 21, R. 90 Proviso (as amended by Allahabad H. C.) — Expression "entertain" in Proviso means "adjudicate upon" or "proceed to consider on merits" and does not refer to initiation of proceedings

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—O. 21, R. 90 Clause (b) to Proviso (as introduced by Allahabad H. C.) — Application to set aside sale made prior to amendment — No compliance with Clause (b) even after its introduction — Effect — Power conferred upon Court by Clause (b) — Nature — Decision of Allahabad H. C., Reversed

SC 1384 B (C N 294)

—O. 21, R. 90 — Failure to give notice of alteration in upset price contained in sale proclamation — Not material irregularity or fraud, within meaning of O. 21, R. 90 — See Civil P. C. (1908), O. 21, R. 66

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—O. 22, R. 6 — Abatement — Death of one of defendants after preliminary decree — Suit does not abate — Time should be given to decree-holder to bring legal representatives on record.

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—O. 23, R. 3 — "Proved to the satisfaction of the Court" — Meaning of — Compromise out of Court — Party alleging agreement to be vitiated by fraud, misrepresentation etc. — Court has power to go into merits of allegations (Obiter) AIR 1940 Bom 60 and AIR 1928 All 494 and AIR 1935 All 137 and AIR 1952 Cal 73 and AIR 1950 Mad 728 and AIR 1959 Ker 130 and AIR 1963 Raj 63, Dissented Mys 209 (C N 54)

—O. 26, R. 13 — See Civil P. C. (1908), S. 11

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—O. 26, R. 15 — See Civil Procedure Code (5 of 1908) S. 11

SC 1536 (C N 325)

—O. 32 and Section 92 — Order 32 does not apply to representation of deity in suits under Section 92 — Removal of a next friend already appointed under the provisions of Rule 4(1) and (2) of Order 32 of the Code, is not necessary before permitting the secretary of the temple committee to represent the deity

Cal 373 D (C N 68)

—O. 38, R. 11 and O. 21, R. 57 — Attachment before judgment — Even after suit is decreed attachment enures for all successive execution applications made within limitation till the decree is either satisfied or discharged — O. 21, R. 57 does not apply

Orissa 164 A (C N 55)

—O. 38 R. 11 — Waiver of attachment before judgment must be proved by clear cut intention — Property under attachment before judgment sold after suit was decreed — One of the decree-holders endorsing the sale-deed — No evidence to show that the consideration was either paid or deposited in Court — Inference of waiver cannot be made — Release of attachment is illegal — See Civil P. C. (1908), S. 64

Orissa 164 B (C N 55)

—O. 41, R. 1 — Dispensing with production of copy of judgment — Power of High

Civil P. C. (contd.)

Court: AIR 1945 Mad 353, Diss.

Mad 353 C (C N 104) (FB)

—O. 41, R. 27 — Production of additional evidence at appellate stage — Appellate Court can direct original Court to take such evidence — No remand for de novo trial

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CIVIL SERVICES**—Bombay Police Manual**

—R. 97 (as applied to Police Force in the State of Gujarat) — Police Force in the State of Gujarat — Constable promoted as Head constable — There is fresh order of appointment — See Constitution of India Art. 311(1)

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—Central Civil Services (Temporary Services) Rules (1965)

—R. 5(1) — Termination of employee — Order describing him as "at present under suspension" carries stigma — Compliance with Art. 311(2) before termination of service is necessary

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—Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956)

—R. 24 — In matters of promotion and seniority, substantive posts matter — Seniority to be determined by date of first appointment to such post and not to post held on deputation by selection

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—Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960)

—R. 12 — Notice can be given either by Government or its temporary servant — Notice by servant stating that he has terminated his services with Government — Notice complying with R. 12 — Servant is not in service of Government from date on which Government received notice and Government cannot take disciplinary proceedings against him after receipt of such notice — Decision of M. P. High Court, Reversed

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—Punjab Police Rules (1934)

—R. 13 — Eligibility for promotion — Prescription of qualification — Not incumbent on Government to provide the qualifications to police employees — Employee has no right to qualify in the course merely because it is conducted by Government: 1969 Ser LR 120 (Punj) Reversed

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—R. 13.10 — Instructions issued by I. G. P. — Instructions direct in conflict with corresponding provisions of Police Rules — Instructions are invalid

Punj 395 C (C N 62)

—R. 13.12 — Reversion to substantive post with removal of name from Promotion List E — No penal consequence involved — Second Appeal No. 1437 of 1962 D/- 20-4-1967 (Punj) Reversed

Punj 415 B (C N 65) (FB)

Civil Services (contd.)**—Railway Establishment Code**

—R. 2046 (2) (b), Rule II (as revised) — Compulsory Retirement — Under Note 1 of Appendix XXXII Railway Board competent to declare who are ministerial servants — Senior Inspector of Station Accounts — Declaration excluding him from list of ministerial servants — Conclusive — Not entitled to be retained in service till age of sixty

Cal 411 (C N 75)

Coal Mines (Conservation and Safety) Act (12 of 1952)

—S. 3(1) — Owner — Definition in Indian Mines Act (1923), Section 3 adopted — Lessee or occupier of mine is owner

Cal 391 A (C N 72)

—S. 17 — Rules under — Rule 39, sub-rule (3c) — Disposal of application for opening or reopening of mine — Procedure

Cal 391 B (C N 72)

Commissions of Inquiry Act (60 of 1952)

—S. 3 — Appointment of Commission — Notification under, by State Government dated 1-10-1967, Para 4(d) (as amended up to 26-9-1968) — Interpretation of — Clause (d) may be analysed in light of S. 3(1)

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—S. 23 (3) — Change in name — Constitution not changed — See Income-tax Act (1922), S. 46 (5A)

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—S. 293 (1)(d) — Petition for winding up — Assets mortgaged for an amount exceeding the limit in S. 293 (1)(d) — Court will not refuse to make winding up order only on that ground — See Companies Act (1956) S. 443(1)

Cal 398 E (C N 74)

—Ss. 439, 529 — Petition under S. 439, for winding up by secured creditor — Maintainability — Not necessary for the secured creditor to give up security or to prove for balance after valuing the security as provisions of bankruptcy are not applicable to petition for winding up

Cal 398 B (C N 74)

—Section 439 — Petition by secured creditor challenged by other creditors on the ground that all assets of company are mortgaged to the petitioner — Assets of company not sufficient even to satisfy the claim of secured creditor — Petition is maintainable

Cal 398 C (C N 74)

—S. 443 — Winding up — Petition by secured creditor whose claim exceeded the claim of all others — Whether company should be wound up — Test for determining

Cal 398 A (C N 74)

—Ss. 443 (1), 293 (1)(d) — Petition for winding up — Assets mortgaged for amount exceeding limit in Section 293 (1)(d) — Court will not refuse to make winding up order only on that ground

Cal 398 E (C N 74)

Companies Act (1956) (contd.)

—S. 529 — Petition by secured creditor

—Winding up — See Companies Act (1956) S. 439

Cal 398 B (C N 74)

Companies (Court) Rules (1959)

—R. 21 Form 3. — Petition for winding up to be affirmed by Principal officer under Rule 21 — Rule is not mandatory — Petition verified by responsible officer — Provisions of form 3 not applicable — Petition cannot be rejected in limine

Cal 398 D (C N 74)

Constitution (Application to Jammu and Kashmir) Orders, 1959 and 1964

—Jammu and Kashmir preventive laws — Immunity to, from Fundamental Rights granted under Article 35(c), Constitution of India — Period of immunity extended under the Orders 1959 and 1964 — No infringement of Fundamental Rights in Art. 22.

J and K 143 B (C N 30)

Constitution of India

—Part 3 (General) — Interpretation of Statutes — Doctrine of severability — Some sections of impugned Act struck down as unconstitutional — What is left survives if invalid provisions do not affect validity of Act as a whole — Real test is whether what remains of the statute is so inextricably bound up with the invalid part that what remains cannot independently survive

SC 1453 K (C N 309)

—Arts. 12, 226 — Words, "other authorities" in Article 12 — Interpretation — Against whom writ can be issued

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—Article 13 — Doctrine of eclipse — Applicability

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—Article 14 — Liability of assessee to pay advance tax as agent of non-resident — Procedure — Provisions of I. T. Act 1961, Ss. 207, 208, 150 do not infringe equality clause — See Income Tax Act (1961), S. 207

SC 1386 (C N 295)

—Article 14 — Gold (Control) Act (1968), Sections 27, 39 — Provisions not discriminatory — See Gold Control Act (1968), Section 27

SC 1453 I (C N 308)

—Article 14 — Equality before law — Test of validity

SC 1453 J (C N 308)

—Arts. 14, 73 and 162 — In appropriate cases Court can strike down executive action as discriminatory — AIR 1958 Kcr 333, Held not good law in view of AIR 1952 SC 75 & AIR 1959 SC 149

Andh Pra 314 A (C N 51)

—Art. 14 — Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956), Seh. cl. 2 (2) — Provision offends Article 14 — Provision however is separable from the rest of the Act

Andh Pra 318 C (C N 52) (FB)

—Article 14 — Equality before law — Andhra Pradesh Slum Improvement (Acqui-

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sition of Land) Act (33 of 1956), Pre. — Act not violative of Art. 14.

Andh Pra 318 B (C N 52) (FB)
—Article 14 — Abuse of power — Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956), Section 3 — Satisfaction of authority — Interference by Courts

Andh Pra 318 C (C N 62) (FB)
—Article 14 — Equality before Law — Collection of evidence against accused and filing chargesheet — Discretionary with Police — Prosecution of some accused and discharge of others on the basis of evidence collected by Police — Not discriminatory. Bom 324A (C N 57)

—Article 14 — Principles of natural Justice — Right to personal hearing — Not an essential ingredient in every case in quasi-judicial proceedings before a Tribunal Cal 391 C (C N 72)

—Article 14 — S. 29 and R. 35 of Kerala General Sales Tax Act do not offend Article 14 of the Constitution — Power of seizure and confiscation is not arbitrary — Sufficient safeguards are provided in Act — Mere possibility of abuse is no ground for striking it down — See Sales Tax — Kerala General Sales Tax Act (15 of 1963), S. 29

Ker 218 E (C N 32) (FB)
—Article 14 — See Constitution of India, Article 16 Mys 238 B (C N 60)

—Article 14 — Equality before law — Public Premises (Eviction of Unauthorised Occupants) Act (1953), Section 7 — Not violative of Article 14 of the Constitution after its amendment by Act 40 of 1963 and insertion of Section 10-E by Amending Act 32 of 1968 — Section 7 is not discriminatory as authorities cannot have recourse to Civil Courts — Only remedy is under the Act — Satisfactory procedure has been provided for determination of lis as to assessment of damages for period of unauthorised occupation. Contrary observations in AIR 1969 Delhi 194, held obiter dicta

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—Articles 15 (3), 16 (2) — Equality of opportunity in public employment — Discrimination in favour of females — Article 15 (3) can be invoked to justify discrimination

Punj 372 (C N 59) (FB)
—Articles 16, 14 — Article 16 gives effect to doctrine of equality in matter of appointment and promotion — Reasonable classification — Test for determination

Mys 238 B (C N 60)
—Article 16 — Equality of opportunity in public employment — Punjab Police Rules, Rule 13 — Police employees on eligibility lists 'C' and 'D' — Prescription of any method for selection from the said lists for sending employees to relevant training courses — Article 16 not infringed. 1969 Ser LR 120 (Punj), Reversed

Punj 395 A (C N 62)
—Art. 16 (2) — Art. 15 (3) can be invoked to justify discrimination under Art. 16 (2) —

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See Constitution of India, Art. 16 (2)

Punj 372 (C N 59) (FB)
—Article 19 — Reasonableness of restrictions — Test SC 1453 G (C N 308)

—Article 19 (1) (f) and (g) — Provisions of Section 29 (4) and (5) of Kerala General Sales Tax Act operate as unreasonable restriction on rights under Article 19 (1) (f) and (g) and are unconstitutional — See Sales Tax — Kerala General Sales Tax Act (15 of 1963), Section 29 (4) and (5)

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—Article 19 (6) — Gold (Control) Act (1968), Sections 27 (2) (d), 27 (6), cls. (a), (b), (e) and (g), 32, 46, 88 and 100 — Provisions impose unreasonable restrictions on fundamental right to carry on trade or business and are invalid — See Gold (Control) Act (1968) SC 1453 H (C N 308)

—Art. 20 (2) — Double jeopardy — Conviction for larceny and burglary with separate sentence on respective counts to run concurrently — Charge and conviction for larceny set aside on grounds of double jeopardy — Reversal does not require change in terms of confinement — (Constitution of United States of America, Fifth Amendment) USSC 65 (C N 9)

—Art. 20 (3) — Privilege against self-incrimination by production of corporate records applies only against the records themselves and all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of the privilege — (Constitution of United States of America, Fifth Amendment) USSC 76 A (C N 10)

—Art. 20 (3) — Privilege against self-incrimination — Rule permitting compelled production of corporate records by their custodian may be invoked only against a party who is in fact the custodian of the records in question — (Constitution of United States of America, Fifth Amendment)

USSC 76 B (C N 10)
—Article 20 (3) — Case from U. S. A. — Testimonial compulsion — Filing of returns by tax payer — (Constitution of U. S. A. Fifth Amendment) USSC 78 B (C N 11)

—Article 22 — Constitution (Application to Jammu & Kashmir) Orders 1959 and 1964 — Jammu & Kashmir preventive laws — Immunity to, from Fundamental Rights granted under Art. 35(c) Constitution of India — Period of immunity extended under the Orders 1959 and 1964 — No infringement of fundamental rights in Art. 22 — See Constitution (Application to Jammu and Kashmir) Orders, 1959 and 1964 J & K 143 B (C N 30)

—Article 31 — Compulsory acquisition — State must compensate owner by paying market value including intelligible increase due to improvement of locality and surroundings — Compensation must be found on such market value and not on criteria secured from sales in vicinity of lands qualitatively not comparable Mad 374A (C N 111)

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—Article 31 (2) (as amended by Constitution (4th amendment) Act of 1955) — Question of adequacy of compensation — Not justiciable. Andh Pra 318 E (C N 52) (FB)

—Article 31 (2) — M. P. Town Improvement Trusts Act 1960 (14 of 1961), Sec. 34 — Public purpose — Scheme framed under Act — Whether for public purpose

Madh Pra 191 D (C N 36)

—Article 35 (c) — Application of Provisions of Constitution to Jammu and Kashmir under Article 370 (1) — Power of President to make modifications — Power includes power to vary modifications — Modifications in Article 35 (c) valid — See Constitution of India, Article 370 (1) (c) (d)

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—Article 35 (c) — Constitution (Application to Jammu and Kashmir) Orders, 1959 and 1964 — Jammu and Kashmir preventive laws — Immunity to, from Fundamental Rights granted under Article 35 (c) Constitution of India — Period of immunity extended under the Orders 1959 and 1964 — No infringement of fundamental rights in Article 22 — (Constitution of India Articles 35 (c) and 22) — See Constitution (Application to Jammu and Kashmir) Orders 1959 and 1964 J and K 143 B (C N 30)

—Article 73 — Protection under Article 14 extends to executive action. AIR 1958 Kerala 333 held not good law in view of AIR 1952 SC 75 and AIR 1959 SC 149 — See Constitution of India, Article 14

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—Article 77 (3) — Executive power of Union — Transaction of Business Rules made by President — Power of Deputy Secretary to transact business without separate authorisation

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—Article 131 — Original Jurisdiction of Supreme Court — Not necessary that suit must be filed for complete adjudication of dispute envisaged therein

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—Article 131 — Original Jurisdiction of Supreme Court — Article does not contemplate suit in which private person is party, either jointly or alternatively with State or Government

SC 1446 B (C N 307)

—Article 131 — Original Jurisdiction of Supreme Court — Article had a forerunner in Govt. of India Act (1935), Section 204 — Origin of Section 204 traced

SC 1446 C (C N 307)

—Article 131 — Original Jurisdiction of Supreme Court — "Subject to provisions of the Constitution" — Clause (2) of Article 143 shows that the power of President overrides the proviso to Article 131

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—Article 131 — Original Jurisdiction of Supreme Court — "State" — Hindustan Steel Ltd., is not, State SC 1446 E (C N 307)

—Article 132 (1) — Substantial question of law

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—Article 133 — New plea — No proper foundation laid at proper stages for the plea — Plea cannot be raised in Supreme Court

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—Article 133 — Civil Proceeding — Final order in civil proceeding — Final Order is to be correlated to facts in dispute

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—Article 133 (1) (a) — Value of subject-matter — Value envisaged is of the subject-matter of dispute

Goa 122 B (C N 22)

—Article 133 (1) (b) — "Property" — Meaning of

Goa 122 C (C N 22)

—Article 133 (1) (c) — Certificate of fitness for appeal — Substantial question of law

Goa 122 D (C N 22)

—Article 134 (1) (c) — Certificate of fitness — High Court must be satisfied that the appeal involves some substantial question of law

SC 1365 A (C N 287)

—Article 136 — Sureme Court declining to accept certificate under Article 134 (1) (c) can allow appellant to apply under Article 136, in proper cases

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—Article 136 — Appeal with special leave — New point — Question whether restrictions imposed upon money-lenders by Hyderabad Money Lenders Act (5 of 1949 Fasli) are unreasonable — Question requiring fresh pleading on questions of fact — Question cannot be allowed to be raised for first time before Supreme Court

SC 1420 B (C N 302)

—Article 136 — New plea — Plea abandoned by appellant in High Court — Not open before Supreme Court

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—Article 136 — Supreme Court when will review evidence

SC 1514 B (C N 317)

—Article 136 — Practice of Supreme Court — Direct appeal in taxing matter by-passing normal procedure not entertained — Supreme Court when would interfere

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—Article 136 — State Government acting under Section 7-F of U. P. Act (3 of 1947) is tribunal within Article 136 — See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7-F

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—Article 143 (2) — Powers of President overrides the proviso to Article 131

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—Article 162 — Protection under Article 14 extends to executive action. AIR 1958 Kerala 333, held not good law in view of AIR 1952 SC 75 and AIR 1959 SC 149 — See Constitution of India, Article 14

Andh Pra 314 A (C N 51)

—Article 189 — Freedom of speech — Suspension of member from Legislative Assembly for disobedience and defiance of Chair — Suspension does not deprive him of his freedom of speech and right to vote — It merely enforces his absence from House as punishment — See Constitution of

Constitution of India (contd.)

India, Article 194 (1)

Punj 379 D (C N 60) (FB)
 —Article 190 — Vacation of seats — Suspension of member from Legislative Assembly — Suspension does not cause any vacancy in House Punj 379 E (C N 60) (FB)

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Bom 324 B (C N 57)

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—Section 21 — Constitution of India — Application to Jammu and Kashmir — Power of President to make modifications under Article 370 (1) (d) — Power includes power to vary modifications — Section 21, General Clauses Act applies — See Constitution of India Article 370 (1) (c) (d)

J and K 143 A (C N 30)

Gift Tax Act (18 of 1958)

—Section 5 (1) (xiv) — Exemption — Gift must be in the course of carrying on business etc., and made bona fide for purpose of such business etc. — Gift is not exempt from tax merely because it is made by person carrying on business or because property gifted is used for purpose for which it was used by donor — Gift by medical practitioner to his son out of love and affection not exempt — AIR 1965 Ker 294, Reversed

SC 1535 (C N 324)

Gold (Control) Act (45 of 1968)

—Constitutional validity — Act is validly enacted, by Parliament under Schedule 7, List I, Entry 52, and List 3, Entry 33, of Constitution — See Constitution of India Schedule 7, List I, Entry 52

SG 1453 B (C N 308)

Gold (Control) Act (contd.)

—Parliament is competent to legislate in regard to the subject-matter of the Act — Subject-matter falls within Item (1) (B) (2) of Schedule 1 of Industries (Development and Regulation) Act (1951) — See Industrial (Development and Regulation) Act (1951), Schedule 1, Item (1), (B) (2)

SC 1453 E (C N 308)

—Constitutional validity — Sec. 5 (2) (b), 27 (2) (d), 27 (6), 32, 46, 88, and 100 are constitutionally invalid, Section 5 (2) (b) due to excessive delegation, the rest as unreasonable restrictions on right to carry on trade or business — But those provisions are not inextricably bound up with the rest and the remaining Act survives

SC 1453 H (C N 308)

—Ss. 27, 39 — Provisions with regard to licensing of dealers and certification of goldsmiths not discriminatory and do not violate Article 14 of the Constitution — Classification of licensed dealers and certified goldsmiths made by the Act is reasonable

SC 1453 I (C N 308)

Hindu Adoptions and Maintenance Act (78 of 1956)

—S. 7 — Adoption by male Hindu — Soundness of mind — Nature of evidence — Burden of proof

Raj 190 A (C N 41)

Hindu Law

—Joint family — Partition — See Civil P. C. (1908), S. 11

SC 1536 (C N 325)

—Widow — Reversioner — See Registration Act (1908), Section 17 (2) (vi)

Assam 102 C (C N 24)

Hindu Marriage Act (25 of 1955)

—Ss. 10, 23 — Cruelty — What amounts to, for judicial separation — There must be apprehension in mind of petitioner, that it would be harmful for him to live with respondent

Bom 312 H (C N 56)

—Ss. 10, 13 (1) (iii) — Petition by husband for divorce on ground of incurable insanity (Schizophrenia)

Bom 312 I (C N 56)

—S. 10 (1) (b) — Cruelty can also be mental — Insulting conduct by wife in public against husband would cause mental agony and pain, and prove harmful and injurious to the health of husband

Mys 232 A (C N 59)

—S. 12 (1) (a) — Words “at the time of marriage” mean the time of first consummation after marriage — Application for annulment on ground of husband’s impotency — First consummation when husband was fifteen years old and wife eleven years — Husband and wife never sharing same bed thereafter — Statement by physician that husband is not impotent — Annulment cannot be granted

J and K 130 A (C N 24)

—S. 12 (1) (a) — Individual generally potent but impotent with respect to his own

Hindu Marriage Act (contd.)

spouse — He is impotent for purposes of the Act
J and K 130 B (C N 24)

—S. 12 (1) (c) — Concurrent findings of lower court on construction of letters and on other evidence that consent of petitioner husband to marriage was not obtained by fraud — Findings are essentially of facts and are binding in second appeal
Bom 312 A (C N 56)

—S. 13 (1) — Petitioner must establish firstly that the respondent has been incurably of unsound mind and secondly, that she has been so, for a continuous period of not less than three years immediately before the filing of the petition
Bom 312 C (C N 56)

—S. 13 (1) — Schizophrenia — Tests — No single test — See Evidence Act (1872), S. 45
Bom 312 E (C N 56)

—S. 13 (1) — Incurable disease — "Schizophrenia" — That it is incurable disease held not supported by authorities cited by counsel
Bom 312 F (C N 56)

—S. 13 (1) (iii) — Schizophrenia — Finding of, is essentially one of fact — Concurrent findings on evidence cannot be challenged in second appeal
Bom 312 B (C N 56)

—S. 13 (1) (iii) — Petition by husband for divorce on ground of incurable insanity (Schizophrenia) — See Hindu Marriage Act (1955), S. 10
Bom 312 I (C N 56)

—S. 23 — Cruelty — What amounts to, for judicial separation — See Hindu Marriage Act (1955), S. 10
Bom 312 H (C N 56)

HOUSES AND RENTS

—Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947)

—S. 6 — Suit for possession of land used for agricultural purposes — Court under the Act has no jurisdiction to entertain — Crucial date for determining whether land is used for agricultural purposes is date on which right conferred by Act is sought to be exercised
SC 1475A (C N 310)

—Public Premises (Eviction of Unauthorised Occupants) Act (32 of 1958)

—Ss. 4 and 5 — Not void on ground of violation of principles of natural justice — Estate Officer in starting proceeding under Section 4 does not act as a Judge in his own cause
Punj 407 D (C N 63)

—S. 5 — Not void on ground of violation of principles of natural justice — See Houses and Rents — Public Premises (Eviction of Unauthorised Occupants) Act (1958), S. 4
Punj 407 D (C N 63)

—S. 7 — Section is not violative of Article 14 of the Constitution after insertion of Section 10-E by Act 32 of 1968
Punj 407 G (C N 63)

HOUSES AND RENTS (contd.)

—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947)

—S. 3 — Order of Commissioner under — State Government refusing to interfere under Section 7-F with that order — Must give reasons — See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 7-F
All 467 (C N 73)

—Ss. 7-F, 3 — Jurisdiction of State Government under Section 7-F is quasi-judicial — State Government acting under S. 7-F is tribunal within Article 136 — AIR 1965 All 465 (FB) and AIR 1964 All 148. No longer good law in view of AIR 1965 SC 1767. — Order refusing to interfere under Section 7-F with order of Commissioner under Section 3 (3) — State Government must state reasons — 1965 All LJ 740 and 1965 All LJ 961, Overruled
All 467 (C N 73) (FB)

—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950)

—S. 7 — Claim for refund of sum paid in excess becoming irrecoverable — Procedure in Section 7 must be followed
SC 1490 A (C N 312)

—S. 7 — Claim for refund of sum paid in excess becoming irrecoverable — Tenant cannot claim set off under general law — It is not open to the tenant to rely on certain provisions of the Act and ignore others — If right and remedy are provided in the same statute one cannot be dissociated from the other
SC 1490 C (C N 312)

Hyderabad Land Revenue Act (8 of 1317 Fasli)

—S. 138 — Revenue sale — Sanction under Section 47 of A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1950) before amendment by Third Amendment Act (12 of 1969) was required before confirmation of sale
Andh Pra 333 B (C N 54) (FB)

Hyderabad Money Lenders' Act (5 of 1349F)

See under Debt Laws.

Hyderabad Municipal Corporation Act (2 of 1956)

See under Municipalities.

Income Tax Act (11 of 1922)

—S. 10 (2) (vi-b) Proviso (b) — Development rebate — Condition precedent — Creation of reserve in compliance with Sec. 17 of Banking Companies Act is not a sufficient compliance with the requirement of proviso (b) — Reserve contemplated by the Proviso is an independent reserve
SC 1530 (C N 322)

—Sec. 10 (2) (xi) — Bad debt — Conditions for claiming allowance — Assessee

Income Tax Act (1922) (contd.)

managing agents — Assessee guaranteeing repayment of debt advanced to selling agent of managed company — Amount paid in discharge of guarantee — Held not permissible deduction — AIR 1967 Cal 530, Reversed
SC 1531 (C N 323)

—S. 10 (4-A) — I. T. O. has jurisdiction to determine reasonableness of claim for remuneration paid to directors in terms of Articles of Association — Burden to show that claim is reasonable is on assessee.
SC 1377 B (C N 291)

—S. 16 (3) — Section creates artificial income — Hence it is to be strictly construed.
SC 1518 A (C N 318)

—S. 16 (3) — Income to minors from partnership firm — When can be included in income of father
SC 1518 B (C N 318)

—S. 24 (2) — "Same business" — Determination of — Considerations
SC 1379 (C N 292)

—S. 34 (3). Proviso — Finding — Incidental observation is not
Mad 372 (C N 110)

—S. 46 (5A) — Change of name does not occasion any substitution or succession — The issue of notice under Section 46 (5A) therefore on bank demanding payment of income tax due from new company was neither irregular nor illegal
Cal 389 (C N 71)

—S. 66-A (2A) — Certificate that matter involves substantial question of law — Certificate must state what in view of the High Court, the substantial question of law is — Merely saying that it fulfils requirements under Section 66-A (2) and is a fit case for appeal to Supreme Court, is a defective certificate
SC 1377 A (C N 291)

Income Tax Act (43 of 1961)

—S. 160 — Liability of assessee to pay advance tax as agent of non-resident — Procedure — See Income Tax Act (1961), S. 207
SC 1386 (C N 295)

—Ss. 207, 208, 160 — Liability of assessee to pay advance tax as agent of non-resident — Procedure — Provisions do not infringe equality clause — Constitution of India, Article 14
SC 1386 (C N 295)

—S. 208 — Liability of assessee to pay advance tax as agent of non-resident — Procedure — See Income Tax Act (1961), S. 207
SC 1386 (C N 295)

—S. 271 (1) (a) — Failure to furnish return — Penalty — Notice issued to assessee to show cause why penalty should not be imposed for failure to submit return under Section 139 (1) — Order imposing penalty — Held order was not tenable in law
Raj 207 (C N 45)

Industrial Disputes Act (14 of 1947)

—S. 2 (j) — 'Industry' — To constitute industry there must be collective enterprise in which employers follow their avocations

Industrial Disputes Act (contd.)

detailed in definition and employ workmen to fulfil their occupations

—S. 2 (j) — 'Industry' — Test to determine — Hospital or nursing home or dispensary — When can be treated as industry — AIR 1960 SC 610, Overruled
SC 1407 A (C N 300)

—S. 2 (j) — 'Industry' — Safdar Jung Hospital, New Delhi is not industry — It is a department of Government — It is not embarked on economic activity analogous to trade or business — Order of Central Government Labour Court, Delhi, D/- 21-2-1969 Reversed
SC 1407 F (C N 300)

—S. 2 (j) — 'Industry' — Tuberculosis Hospital, New Delhi is not an industry — It is wholly charitable and its dominant purpose is research and training — Order of Additional Industrial Tribunal, Delhi, D/- 24-2-1969, Reversed
SC 1407 G (C N 300)

—S. 2 (j) — 'Industry' — Kurji Family Hospital is not an industry — It is entirely charitable institution carrying on work of training, research and treatment — 1970 Lab IC 105 (Pat), Reversed
SC 1407 H (C N 300)

—S. 2 (j) and (s) — Government undertaking construction of a dam — Person or firm associated with work as independent contractor or otherwise would also be 'industry' — Labourers employed by such person or firm would be 'workmen'
Pat 295 B (C N 48)

—S. 2 (k) — Essential of an industrial dispute
SC 1407 B (C N 300)

—Ss. 2 (k) and 10 — Industrial Dispute — Power of Government to make reference — Existence of dispute decided with reference to facts of each case — A demand and a refusal of it are not always necessary
Pat 295 E (C N 48)

—S. 2 (l) — Reference concerning an alleged lockout — Employer denying it — Case of closure of business not pleaded — Question if there was lockout, held, could not be decided as a preliminary issue — See Industrial Disputes Act (1947), Section 10
Pat 295 F (C N 48)

—S. 2 (n), Sch. I, Item 9 — Public utility service — Heading of Sch. I and Cl. (vi) of Section 2 (n) presuppose existence of industry which may be notified as public utility service for special protection under Act — Hence 'services in Hospitals and dispensaries' can be declared to be public utility service only if they satisfy the test of industry
SC 1407 E (C N 300)

—S. 2 (s) — Workman — Word 'industry' in definition of workman must take colour from definition of that term in Section 2 (j)
SC 1407 C (C N 300)

—S. 2 (s) — Question whether an employee is a "workman" under Industrial Disputes Act or "worker" under Factories Act is one of law — Decision thereon of Labour

Industrial Disputes Act (contd.)

Court when can be interfered with by High Court — See Constitution of India, Art. 226

Mys 225 B (C N 58)

—S. 2 (s) — Workers and Independent labour contractors — Payment on daily rates or employment on temporary basis does not make workers into contractors

Pat 295 C (C N 48)

—S. 2 (s) — Master and servant relationship — Existence of, a pure question of fact — Right to control and supervise the work is an important test Pat 295 D (C N 48)

—S. 10 — Reference by Government — Duty of Government to avoid mistakes

Mys 212 B (C N 55)

—S. 10 — Tribunal's power to make interim orders — Interim order directing deposit of two months' wages for payment to workmen — Case for such an interim order not made out — Order, held, beyond the competence of the Tribunal

Pat 295 A (C N 48)

—S. 10 — Industrial Dispute — Power of Government to make reference — Existence of dispute decided with reference to facts of each case — A demand and a refusal of it are always not necessary — See Industrial Disputes Act (1947), Section 2 (k)

Pat 295 E (C N 48)

—Ss. 10, 2 (1) and 25-FFF — Reference concerning an alleged lock-out — Employer denying lock-out — Case of closure of business not pleaded — Question if there was lock-out, held, could not be decided as a preliminary issue

Pat 295 F (C N 48)

—S. 10 (1) — Reference — Government can make reference even if it has refused it earlier — It is administrative function AIR 1966 Punj 354, held, impliedly overruled by AIR 1970 SC 1205 Punj 412 A (C N 64)

—S. 10 (4) (as amended in 1952) — Reference regarding discrimination between seven workmen — Discrimination between these seven and others not named in the reference was outside the reference

Mys 212 A (C N 55)

—S. 25-FFF — Reference concerning an alleged lockout — Employer denying it — Case of closure of business not pleaded — Question if there was lock-out, held, could not be decided as a preliminary issue — See Industrial Disputes Act (1947), Section 10

Pat 295 F (C N 48)

—S. 25-FFF — Closure — Expression means factual closure of business and not its pretension by merely closing place of business

Pat 295 G (C N 48)

—S. 33-C (2) — Application by retired workman for recovery of money due from employer — Maintainability

Mys 225 A (C N 58)

—Sch. I, Item 9 — Public utility service — Test — See Industrial Disputes Act (1947), Section 2 (n)

SC 1407 E (C N 300)

Industrial Disputes Act (contd.)

—Sch. 3, Item 5 — Company having all-India organization — Scheme for medical benefit for its workmen — Calcutta scheme already extended to areas covered by Bangalore, Hyderabad and Kerala branches as it was fair and reasonable — Held there was no reason why scheme should not be extended to Madras region as there was no substantial difference between those areas and Madras region so far as the question of medical benefit to workmen was concerned — Question of ceiling on burden of medical facilities not considered — But certain diseases of contagious and epidemic nature (such as venereal disease, leprosy, small pox, typhoid or cholera) excepted from that scheme — I. D. No. 21 of 1965, D/- 28-2-1966 — Ind. Tri. (Mad), Reversed

SC 1421 B (C N 303)

—Sch. 3, Item 5 — Gratuity scheme — Gratuity payable in cases of dismissal for misconduct — Provision for forfeiture, if misconduct is gross, not unreasonable — Longer period of qualifying period in other cases of misconduct reasonable — I. D. No. 21 of 1965, D/- 28-2-1966 — Ind. Tri. (Mad), Reversed

SC 1421 C (C N 303)

—Sch. 3, Item 11 — Illegal discharge or dismissal — Awarding compensation instead of reinstatement — Discretionary — Mechanical exercise of discretion by Tribunal in awarding reinstatement — Refusal to interfere with, by High Court in writ jurisdiction held unjustifiable — AIR 1969 Orissa 252, Reversed

SC 1401 A (C N 299)

—Sch. 3, Item 11 — Illegal discharge or dismissal — Compensation instead of reinstatement found justifiable on facts of case — Assessment of compensation — Compensation for a period of two years at the rate of salary last drawn by the concerned workman, held, would meet the ends of justice

SC 1401 C (C N 299)

Industries (Development and Regulation) Act (65 of 1951).

—S. 2 — "Scheduled industry" in S. 2 not synonymous with "industrial undertaking"

SC 1453 F (C N 309)

—S. 18E (1) (c) — Management of company taken over by Government — Petition for winding up of company — Validity of sanction challenged — Shareholders or creditors of such company are not entitled to challenge the validity of liquidation proceedings on the ground of validity of the sanction

Cal 398 F (C N 74)

—S. 18E (1) (e) — Management of company taken over by Government — Petition for winding up of company — Validity of sanction challenged — Shareholders or creditors of such company are not entitled to challenge the validity of liquidation proceedings on the ground of validity of the sanction

Cal 398 F (C N 74)

Industries (Development and Regulation) Act (contd.)

—Sch. 1 — Classification of items — Not logical or scientific — Heading “metallurgical industry” does not control scope and meaning of item (1) (B) (2)

SC 1453 D (C N 308)

—Sch. 1, Item (1) (B) (2) — Manufacture of ornaments falls within item (1) (B) (2) — Gold (Control) Act (1968) is validly enacted by Parliament

SC 1453 E (C N 308)

J. and K. Civil P. C. (10 of 1977 Smt.)

—S. 20 — Decree for possession of land passed by High Court — Suit for cancellation of, presented before Sub-Judge in whose Court the decree is sought to be executed — Though the Sub-Judge has jurisdiction to hear the case, it will be proper that the case be heard by High Court, the decree being passed by it J & K 141 (C N 29)

J. and K. Hindu Marriage Act (8 of 1955)

See Hindu Marriage Act (1955), S. 12 (1) (a).

J. & K. Preventive Detention Act (13 of 1964)

See under Public Safety.

Kerala General Sales Tax Act (15 of 1963)

See under Sales Tax.

Kerala General Sales Tax Rules

See under Sales Tax.

Land Acquisition Act (1 of 1894)

—S. 5-A — Hearing of objections — Decision on land owner's objections not communicated to him — Non-communication per se is no proof of lack of bona fides or absence of public purpose — Govt is not bound to communicate or even decide on the objections Goa 120 A (C N 21)

—S. 6 — Declaration of requirement for public purpose — Questionability — In cases of lack of bona fides and other colourable exercise of power, the declaration is justiciable Goa 120 B (C N 21)

—S. 23 — Assessment of compensation — Matters to be considered — Loss of earning caused by acquisition must be taken into consideration — Land used by District Board as market place on payment of rent to owner — Owner having reasonable expectation to receive such rent in future for a number of years — Evaluation must be by capitalisation of rent and not on basis of value of land not qualitatively comparable to land acquired Mad 374 B (C N 111)

Letters Patent

—(Cal) Cl. 12 — Original jurisdiction as to suit — Cause of action — Meaning of Cal 394 A (C N 73)

—(Cal) Cl. 12 — Jurisdiction — Plaintiff resident of Calcutta — Suit under Clause 12 against defendant residing in U. P. claiming

Letters Patent (contd.)

compensation for writing defamatory letter — Claim held remained unascertained and could not be called a debt due to the plaintiff payable at Calcutta — Calcutta Court could not have jurisdiction — Principle that debtor must find out creditor to pay his debt could not apply

Cal 394 B (C N 73)

—(Cal) Cl. 12 — Balance of convenience — Leave granted to file suit in Calcutta Court — Averments in application for revocation of leave showing that balance of convenience would be overwhelmingly in favour of the defendant in having the suit heard in the Uttar Pradesh Court and the prejudice to defendant would amount to injustice if the suit was allowed to be proceeded with in the Calcutta Court — Leave held should be revoked

Cal 394 C (C N 73)

—(Cal) Cl. 12 — Revocation of leave — Considerations Cal 394 D (C N 73)

—(Cal) Cl. 12 — Application for revocation of leave — Question of mala fide cannot be considered Cal 394 E (C N 73)

Limitation Act (9 of 1908)

—S. 12 (2) — Exclusion of time — Common judgment of Court — Appeals filed by common appellant — Copy of judgment filed along with one appeal only — Exclusion of time would also enure to connected appeals filed by him: AIR 1967 Mad 122 and AIR 1915 Mad 493 (2), Overruled Mad 353 A (C N 104) (FB)

—S. 12 (2) — Whether once a certified copy of the judgment and decree furnished the basis for exclusion under Section 12 (2) and (3), it would enure to the benefit of not merely the appellant who had secured them but also to other parties to the judgment appealed against, whether or not they filed appeals together or separately on the same day or different dates. (Quaere)

Mad 353 B (C N 104) (FB)

—S. 14 — Prosecution of proceedings with due diligence — Sale of property in execution proceedings — Sale however set aside pursuant to objection by judgment-debtor under U. P. Encumbered Estates Act — Held decree-holder prosecuted execution proceedings in good faith and with due diligence and was entitled to protection of Section 14 SC 1525 D (C N 321)

—S. 15 (1) — “Limitation prescribed” — Meaning of — Applicability to Section 48, Civil P. C. (before its deletion)

SC 1525 A (C N 321)

—Art. 30 — Suit against railway for compensation for damages to goods delivered — Starting point of limitation — Burden of proof Bom 307 B (C N 55)

—Arts. 56, 115, 120 — Building contract — Suit claiming enhanced rates for work done in view of altered circumstances —

Limitation Act (1908) (contd.)

Limitation — Claim is not for price of work done or arising out of contract or for compensation for breach of contract — Neither Article 56 nor 115 but 120 held applied — Starting point of limitation under Art. 120 — F. A. Nos. 190 and 213 of 1960, D/- 19-1-1965 (Pat), Reversed

SC 1433 (C N 305)

—Art. 115 — Building contract — Suit claiming enhanced rates for work done in view of altered circumstances — Claim is not for compensation for breach of contract — See Limitation Act (1908), Article 56

SC 1433 (C N 305)

—Art. 115 — Suit to recover money on personal covenant — Equitable mortgage — Mortgage deed not registered — Suit for personal decree filed after more than three years after creation of mortgage — Absence of acknowledgment or renewal of liability — Suit is barred

Mad 337 A (C N 97)

—Art. 120 — Building contract — Suit claiming enhanced rates for work done in view of altered circumstances — Claim is governed by Article 120 — See Limitation Act (1908), Article 56

SC 1430 (C N 305)

Limitation Act (36 of 1963)

—S. 4 — Expiry of period prescribed by special law when Court is closed — Appeal under Section 116A, Representation of the People Act can be filed on reopening day under Section 4 read with Section 29

SC 1477 B (C N 311)

—S. 5 — Sufficient cause — Counsel's mistake — See Workmen's Compensation Act (1923), S. 30

Goa 127 A (C N 23)

—S. 12 — Exclusion of time in legal proceedings — Time requisite for obtaining copy — Can be excluded in computing limitation prescribed by Section 116A, Representation of the People Act, 1951

SC 1477 D (C N 311)

—S. 29 (2) — Special law — Period of limitation prescribed by Section 116A, Representation of the People Act, 1951 is one prescribed by special law within meaning of Section 29 (2)

SC 1477 C (C N 311)

Madhya Pradesh Town Improvement Trusts Act 1960 (14 of 1961)

—S. 34 — Public purpose — Scheme framed under Act — Whether for public purpose — See Constitution of India, Art. 31(2)

Madh Pra 191 D (C N 36)

—Ss. 34 and 38 — Scheme framed under Act — Scheme combining two types mentioned in sections — Scheme is not unauthorised

Madh Pra 191 E (C N 36)

Madhya Pradesh Town Improvement Trusts Act (contd.)

—S. 34 — Scheme framed under Act for shifting wholesale market from crowded localities to site outside city and establishing retail markets there — It is not usurpation of function of market committee under M. P. Agricultural Produce Markets Act, 1960 and of Municipal Corporation under M. P. Municipal Corporation Act, 1956

Madh Pra 191 F (C N 36)

—S. 38 — Scheme framed under Act — Scheme combining two types mentioned in section — Scheme is not unauthorised — See M. P. Town Improvement Trusts Act (1960) (14 of 1961), S. 34

Madh Pra 191 F (C N 36)

—S. 52 (2) — Procedural irregularities in framing and sanctioning scheme — They are cured under Section 52 (2)

Madh Pra 191 (C N 36)

—S. 68 (1) — Acquisition of lands under Act — Notice of intention of Improvement Trust to acquire lands — Notice to individual owners is not necessary

Madh Pra 191 B (C N 36)

—S. 70 — Inquiry under — Not obligatory

Madh Pra 191 C (C N 36)

Madras General Sales Tax Act (9 of 1939)

See under Sales Tax

Madras Paddy and Rice Dealers (Licensing and Regulation) Order (1965)

—Order is invalid— Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A) Defence of India Rules (1962) came into force on 25-5-1965

Mad 351 C (C N 103)

Madras Paddy and Rice Dealers (Licensing and Regulation) Order (1966)

—Order invalid, since State Government had not formed opinion that it was necessary and expedient for purposes mentioned in Section 3(1) Essential Commodities Act.

Mad 343 B (C N 99)

Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1964)

—Order is invalid— Order expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965

Mad 351 D (C N 103)

—Order is invalid — Order has expired on 20-6-1965 because the concurrence of the Central Government was not ob-

Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order (contd.)
 tained within a month after R. 125(3-A),
 Defence of India Rules (1962) came into
 force Mad 351 E (C N 103)

Madras Paddy and Rice (Movement Control) Order (1964)

—Order is invalid — Order expired
 on 20-6-1965 because the concurrence of
 the Central Government was not obtained
 within a month after R. 125 (3-A), De-
 fence of India Rules (1962) came into
 force Mad 351 B (C N 103)

Madras Paddy and Rice (Movement Control) Order (1965)

—Order is invalid — Order expired on
 20-6-1965 because the concurrence of the
 Central Government was not obtained
 within a month after R. 125 (3-A), De-
 fence of India Rules (1962) came into
 force Mad 351 A (C N 103)

Madras Paddy and Rice (Movement Control) Order (1966)

—Order invalid because before passing
 it the State Government had not formed
 an opinion that it was necessary and ex-
 pedient for purposes mentioned in Sec-
 tion 3(1), Essential Commodities Act
 Mad 343 A (C N 99)

Madras Panchayats Act (35 of 1958)

See under Panchayats

Madras Panchayats Rules

See under Panchayats

Madras Village Panchayats Act (10 of 1950)

See under Panchayats

Mahomedan Law

—Inheritance — Husband and wife —
 One spouse can inherit other also in some
 other capacity

Cal 387 (C N 70)

—Wakf — Incidents of — Mutwalli —
 Rights of, in relation to wakf property —
 Observations in AIR 1933 All 407, Over-
 ruled — See Tenancy Laws — U. P. Za-
 mindari Abolition and Land Reforms Act
 (1 of 1951), Section 18 (1) (a)

All 509. (C N 75) (FB)

Mines Act (4 of 1923)

—S. 3 — Definition of 'owner' adopted
 in Section 3(1) of Coal Mines (Conserva-
 tion & Safety) Act 1952 — See Coal Mines
 (Conservative and Safety) Act (1952),
 Section 3(1) Cal 391 A (C N 72)

—S. 52 — Leave with wages — Em-
 ployer agreeing to give fifteen days
 leave annually in place of seven days —
 It means one day's leave for nineteen
 days work and not for sixteen days work
 Pat 314 (C N 52)

Motor Vehicles Act (4 of 1939)

—S. 2(20) — Inter-State permit —
 Grant of, by authority of one State —
 Counter-signature by authority of other
 State essential to make it valid as such
 — Till then it is a primary permit op-
 erative in State which granted it — See
 Motor Vehicles Act (1939), S. 63(1)

Mys 219 B (C N 57)

—S. 33 (1) (b) — Suspension of regis-
 tration — Alleged use of vehicle for hire
 without valid permit — Suspending certi-
 ficate of registration a quasi-judicial func-
 tion — Principles of natural justice must
 be followed Goa 116 B (C N 20)

—S. 35 — Appeal against order of sus-
 pension of registration — Appellate Au-
 thority also a quasi-judicial authority —
 Authority must follow principles of natu-
 ral justice — The appellate authority
 should have remedied the defects in pro-
 cedure followed by the original authority
 Goa 116 C (C N 20)

—Ss. 47 and 64 — Procedure for grant
 of stage carriage permits — Permits
 granted by R.T.A. without limiting num-
 ber of stage carriages — Remedy of
 aggrieved person is by way of appeal
 under Section 64 Raj 200 A (C N 42)

—S. 47 — Procedure for grant of stage
 carriage permits — R.T.A. should dispose
 of all such pending applications as actual-
 ly become ripe for hearing by the time
 it decides to convene a meeting for con-
 sideration of such applications — Civil
 Writ Petn. No. 66 of 1968 (Raj) Reversed
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—S. 47(3) — Limiting number of stage
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 sity SC 1542 A (C N 327)

—S. 47(3) — Limiting number of stage
 carriages — Time — Determination of
 limit of number of permits is to be made
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 SC 1542 B (C N 327)

—S. 47(3) — Scope — Order under
 Section 47(3) is not contemplated in the
 case of inter-State or inter-regional stage
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—S. 47(3) — Regional Transport Au-
 thority itself under Section 57(2) inviting
 applications for grant of permits and ap-
 pointing dates for reception of applica-
 tions — This indicates that there was
 valid determination of the number of
 stage carriage permits to be granted
 under Section 47(3)

SC 1542 F (C N 327)

—S. 47 (3) — Question whether there
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 derations SC 1542 G (C N 327)

—S. 47(3) — Prior order under, is
 essential for entertaining petitions for
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—S. 47(3) — Prior order under, ab-
 sence of — Goes to the root of jurisdic-
 tion to exercise powers under Section 48

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— Point can be raised at any stage of proceedings, even in writ petition for first time Mad 379 B (C N 113)

—S. 48 — Order under, is subject to prior order under Section 47(3) — Without prior order, disposal of petition under Section 48 is without jurisdiction

Mad 379 D (C N 113)

—Ss. 63(1) and 2(20) — Inter-State permit — Grant of, by authority of one State — Counter-signature by authority of other State essential to make it valid as such — Till then it is a primary permit operative in State which granted it

Mys 219 B (C N 57)

—S. 63(3), Proviso — Inter-State agreement providing for counter-signature of inter-State permits — Counter-signature neither made nor refused by other State till commencement of scheme under Section 68-C excluding private operators — Permit not valid in other State — Refusal to countersign could be enforced by mandamus but not after commencement of scheme

Mys 219 C (C N 57)

—S. 64 — Jurisdiction of State Transport Appellate Authority — Appeal against Order refusing grant of permit — Jurisdiction of Appellate Authority is confined to that aspect only — Authority cannot modify Order under Section 47(3)

SC 1542 E (C N 327)

—S. 64 — Grant of permits without limiting number of stage carriages — Remedy available is to file appeal under Section 64 — See Motor Vehicles Act (1939), Section 47

Raj 200 A (C N 42)

—S. 64(i) — Right of appeal against order under Section 47(3) — According to Madras Motor Vehicles Rules there is separate right of appeal against an order under Section 47(3) — Order under Section 47(3), made at a sitting on some day on which applications for grant of permits were considered — There cannot be any grievance that there being no sufficient space between two orders person aggrieved by order under Section 47(3) could not prefer appeal there being separate right of appeal against order under Section 47(3)

SC 1542 D (C N 327)

—S. 68-C — Kolar Scheme, Clause (d) — Exclusion of private operators — Extent of — To earn exemption under scheme private operator must hold inter-State permit on date of commencement of scheme — Commencement of operation on basis of such permit not necessary

Mys 219 A (C N 57)

—S. 110-D — Appeal — Who can prefer — "Person aggrieved" — Question whether insurer was rightly absolved can be raised by insured

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—Bombay Provincial Municipal Corporations Act (59 of 1949)

—S. 393 — Section has nothing to do with composition of offences under Act — Question of compounding of offence has to be decided by reference to S. 481 (1) (b)

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—S. 481 (1) (b). — Power of Municipal Commissioner to compound offences under the Act — Extent of

Bom 333 C (C N 58)

—Sch. Chap. VIII, R. 29 (1) (d) — Offence of importing goods without paying octroi duty — Municipal Commissioner has no power to compound offence either under Criminal Procedure Code or under the Act

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—S. 178(2) (xxii), R. 32 — Money due under contract is not recoverable by distraint or prosecution

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—R. 32 — Recovery of sums due to Panchayat — See Panchayats — Madras Panchayats Act (35 of 1958), S. 178 (2) (xxii)

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—S. 58 — Income — Meaning of — Mahimai collections are not income

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—S. 69 — Dissolution of partnership — Suit for accounts — Agreement outside

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— No retrospective effect — Bonus for 1963-64 — Act does not apply — Bonus payable for that year will have to be calculated on the basis of FB Formula as approved by Supreme Court—I. D. No. 21 of 1965, D/-28-2-1966 — Ind Tri (Mad), Reversed SC 1421 A (C N 303)

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— S. 85 — Intoxication — Absence of any — Accused not shown under influence of liquor — Section 85 will not protect him Pat 303 A (C N 49)
— Ss. 121 to 130 — Chap. VI (Gen.) — Vicarious liability of dealer in criminal law — Extension beyond reasonable limits — Provision is void under Article 19 of the Constitution

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— S. 149 — Every member of unlawful assembly guilty of offence committed in prosecution of common object — Common object and not common intention essential SC 1492 (C N 313)

— S. 282 — Conveying person by water for hire in unsafe or over-loaded vessel — Accident not due to overloading or unsafe condition — Conviction under S. 282 is bad SC 1362 (C N 286)

— S. 292 — Obscene books etc. — Question of obscenity — Does not altogether depend on oral evidence but must be judged by the Court

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— S. 292 — Obscene books etc. — Obscenity — Determination — Aspects to be considered by Court—Criminal Appeal No. 805 of 1965, D/- 25-10-1966 (Bom), on facts Reversed SC 1390 B (C N 296)

— S. 300 (thirdly) — Intention to murder when can be inferred — Assault with dunda breaking ribs of both sides, perforating pleura and lacerating lung — Injuries are sufficient in ordinary course of nature to cause death — Intention to cause death could be inferred — Offence fell under Section 300 (thirdly)

Pat 303 B (C N 49)

— S. 323 — Applicability — Seizure of cycle by Inspector — Accused slapping inspector and taking away cycle — It was found that inspector was acting in his capacity as public servant and in discharge of his official duties — Held, accused was guilty of offence under Section 332 and not under Section 323 — See Penal Code (1860), S. 332

Mad 359 (C N 106)

— Ss. 324 and 326 — Instrument for cutting — Tooth is instrument for cutting and serves as weapon of offence and defence — Injury by tooth-bite is offence

Penal Code (contd.)

under Section 324 or 326 depending upon whether injury is simple or grievous

Pat 322 (C N 57)

— S. 326 — In considering sentence to be passed, nature of injury, weapon and part of body on which injury was caused are important factors to be considered

Guj 186 D (C N 32)

— S. 326 — Injury by tooth-bite is offence under Section 324 or 326 depending upon whether injury is simple or grievous — See Penal Code (1860), Section 324

Pat 322 (C N 57)

— Ss. 332 and 323 — Applicability — Seizure of cycle by Inspector for want of licence — Accused slapping inspector and taking away cycle — Evidence showing that cycle had licence — It was found that inspector was acting in his capacity as public servant and in discharge of his official duties — Held, accused was guilty under Section 332 and not under S. 323 — He being first offender, interest of justice would be served by admonishing him under Section 3(1) of Act 20 of 1958

Mad 359 (C N 106)

— S. 361 — Accused charged under Sec. 361 — Accused could also be charged for abduction — Explanation under Section 342, Criminal P. C. sought — Age of victim not being proved, accused could be convicted for abduction under Section 366 of Penal Code — See Criminal P. C. (1898), S. 236

Guj 178 B (C N 29)

— S. 366 — Entry of birth date in non-Government School's General Register admissible under Section 35 — Evidentiary value depends on other factors — Parents of victim not examined as to her age — Entry held could not be held to have proved the age — See Evidence Act (1872), Section 35

Guj 178 A (C N 29)

— S. 366 — Accused charged under Section 361, Penal Code for kidnapping — Accused also could have been charged under Section 366, on same facts — Age of victim not being proved, accused could be convicted for abduction under Section 366 — See Criminal P. C. (1898), Section 236.

Guj 178 B (C N 29)

— S. 409 — Criminal or dishonest misappropriation is essential — Mere retention of money not enough

Pat 311 B (C N 51)

— S. 409 — Dishonest intention — No rule regarding depositing collections within specified period — Accused retaining money for 15 days and depositing at once when demanded — Accused's security deposit with office more than amount misappropriated — Case held of carelessness and not dishonest intention

Pat 311 C (C N 51)

— S. 429 — Offence under — Essential ingredient of — Existence of requisite

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Raj 203 (C N 43)

—S. 467 — Failure to establish that accused made forgery or interpolations — No adverse inference to impute motive to commit offence under Section 409 can be drawn, against him

Pat 311 A (C N 51)

—Ss. 482, 483 and 486 — Period of limitation prescribed under Section 92 of Trade and Merchandise Marks Act does not apply to offences under Penal Code — That provision concerns prosecutions for offences under that special law

Mys 218 (C N 56)

—S. 483 — Period of limitation under Section 32, Trade and Merchandise Marks Act does not apply to offences under Penal Code — See Penal Code (45 of 1860), Section 482

Mys 218 (C N 56)

—S. 486 — Period of limitation under Section 32, Trade and Merchandise Marks Act does not apply to offences under Penal Code — See Penal Code (45 of 1860), Section 482

Mys 418 (C N 56)

—S. 499 — Defamation — Good faith and bona fide — Proof

SC 1372 A (C N 289)

—S. 498 First Exception — Imputation of truth for public good — Truth of imputation and publication of imputation for public good must be proved by accused

SC 1372 B (C N 289)

—S. 499 Ninth Exception — Imputation for protection of interest — Interest of the person has to be real and legitimate when communication is made

SC 1372 C (C N 289)

—S. 500 — Punishment for defamation — Conviction of President of Municipal Committee — Facts found dispelling any semblance of good faith and indicating lack of prudence and dignity with the President — Reduction of simple imprisonment from three months to two months so that it would save him from disqualification for continuing as President of the Municipality held not warranted

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Police Act (5 of 1861)

—S. 29 — Words "criminal charge" in Proviso (a) — Meaning — Delinquent convicted under Section 29, Police Act and dismissed — Article 311(2) Proviso (a) applies — Hence Article 311(2) is inapplicable — See Constitution of India, Article 311(2) and Proviso (a)

Cal 384 A (C N 69)

Post Office Rules

—Rr. 118 & 119 — Money order — Money received by unauthorised person against Rule 118 — Acknowledgment and money order signed by such person and not by payee as required by Rule 119 — Money order receipts cannot be legally

Post Office Rules (contd.)

accepted as payments to addressee

Assam 102 B (C N 24)

—R. 119 — Money order — Money received by unauthorised person against Rule 118 — Acknowledgment and money order signed by such person and not by payee as required by Rule 119 — Money order receipts cannot be legally accepted as payments to addressee — See Post Office Rules, Rule 118

Assam 102 B (C N 24)

Prevention of Corruption Act (2 of 1947)

—S. 5 — Misappropriation — Negative burden on prosecution can be discharged by circumstantial evidence

SC 1514 D (C N 317)

Preventive Detention Act (4 of 1950)

See under Public Safety

Probation of Offenders Act (20 of 1958)

—S. 3(1) — Accused slapping Inspector on duty — First offence — Admonition held was enough — See Penal Code (1860), Section 332

Mad 359 (C N 106)

Provincial Small Cause Courts Act (9 of 1887)

—Ss. 15 and 16, Schedule second, Articles (1) and (3) — Suit for compensation against railway for loss or injury to goods — Cognisance by Court of Small Causes not barred

Bom 307 A (C N 55)

—S. 16 — Suit for compensation against railway for loss or injury to goods — Cognisance by court of Small Causes not barred — See Provincial Small Cause Courts Act (1887), Section 15

Bom 307 A (C N 55)

—Sch. II, Arts. (1) and (3) — Suit for compensation against railway for loss or injury to goods — Cognisance by Court of Small Causes not barred — See Provincial Small Cause Courts Act (1887), Section 15

Bom 307 A (C N 55)

Public Premises (Eviction of Unauthorised Occupants) Act (32 of 1958)

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PUBLIC SAFETY**Jammu & Kashmir Preventive Detention Act (13 of 1964)**

—S. 3 — Detention order under Section 3 — Revocation of, under Sec. 14(2) — Revocation for technical defect included — No fresh facts arising after revocation — Fresh order of detention under Section 3 not valid — See Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Section 14

J & K 143 C (C N 30)

—S. 3 (1) (a) (i) and (2) — Term "Public Order" — Is not synonymous with "law and order"

J & K 137 A (C N 27)

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—S. 3 (1) (a) (i) — Order of detention not in terms of section — Extraneous evidence cannot be given to cover up lacuna J & K 137 B (C N 27)

—Ss. 14 and 3 — Detention order under Section 3 — Revocation of, under Section 14(2) — Revocation for technical defect included — No fresh facts arising after revocation — Fresh order of detention under Section 3 not valid J & K 143 C (C N 30)

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—S. 3 — Activities prejudicial to maintenance of public order — Connotation and test of Orissa 176 (C N 58)

—S. 3 (1) (a) (ii) — Subjective satisfaction of detaining authority, not justiciable — If any ground of detention is vague the order must be quashed Orissa 163 (C N 54)

Rajput Adoption Rules (1895-96)

—Applicability — Applicable to Jagirdars and not merely to Rajputs — Under the Rules principle of "mooris-i-ala" was applicable to adoptions in case of Jagirdars — No person, under that principle, outside the line of original grantee i.e., Jagirdar could be recognised as his heir Raj 190 D (C N 41)

Registration Act (16 of 1908)

—S. 17(2) (vi) — Compromise decree — Hindu widow entering into compromise with reversioner to whom properties were to devolve absolutely after widow's death — Decree not comprising immovable property other than subject-matter of suit — Compromise decree is exempt from registration — It confers title on reversioner after widow's death — Suit for ejectment of tenant on basis of compromise decree can be maintained by reversioner without suing for declaration of his title — Other heirs of widow are not necessary parties Assam 102 C (C N 24)

—S. 35 — Execution of deed of adoption — Endorsement of Registrar under Section 35 — Admissibility in evidence — See Hindu Adoptions and Maintenance Act (1956), Section 7 Raj 190 A (C N 41)

Representation of the People Act (43 of 1951)

—S. 77 — Account of election expenditure SC 1477 H (C N 311)

—S. 81 — Presentation of petition — See Civil P. C. (1908), O. 1, R. 8 Cal 373 E (C N 68)

—S. 90 (5) — Amendment of particulars of corrupt practice alleged in peti-

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tion — Power of tribunal

SC 1477 F (C N 311)

—S. 99 — Proceeding under for naming a person, guilty of corrupt practice — Duty of court or Tribunal — Person found to be guilty must be named — No discretion is left in the matter provided the person concerned is noticed and heard SC 1477 J (C N 311)

—S. 116A — Appeal — Period of limitation prescribed is a special period of limitation within meaning of Section 29 (2) of Limitation Act attracting provisions of Sections 4 and 12 thereof — Limitation after taking into account time for obtaining certified copy of order of Tribunal expiring during summer recess — Appeal filed on first day of re-opening of High Court is within time SC 1477 A (C N 311)

—S. 116A — Application for amendment filed during trial of election petition — Tribunal wrongly rejecting it — High Court can allow amendment and evidence to be recorded even after a long period SC 1477 G (C N 311)

—S. 123 — Corrupt practice — Proof by evidence beyond reasonable doubt — Benefit of doubt when can be given SC 1477 E (C N 311)

—S. 123 (4) — Corrupt practice — Publication of false and defamatory matter — Matter relating to personal character or conduct of candidate — Illustrative case SC 1500 A (C N 316)

—S. 123 (4) — Corrupt practice — Election of appellant challenged — Appellant's own polling agents giving evidence against him as witnesses — Their evidence has to be treated with great caution. SC 1500 B (C N 316)

—S. 123 (4) — Corrupt practice — Publication of false and defamatory matter — Posters, handbills etc., circulated and distributed amongst the voters of the constituency — Statements found false and could not be believed to have been true — Statements made to prejudice the prospects of election — Appellant guilty of a corrupt practice under S. 123 (4) SC 1500 C (C N 316)

—S. 123 (6) — Candidate incurring expenditure exceeding amount permissible under Section 77 — Candidate is guilty of corrupt practice under Section 123(6) which renders his election void under Section 100 (1) (b) SC 1477 I (C N 311)

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—S. 38 — Instalment deliveries — Defective delivery in first instalment — Whether buyer can treat it as repudiation of whole contract, or only of that defective delivery depends upon term of contract Pat 323 A (C N 58)

SALES TAX

—Kerala General Sales Tax Act (15 of 1963)

—S. 29 and Rule 35 — Do not offend Article 14 of the Constitution — Power of seizure and confiscation is not arbitrary — Sufficient safeguards are provided in Act — Mere possibility of abuse of power is no ground for striking it down
Ker 218 E (C N 32) (FB)

—S. 29 and Rule 35 — Rule 35 (5) does not go beyond limits of Section 29. (Obiter)
Ker 218 G (C N 32) (FB)

—S. 29 (3) and (4) and Rule 35 (3) to (12) — Provisions violate Article 301 and are bad for want of Presidential sanction under Article 304 (b) of Constitution — (1965) 16 STC 659 (Ker), Overruled
Ker 218 B (C N 32) (FB)

—S. 29 (4) and (5) and Rule 35 (5) to (12) and (15) — Provisions operate as unreasonable restriction on rights under Article 19 (1) (f) and (g) and are unconstitutional — (Constitution of India, Article 19 (1) (f) and (g)).
Ker 218 F (C N 32) (FB)

—Kerala General Sales Tax Rules

—R. 35 — Does not offend Art. 14 of the Constitution — Power of seizure and confiscation is not arbitrary — Sufficient safeguards are provided in Act — Mere possibility of abuse is no ground for striking it down — See Sales Tax — Kerala General Sales Tax Act (15 of 1963), Section 29
Ker 218 E (C N 32) (FB)

—R. 35(3) to (12) — Provisions violate Art. 301 and are bad for want of Presidential sanction under proviso to Art. 304 (b) of Constitution — See Sales Tax — Kerala General Sales Tax Act (15 of 1963), S. 29(3) and (4): Ker 218 B (C N 32) (FB)

—R. 35(5) — R. 35(5) does not go beyond limits of Section 29 (Obiter) — See Sales Tax — Kerala General Sales Tax Act (15 of 1963), S. 29
Ker 218 G (C N 32) (FB)

—R. 35(5) to (12) and (15) — Provisions operate as unreasonable restriction on right under Art. 19(1) (f) and (g) and are unconstitutional — See Sales Tax — Kerala General Sales Tax Act (15 of 1963), S. 29(4) and (5)
Ker 218 F (C N 32) (FB)

—Madras General Sales Tax Act (9 of 1939)

—S. 12-B(7) (a) — Power of review — Exercise of—Review not intended to correct laches or omission or negligence of parties in not placing relevant decisions before Court — Mad 378 (C N 112) (FB)

—Tamil Nadu General Sales Tax Act (1 of 1959)

—S. 2(n) — Sale — Contract for providing and fixing doors and window frames — Contractor undertaking to supply

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materials and to provide the labour required for execution of the totality of work — Contractor further agreeing to receive a consolidated sum as consideration — Contract is one and indivisible — Contract is essentially a contract for work and labour — Amount of consideration cannot be assessed to tax — Mad 346 (C N 100)

—West Bengal Sales Tax Rules (1941)

—R. 84 — Service of notice of demand — Presumption as to, under R. 84(2) is a rebuttable one — Sub-rule (2) of R. 84 is not inconsistent with sub-section (1)
Cal 415 C (C N 77)

Settlement deed

See Contract Act (1872), S. 16.

Specific Relief Act (1 of 1877)

—S. 24 — Suit for specific performance — Plaintiff must show readiness to do his part of contract until end of trial
Orissa 161 A (C N 53)

—S. 27 — Contract of sale of joint family property by member having power of attorney in that behalf — Omission to mention name of a member in power of attorney — Specific performance of contract against that member, when can be granted
Pat 304 A (C N 50)

—S. 27(b) — Defendant purchasing property after contract of sale in favour of plaintiff—Burden is on defendant to prove that he is a bona fide purchaser for value without notice of earlier contract
Pat 304 B (C N 50)

Stamp Act (2 of 1899)

See under Stamp Duty.

STAMP DUTY

—Stamp Act (2 of 1899)

—S. 49(d) — Allowance for spoiled stamps — Section does not contemplate allowance where a composite instrument embodying rights and liabilities fails only in part and is good for the remaining part
Mad 349 A (C N 102) (FB)

—Sch. I, Art. 23 — Conveyance — Mother by deed giving up her life interest in property in favour of her son and grandson — Mother to be paid monthly amount to be charged on some other property — Held, deed did not operate as conveyance and hence not chargeable under Article — Mad 348 B (C N 101)

—Sch. I, Art. 55 — Release — Mother by deed giving up her life interest in property in favour of her son and grandson — Mother to be paid certain amount monthly — Amount to be charged on some other property—Held, deed operated only as release and not as conveyance — That release was for consideration did not make any difference
Mad 348 A (C N 101)

Stamp Duty — Stamp Act (contd.)

—Sch. I, Art. 55 — Release — Characteristics — No transfer of interest or right to another who had no pre-existing right — Release in favour of person having such right — His right or claim is enlarged or is made fuller in its content

Mad 348 C (C N 101)

States Reorganization Act (37 of 1956)

—S. 115(5) — Integration of services — Formation of new State of Madhya Pradesh — Final gradation list prepared by Central Government relates back to 1-11-1956 — Absorption of certain persons by State Government in 1959 and promotion of persons so absorbed in 1965 and 1966 — State Government had, under Arts. 162 and 246 (3) read with Entry 41 of List 2, full power to deal with its services

Madh Pra 189 A (C N 35)

Succession Act (39 of 1925)

—S. 2(bb):— District Judge — Meaning of — Additional District Judge has jurisdiction to grant probate of Will under S. 264(1) — See Succession Act (1925), S. 264(1) Assam 111 A (C N 25)

—Ss. 264(1), 2(bb) — 'District Judge' — Meaning of — Additional District Judge has jurisdiction to grant probate of Will under S. 264(1)

Assam 111 A (C N 25)

—S. 264(1) — Grant of probate or letters of administration — Propounder must dispel all doubts regarding execution of Will from mind of Court — Even if execution of Will is proved Court can still refuse to grant probate or letters of administration when reasonable doubt regarding genuineness of Will exists

Assam 111 B (C N 25)

—S. 381 — Suit for rent by holder of succession certificate — Not bad for non-joinder of other legal heirs of deceased — See Civil P. C. (1908), O. 1, R. 9

Assam 102 A (C N 24)

Suppression of Immoral Traffic in Women and Girls Act (104 of 1956)

—S. 15 — Search—Non-compliance with Section 15 is irregularity curable under S. 537, Criminal P. C.

SC 1396 D (C N 297)

—S. 15(1) — Power to search — Power is conferred by statute and not derived from recording of reasons — Omission to record reason before or after search — Trial is not vitiated unless it is shown that prejudice is caused

SC 1396 A (C N 297)

—S. 15(1) and (2) — Search. — Non-compliance with sub-sections (1) and (2) is mere irregularity — Trial not vitiated unless prejudice is caused by non-compliance — AIR 1965 Andh Pra 176, Overruled

SC 1396 B (C N 297)

Tamil Nadu General Sales Tax Act (1 of 1959)

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TENANCY LAWS

—A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1950)

—S. 47 — Before amendment by Third Amendment Act (12 of 1969) — Sale in invitum (Revenue Sale) is transfer within S. 47 — Prior sanction required only before confirmation of sale — After amendment, no sanction is necessary before confirming sale

Andh Pra 333 A (C N 54) (FB)

—Bihar Land Reforms Act (30 of 1950)

—S. 7(1) — Homestead — Factory having for benefit of workers, staff quarters, clubs, kitchens etc. — Buildings would not fall within S. 7(1) — Definition of 'factory' in Factories Act cannot be any guide in determining meaning of 'factory' in S. 7 — 1966 BLJR 142, Reversed

SC 1539 (C N 326)

—S. 10(2) — Second proviso (as amended by Bihar Act 4 of 1965) — Enactment of second proviso to S. 10(2) after Act 67 of 1957 was without jurisdiction — Amendment is ultra vires the Constitution—AIR 1968 Pat 50, Reversed

SC 1436 D (C N 306)

—U. P. Zamindari Abolition and Land Reforms Act (1 of 1951)

—S. 18(1) (a) — Land other than sir and grove — Proprietary right in respect of subject-matter of waqf-alal-aulad — One of mutwallis (who were also co-beneficiaries) cultivating land personally — Right of bhumidhar does not accrue either in his favour or in favour of the other co-mutwalli—Wakf—Incidents of — Observation in AIR 1933 All 407, Overruled

All 509 (C N 75) (FB)

Tort

—Joint tort-feasors — Suit against one compromised and decree passed — Other tort-feasors are not released — Liability is joint and several. (C. R. No. 325 of 1957, D/- 5-1-1960 (Allahabad), Reversed)

SC 1468 C (C N 309)

—Vicarious liability — Seizure of cut wood under statutory powers — Seized wood entrusted to Supratdar — Misappropriation of, by Supratdar — State not liable Madh Pra 179 B (C N 33) (FB)

Trade and Merchandise Marks Act (43 of 1958)

—S. 92 — Period of limitation prescribed does not apply to Penal Code offences — See Penal Code (1860), S. 482

Mys 218 (C N 56)

Transfer of Property Act (4 of 1882)

—S. 8 — Deed, construction of — Held on construction that arrangement referred to in document was for convenient management of property and distribution of plaintiff's share of income

Raj 190 E (C N 41)

—S. 111(c) — Lease by female owner for a term of years — Interest of lessor vesting in plaintiff absolutely under a compromise decree on her death — Lease terminates on her death — Continuance of lessee is without authority unless there is attornment — Plaintiff entitled to maintain suit for ejectment

Assam 102 E (C N 24)

University of Rajputana Act (1946)

See under Education.

U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947)

See under Houses and Rents.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951)

See under Tenancy Laws.

Wealth Tax Act (27 of 1957)

—S. 2(e) — Assets — 'Agricultural land' meaning of — Intention of owner of land not irrelevant but has bearing on its determination — Land situated in heart of residential area, not found cultivated on date of valuation under S. 2(g) is not agricultural land and is an asset for assessment

Pat 327 A (C N 59)

—S. 2(m) and (e) — Net wealth — Claim for exemption from assessment on ground that certain land being agricultural land was not an "asset" — Onus of proof is on claimant — Non-assessment in previous years — No inference that land was accepted as agricultural land

Pat 327 B (C N 59)

—S. 13 — Instructions and directions of Board of Revenue control power of officers in matters administrative but not quasi judicial — Proviso to S. 13 does not imply that Board may give directions to

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SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1970 SEPTEMBER

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REVERS.=Reversed in

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—S. 24 — ('64) C. R. No. 325 of 1957, D/- 5-1-1960 (All) — Revers. AIR 1970 SC 1468 B (C N 309).

—S. 39 — AIR 1940 Lah 394 — Diss. AIR 1970 Andh Pra 307 (C N 49).

—S. 47 — ('66) Spl. C. Appln. No. 871 of 1965, D/- 10-9-1966 (Gui) — Revers. AIR 1970 SC 1475 C (C N 310).

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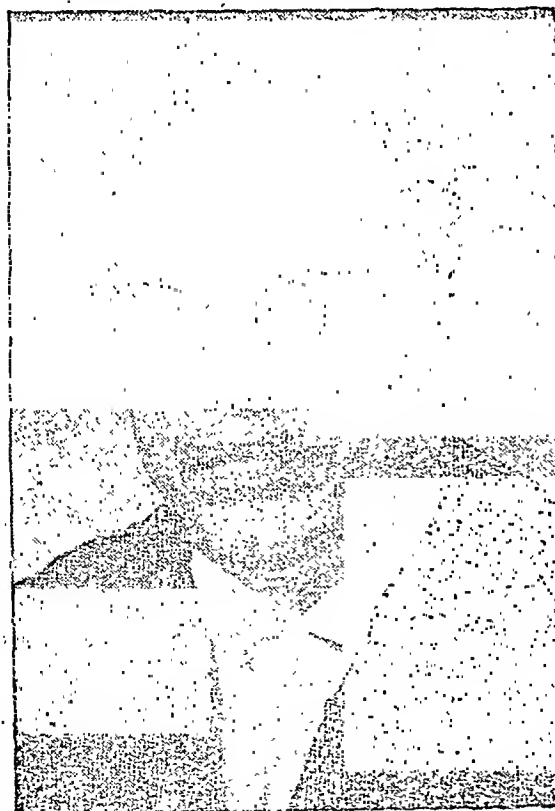
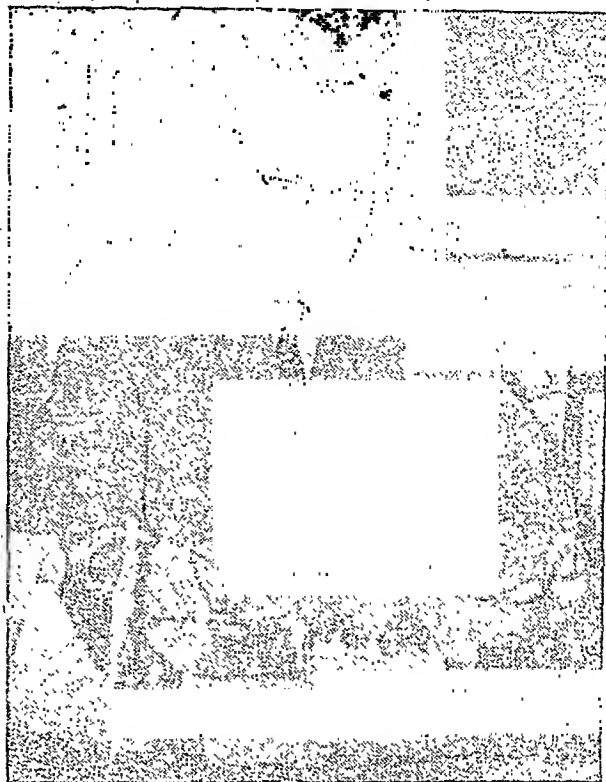
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WHEN ORDERING A LAW BOOK**FIRST ASK****THE A. I. R. A PUBLICATION****IN THE FIELD?**

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Chief Justice,
Assam and Nagaland
High Court.



The Hon'ble Mr. Justice
B. C. Misra, *Judge,*
Delhi High Court.

CRIMINAL LAW PRACTICE, BY RAM-CHANDRA VERMA, CIVIL AND ASSISTANT SESSIONS JUDGE, FOREWORD
By Mr. Mithanlal, Retired Judge, High Court, Allahabad, Eastern Law House Private Ltd., Calcutta, Page VIII and 332, Price Rs. 15.

Here is a combined handbook on Criminal Law and procedure as well as matters relating to the appreciation of evidence in Criminal trials. For complaints under the Criminal Procedure Code under the different sections, they must emanate from the public servant concerned or his official superior, from the Court in some instances, from the Government or from the persons aggrieved. Every offence is ordinarily tried or enquired into by a Court within the local limits of whose jurisdiction it was committed. Under the Criminal Procedure Code, an investigation starts after the police officer receives information in regard to an offence, and it generally consists in proceeding to the spot of offence; ascertainment of the facts and circumstances of the case; discovery and arrest of the suspected offender; collection of evidence relating to the commission of the offence, which may include the examination of various persons (including the accused) and recording their statements if the officer thinks fit, and the search of places and seizure of relevant things to be produced at the trial; and the formation of the opinion as to whether on the available material a case has been made out or not; and finally, the report.

2. Once before the Court, the rules of procedure designed to ensure justice must be scrupulously followed. The main concern of the Court should be a fair trial. The tests to determine a fair trial are whether the accused knows what he is being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. For a trial to be valid, it should be tried before a Court of competent jurisdiction and should be conducted by a public prosecutor on behalf of the State in police cases. If in his absence the Judge himself performs the functions of a public prosecutor it is a negation of fair trial, as it may give rise to apprehensions in the mind of the accused. In criminal cases link evidence of various kinds is often necessary. Link evidence is evidence which establishes the link between different pieces of evidence to show the conti-

nunity of circumstances. The Court has to see that the requisite link evidence has been produced for its examination. The administration of Criminal Justice directly affects the accused but indirectly the whole society. It is therefore necessary that the trial of Criminal cases is conducted with the utmost efficiency.

3. In a civil suit there are always two parties before the Court and they have conflicting interests. There is no such conflict in a Criminal case. The interest of the State lies in ascertaining the truth about the charge and not in securing conviction in every case. Prosecution evidence must rule out every reasonable doubt. There are special cases in which corroboration is required and thus a minimum of evidence is requisite. In a Civil case, when both parties lead evidence the importance of the question of burden of proof disappears; the party whose evidence is weak fails. If there is a substantial preponderance of evidence on one side, though the case may be still in doubt, the Court decides in accordance with their relative weightage. In a Criminal case the only thing that the accused person has to meet is the case of the prosecution and such addition to it as he may have voluntarily made by his own statement and that of the defence witnesses.

4. In a Criminal trial, the accused being presumed to be innocent, the burden of proof is on the prosecution. Where the evidence is unworthy of belief or it is inconsistent with the innocence of the accused, he is entitled to acquittal even if he has made no defence. He cannot be made to offer any explanation if the circumstances merely throw suspicion on him. Because the benefit of doubt goes to accused, in a great majority of cases the trial results in acquittal. The guilt must be proved to the hilt. Stronger proof is necessary in a criminal trial than in a civil case. When arguments are over on either side the judgment is delivered; it contains the points for decision and the decision on them with reasons. After stating the prosecution case, the defence version and the gist of the prosecution evidence the points which arise for decision are formulated. The evidence relevant to those points is analysed and discussed before taking a decision on it.

5. The opening chapters of the book under review deal with the complicated questions of jurisdiction, validity of Criminal proceedings and the duty of a committing

court in offences triable by a Court of Session. Chapters IV and V give points of caution for trial courts and deal with the topics of link evidence, legal evidence, judicial finding and qualitative judgment. Chapters VI to XXV embody the classification of different kinds of evidence, their value and the manner of their appreciation. The evidence which comes in criminal cases has been divided into the categories of oral evidence, circumstantial evidence, expert evidence, medical evidence and documentary evidence. Chapters XXVI to XXVIII deal with the points of defence for the accused. It will appear that in some cases the opinion of defence counsel in suggesting the defence version in cross-examination was used as a circumstance against the validity of belated defence. In different Chapters the points for defence have been prominently brought out, either in a separate column or in a separate note. For example, Note 41 of Chapter XXIV gives a list of defences against the evidence of identification, Note 74 of Chapter XXVI gives a list of the points for argument for defence counsel. Mr. Mithanlal observes in the foreword that Chapter XXVIII, relating to investigation and the irregularities committed showing the cause of investigations, fills a lacuna.

6. It is well that each chapter is introduced by a useful synopsis, and there is a general index. The Appendices include brief notes on S. 162, Cr. P. C., on other salient provisions of the said Code, on Ss. 24, 25 and 27 of the Evidence Act and other salient provisions. The burden of proof falls on the prosecution but, as the author says, they often get little time to prepare a case, and for them this book should come in handy for reference to various practical problems. Written from the practical point of view of busy lawyers and Courts, rising members of the legal profession, intent on acquiring special skill in the conduct of criminal cases, should find their subject-matter conveniently arranged and all the material needed for a trial put forth properly.

R.S.S.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA AND PAKISTAN (A COMPARATIVE STUDY OF PRINCIPLES AND REMEDIES), By M. A. Fazal, M.A., LL.B. (Dac.) D. Phil. (Oxon.), Oxford University Press, Oxford House, Apollo Bunder, Bombay 1, BR Pp. XXXII and 345, Price 80 S.net.

There have not been many publications in India on the judicial control of administrative action and the development of administrative law. In 1903 Das published a book entitled "The Law of Ultra Vires in India" and Ghose's "Comparative Administrative Law" appeared in 1918. In 1938 the Madras Law Journal Press published another small book under the title "Administrative Law in Madras". In the post-independence period Dr. A. T. Marikose published his "Judicial Control of Administrative Action in India" in 1956, a comprehensive work on the remedies based on case law. The book now under review studies the evolution of the principles of judicial control of administrative action and the remedies by which these principles are given effect to. It examines the decisions of the Courts in India and Pakistan against the background of English Law and American doctrines and shows the subtle differences that have arisen between the various systems. Based on a thesis submitted for the Degree of Doctor of Philosophy in the University of Oxford, it is believed to be the first comparative analysis in the field.

2. The Indian Constitution-makers envisaged a welfare State with wide extension of the administrative process. They drew up a list of "fundamental rights" and machinery for their enforcement. Article 19 of the Constitution guarantees to every citizen the right to practise any profession, or to carry on any occupation, trade or business, 'subject to reasonable restrictions'. This and other constitutional provisions are the sanction behind the operation of administrative adjudicatory authorities that have been set up under the different statutes. The Constitution-makers also incorporated in the Constitution certain provisions which invested the Courts with broad powers of review. Article 226 empowers the High Courts to issue to any person or authority including, in appropriate cases, any Government directions, orders or writs in the nature of Habeas Corpus, mandamus, prohibition, certiorari, or any of them. Thus the Constitution sought to provide the safeguards against the extended powers of administration. The judicial review of administrative action has therefore constitutional sanction behind it.

3. The distinction between judicial or quasi-judicial acts, on the one hand, and administrative acts, on the other, has, it is feared, turned the Indian law into a maze of uncertainties. The administrative process is the "complex of methods by which

administrative agencies carry out their tasks of adjudication, rule-making and related functions". The emergence of this process has been precipitated in India by the rapid extension of Governmental activities. It has been accepted as an inevitable consequence of national planning and the welfare state, but the problem has been one of providing safeguards. There have been demands for institutional safeguards against corruption and maladministration of Government departments. A vigilance commission has already been installed by the Central Government and there has been a proposal for the creation of an institution equivalent to the "Ombudsman".

4. As to the judicial review of administrative acts the Courts in India hold that it is not easy to find in the words of the statute the principle of *audi alteram partem* or the rule of natural justice. The rules of natural justice have to be imported in a proceeding even when the statute is silent. The question whether the Indian Courts will adopt the policy of Pakistani Courts, viz., the abandonment of the distinction between administrative and judicial proceedings for the purpose of judicial review and the application of the principle of *audi alteram partem*, remains to be seen.

5. The author of the book under review deals with the growth of judicial control in terms of the jurisdictional principle in India and Pakistan, or the principle of *ultra vires*, and the scope of the review under the jurisdictional principle. There are chapters on "Review of Fact and Law" and "Natural Justice", the latter under the sections of bias, and the right to a hearing. A separate chapter on "Remedies" deals with the subject under the heads of Actions for damages, Injunctions, Declarations, Prerogative Remedies and Relative Scope of the Remedies. A discussion of the ordinary law remedies precedes that of the prerogative ones in order to examine the extent of their application in administrative law and see how far they supplement the prerogative remedies.

6. The author's conclusions are given last. In India and Pakistan the legislature can offer guidance to the Courts in the area of judicial control of administrative actions on the lines of the Administrative Procedure Act passed by the U. S. Congress in 1946. At present administrative decisions need not be accompanied by reasons. The English Act (The Tribunals and Inquiries

Act, 1958) provides a legal right to a reasoned decision, and the enactment of a similar provision in India may be considered. One of the problems of administrative law is bias—of vitiating adjudication proceedings by the performance of inconsistent functions, including prosecuting, investigating, instituting proceedings and negotiating settlements; many administrative agencies perform all these functions. The problem is to separate the functions on lines indicated by the American Administrative Procedure Act. The *audi alteram partem* is the most important principle of natural justice, which should ensure fair hearing. Until the legislatures find it more practicable to incorporate into the particular statutes the requirement of the right of hearing, they should provide more definitely by a general statute for both the contents and scope of the rule. Among the remedies, there is an anomalous requirement that a notice of two months is necessary for any suit against the Government or against any public officer acting in his official capacity and it is explained why it is desirable to dispense with this requirement in general. Dealing finally with the doctrine of sovereign immunity the author analyses the unsatisfactory position of the law as it obtains.

7. A detailed bibliography and an exhaustive index add to the value of the work. There are also a list of abbreviations and tables of cases and statutes.

8. The volume should be useful not only to practising lawyers and students in India and Pakistan but to all those who are interested in the problem of the legality of administrative action throughout the world.

R.S.S.

THE BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (With Rules and Notifications): By C. C. Anajwala, B. A. (Hons), LL.B., Advocate, High Court, Bombay, C. Jamnadas & Co., 146 C, Princess Street, Bombay-2 or 1297/167, Relief Road, Ahmedabad, PP. XX & 220. Price Rs. 12.50.

Under the Bombay Tenancy and Agricultural Lands Act, occupancy rights, free of all encumbrances, are conferred on the tenant. Ejectments after a certain date are made illegal. Transfers to non-agriculturists in any form are declared invalid, thus eliminating the class of investors in land. While absentee landlordism has been abolished, the interests

of minors, widows, persons suffering from mental or physical disability, persons serving in the armed forces and certificated landlords (with an annual income of Rs. 1,500 or less) are not ignored. Even where the landlord resumes land for personal cultivation or for any agricultural purpose, care is taken to provide that the tenant, after termination of tenancy, is left with at least half the area of land leased to him; and in the event of the landlord failing to use the resumed land for the specified purpose within one year, he is required to restore possession to the tenant.

2. The book now being reviewed contains the full text of the Bombay Tenancy and Agricultural Lands Act, 1948, as in vogue in the Bombay areas of Maharashtra and Gujarat, shown separately for each area as a matter of convenience. It provides a commentary on the various provisions of the Act, as supported by the latest case law on the subject. The Tenancy Rules, notifications under S. 43A (3), table of cases and general index are also included. The chapters in the book cover, *inter alia*, general provisions regarding tenancies; special rights and privileges of tenants and provisions for distribution of land for personal cultivation; special provisions for termination of tenancy by landlords who are or have been serving members of the armed forces and for the purchase of their lands by the tenants, special provision for lands held on lease by industrial or commercial undertakings and by certain persons for the cultivation of sugarcane and other notified agricultural produce; special provisions in respect of areas within the limits of a municipality or a cantonment; management of estates held by landholders; and restrictions on transfers of agricultural lands, management of uncultivated lands and acquisition of estates and lands. The construction of a water course through the land of another, offences and penalties, and the procedure and jurisdiction of Tribunal, Mamlatdar and Collector; and appeals and revision are dealt with in the other Chapters.

3. The author has pointed out the lacunae in the law and its implementation and made suggestions for meeting them. The provision regarding surrenders in S. 15 appear to be inadequate. The landlords should be discouraged from exercising pressure upon the tenants to give up their lands; they should not get additional benefit from such surrenders besides what they would get had they duly applied for

resumption, i. e. half the land, and not the entire land. The Act does not confer any rights on the sub-tenant other than that of a permanent tenant; and an amendment on the lines of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1959 appears to be necessary. Further the tenant's right to purchase becomes ineffective if he fails to appear before the Tribunal, appears but makes a statement that he is not willing to purchase, or defaults in the payment of the purchase price. No administrative action is being taken to keep a scrutiny over the payment of the purchase price; no warnings to the tenants, who are mostly illiterate, or demand notices are being issued. Action under the provision which provides for recovery of unpaid amount as arrears of land revenue is being taken only in cases where the landlord applies, which he rarely does.

4. The landlord is required to issue receipts for the rent paid to him by the tenant. However no such receipts are being passed in many cases. There is also no specific provision for remitting rent by money order or its deposit in court. The existing provisions regarding payment of rent may be suitably amended with a view to safeguarding the interests of the tenant. The law suffers from vagueness both in regard to the fixation of the maximum rent and the fixation of purchase price. The maximum rent would need further review and careful scrutiny to ensure that the rent together with the other dues does not exceed 1/6 of the produce. As regards purchase price, the present Act leaves in the hands of the Agricultural Lands Tribunal a wide discretion and in many cases the purchase price has been fixed arbitrarily. Perhaps, says the author, a reasonable solution could be found with due regard to the provisions of the Constitution, and the element of arbitrary exercise of the Tribunal's discretion eliminated. Although transfers of land to non-agriculturists is barred, an exception is made in favour of co-operative societies in securing the loans advanced by them. With the commercial banks after nationalisation being called upon to bear a much bigger share than before of the burden of agricultural credit, it seems expedient to place the commercial banks on a par with the co-operative banks. Finally, the implementation of the Act has been "very slow and unsatisfactory". The position is rather disturbing and the object of the land reforms may be defeated if remedial

action is not taken promptly. It seems that the law should be suitably amended to provide for conferment of occupancy rights on the tenants compulsorily in all cases and purchase price recovered as land revenue. The inducement offered to the landlord for resumption of land either on his own application or by reason of voluntary surrender on the tenant's part should be withdrawn.

5. This is a complex piece of legislation which the author has tried to make as simple and intelligible as he can. It should be quite useful to students of law, practising lawyers, legislators and laymen as well as Government officials. R.S.S.

A MODERN VIEW OF THE CRIMINAL LAW: By S. W. Stewart LL. B. (Lond), Lecturer in Law, University of Wales, Pergamon Press Ltd, Headington Hill Hall, Oxford, Pp. XXIII and 262. Price 25s. net.

Comparative criminal law is a growing field for study and criminologists have been paying more and more attention to legal principles and characteristics. The ideal characteristics they desire in any system of criminal law are "specificity" (each offence should be strictly defined and where behaviour does not strictly fit the definition there can be no offence), "Uniformity" (criminal justice must be uniformly administered without regard to a person's social status) and 'penal sanction' (punishment behind every offence to be administered impartially). The conformity of English criminal law with these characteristics has been discussed and illustrated by interesting cases in the publication under review. The author explains and discusses the nature of criminal law, classifies the leading crimes in English law and shows the application of the criminal law both in private and public life. He examines the aims of criminal law and gives a broader meaning to the word 'punishment' which may also include 'treatment'. The varying opinions on the purposes of criminal law are outlined by the author, who focusses attention on whether it is intended to punish the delinquent to reform him, to deter others or to satisfy the demand for retribution by the injured person and the public. He has covered recent provisions for the payment of compensation to victims of crimes of violence, and shows that the defences available to the accused person have increased mainly through

the medium of diminished responsibility. He investigates the principles of criminal law and the reasons for the development of the present law, with comments on present and prospective changes. These changes have been illustrated by an examination of offences affecting both individual and public rights, making it a comprehensive survey of modern criminal law.

2. The book is divided into four different parts. In dealing with the general principles in Part I the author shows how the present state has been achieved and what provisions new and prospective, might do in the future. This part includes the aims and classification of criminal law, analyses of crimes, strict and vicarious liability, liability according to the status, including infants, married women, corporations and trade unions, and also degrees of participation in criminal offences and their modification. The author has embodied recent enactments such as the Criminal Law Act, 1967 and the latest Criminal Justice Act, so that all references to felony and misdemeanour have been replaced with more recent terminology such as "arrestable offence" and other phrases appropriate to the changes effected. This part also deals with special defences to criminal liability including insanity and diminished responsibility. There are also chapters on the English Criminal Law Courts with the reforms recently introduced, and the effect of capital punishment on the criminal law of England.

3. The second part is concerned with the protection of individual interests and covers such crimes as murder and manslaughter, assault, stealing, frauds and allied offences. The subject of stealing is dealt with under the heads of simple stealing, stealing by trick, stealing by mistake, stealing by finding, things capable of being stolen, and the Theft Bill. The provisions of the Theft Act, 1968 do not depart very much from those of the draft theft Bill which was submitted with the report of the Criminal Law Revision Committee, but in order that the true position after 1st January 1969 can be ascertained, an Appendix has been added which details those sections of the Theft Act which have been discussed. The draft Theft Bill provides new definitions of stealing, criminal deception and handling stolen goods and a reconsideration of robbery, blackmail and breaking offences, as designed to keep away the difficult anomalies which exist in this branch of criminal law.

4. Part III deals with the protection of community interests and industrial offences. The author shows there is an increasing amount of statute law which enforces penalties for failure to observe minimum standards for safety and welfare of staff at work and for the protection of the public. Another important section of law relates to road traffic. Whether road traffic offences should be classified as criminal is discussed by the author, who examines the more important offences provided by the Road Traffic Acts and the Road Safety Act 1967. These offences include many which have been or will be, the subject of reforms.

5. In Part IV the author sums up what has gone before by referring to what he considers, the most controversial parts of English Criminal Law. Some aspects of the law still require modification while, in cases where it has been reformed, it has not either completely achieved its purpose or has left unintentional anomalies. The author concludes that, whatever reform becomes effective, the purpose of criminal law will always be a demand for obedience to a pattern of behaviour laid down by the authority of the State, although the sanction to enforce compliance will move away from punishment to reformation of the offender and the payment of restitution to victims of any crimes which cause loss or injury. Recent experience has shown that the overlapping of criminal offences and moral wrongs can be extended or contracted as the legislature thinks fit, but such alteration leave anomalies not obviously contemplated by the drafters of the relevant statutes. It is more sensible, says the author, to classify criminal offences according to the severity of the sanction behind them rather than to rely upon a categorisation of offences resulting from historical development and taking no account of seriousness. Within the degrees of participation in crime, the author would seem to think that the type 'inchoate' or 'incomplete' as applied to any offence serves to signify a small division of offences like attempts, incitement and conspiracy; they may be complete offences in themselves as far as liability is concerned, but they have their own characteristics in not having achieved the result which influenced the offenders to act as they did. With regard to the defences of insanity, diminished responsibility, and drunkenness the controversy that exists relating to the distinction between legal and medical insanity may continue to remain with us. A considera-

tion of liability incurred vicariously might lead to the conclusion that it is an area of inimical responsibility which could very well be examined and reformed. This principle leads to the liability of incorporated bodies, but it is a pity that the lack of case decision has left unestablished to what extent an incorporated body can be liable for criminal offence. It seems that, apart from the modification of existing criminal offences, a great part of future legislation will be concerned with creating offences which may be necessary for protecting community interests. At the same time it is suggested that we must consider how far such protection of community interests might be allowed without undue encroachment on the individual rights of a citizen.

6. The book has been written with a lifetime of knowledge and experience behind it. The author was a detective inspector in the Cardiff City Police force and especially in the Western Criminal Record office. Parts of the book have been used in lectures given by him at the University of Wales, where he is a lecturer. The book should therefore be of considerable interest to the public as well as to the law student and lawyer. R.S.S.

THE MODERN LAW OF TRUSTS.

By David B. Parker, LL.B., Bar-at-Law and Anthony R. Mellows, LL.M., Ph. D., Solicitor of the Supreme Court, Law Lecturers at King's College, University of London. Sweet and Maxwell Ltd., 11 New Fetter Lane, London. (In India: N. M. Tripathi Private Ltd., Bombay). 1966. pp. XXV and 368. Price Rs. 73-50.

The word "trust" refers to the duty or aggregate accumulation of obligations that rests upon a person described as a "trustee" in relation to property held by him, or under his control. That property he will be compelled by a Court to administer in the manner lawfully prescribed by the trust instrument, or in accordance with equitable principles. As a consequence the benefits and advantages accrue, not to the trustee, but to the beneficiaries; or, in their absence, for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue to the extent of his beneficial interest.

2. The subject-matter of a trust may be real or personal property; it may be not only of a legal estate but also of an equitable interest

in property. Among the principal objects of the trust are to enable the property, particularly land, to be held for persons who cannot themselves hold it; to enable a man to make provision for dependants privately; to tie up property so that it can benefit persons in succession; to protect family property from wastrels; to make a gift in future; to make provision for causes or non-personal objects; to enable two or more persons to own land; to provide pensions for retired employees or dependants and to minimise the incidence of income-tax and estate duty. The rules which govern a trust are supposed to be more or less the same whatever the purpose for which it is employed, and the present publication tries to explain those rules.

3. The book under review places emphasis on the modern law, the history and development of which is adequately traced. The modern statutes and cases are fully dealt with, the incidence of taxation being kept to the fore. The law is generally stated as at 1st January 1966, but, wherever possible, some of the cases decided since that date have been included in footnotes. Attention has been directed in particular to a decision of the Court of Appeal which appears to have reversed the previous law on the meaning of S. 56 of the Law of Property Act, 1925. After considering the classification of trusts, the authors examine in detail, in eight chapters, the various trusts in use today. Trustees and administration of trusts are next dealt with, in five chapters. The important topics of investment, apportionment, infant beneficiaries, and the position of beneficiaries generally, are next dealt with, each in a separate chapter, while the work concludes with chapters on variation of trusts, and breach of trust. There are a table of cases, a table of statutes, and a useful index.

4. This text-book has been specifically designed and written to present a concise and comprehensive account of the law, every topic in it has been clearly presented to the student, and it should stimulate his interest in the principles and concepts of the law and its details.

R.S.S.

LAW RELATING TO BUILDING AND ENGINEERING CONTRACTS IN INDIA (including the Duties and Functions of Architects, Engineers and Surveyors). By G. T. Gajria, B.A., LL.B., Advocate, Supreme Court of India. N. M. Tripathi Private Ltd., Bombay 2, 1st Edition, 1967, pp. xcvi & 839, Price Rs. 50.

With the growth of the building and construction industry in India, the scope of disputes relating to the rights and obligations of the persons concerned with it, and the meaning and interpretations of the various clauses of the contracts entered into by the parties have also increased in importance. Most of these contracts contain an arbitration clause for the settlement of the disputes arising from them and the number of arbitration cases has, therefore, greatly increased, and called for a publication dealing with the legal aspect relating to the rights and obligations of the various persons connected with the industry. The present volume incorporates the Indian Law on the various topics and has made use, where the general principles are concerned, of well-known English authors like Hudson, Emden & Watson, Keating and Croeswell. Although the principles of law on contracts and arbitration have been based upon English jurisprudence, these English writers do not deal with their application in the light of the Indian statutory provisions.

2. According to the Indian Contract Act, only those agreements are contracts which are enforceable as such, having been made by free consent of the parties, by persons competent to contract, for lawful consideration and lawful object which are not expressly declared to be void by any statute, and a building contract is defined as "contract containing an exact and minute description of the terms, account, or remuneration of particulars for the construction of a building." A "contractor" is generally a person who in the pursuit of an independent business, undertakes to do specific jobs of work for other persons, without submitting himself to their control with respect to the details of the work, and a building contractor is obviously a builder who works by contract. The breach of a contract is the failure or refusal to perform it, and any breach by one party gives the other party an immediate cause of action and a right to damages for loss flowing from the breach. The "Arbitrator" is the person to whose attention the matters in dispute are submitted—a 'judge of the parties' own choosing, whose functions are judicial, to dispense equal justice to all the parties and to decide the law and facts involved in the matters submitted for arbitration. In the book under review a whole chapter deals separately with arbitration under over 150 sub-heads in the synopsis. Building and engineering contracts usually include an arbitration clause, a speedy remedy for settling disputes involving technical points. The proceedings are private, the atmosphere less formal than the courts, and the arbitrator's award relatively final in view of the narrow scope for appeal.

3. The present volume has twenty chapters, each preceded by a very detailed synopsis, which is of great help. The chapters include those on the duties of architects, engineers, and builders, the performance of contracts, price and payment, defective work and its consequences, breach of contracts, damages, forfeiture and determination, materials, plant and machinery, and assignment. The volume contains a useful table of cases and index.

4. From 1952 to 1964 the author was Standing Counsel in the Central Public Works Department, Government of India and, as such, he had to deal with important arbitration cases involving both technical and legal points relating to building and engineering contracts. One of the standard books on the subject, the present work should explain to the builder, architect, surveyor, engineer and contractor their rights and obligations in respect of a particular building work as laid down by law and the meanings and interpretations of the terms used in the contract. It should cater to the needs of the lawyers as well as of engineers and contractors and others connected with the industry. R.S.S.

LAW ON DEFALCATION, FORGERY AND FALSIFICATION OF ACCOUNTS, By Radhashyam Maitin, B. L., Advocate, Gaya, Bairamkrishna and Bros., Murarpur, Gaya, 1968, Pp. xxxviii (sic) and 336, Price, Rs. 15.

For a variety of reasons cases of criminal breach of trust, criminal misappropriation, forgery, and falsification of accounts, which are more or less interlinked with one another, have been increasing, and the need was being felt for a special study of this branch of law. Broadly speaking, the offence of criminal breach of trust consists in the fraudulent appropriation of another's property by a person to whom it is entrusted or to whose hands it has lawfully come. It is akin to cheating, theft, and criminal misappropriation, although differing from it in important respects. Ss. 405 to 409 of the Indian Penal Code, deal with this offence, it being defined in the first section and Ss. 406 and 409 providing details of punishment for it. Offences committed by different persons such as Carriers, warehouse-keepers, clerks, servants, agents, public servants and bankers fall under the purview of Ss. 407 to 409, while S. 406 embraces all other cases. One falsehood leads to another; one crime leads to another. Criminal breach of trust leads to forgery, and forgery to falsification of accounts. Sections 463 and 465 of the Indian Penal Code, deal with forgery, and S. 477-A with falsification of accounts. Accord-

ing to S. 463, "whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or any person, or to support any claim or title or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery". The next section defines the making of a false document and S. 465 lays down that "whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both". The one ingredient common to Ss. 463 and 464 is fraud. Falsification of Accounts is, therefore, an important link in the defalcation of money. Persons who are in charge of books of account sometimes falsify or mutilate them with intent to defraud.

2. The publication under review attempts to explain precisely and clearly the essential principles of the law on the subject. The law contained in the statutory provisions has been presented with the aid of up-to-date decided cases, all the cases under each head being grouped together to enable the busy lawyer to find what he wants at a glance; as far as possible, the exposition of the law has been presented in the words of the judges themselves. There are on the whole nineteen chapters in the volume, and chapter titles like Presumption and Inferences, Onus and Proof, Charges, Trial and Misjoinder of Charges, Investigation, and Modus Operandi of Crime are only illustrative. Included in the book are model charges, a table of cases and a subject-index, while the Appendices include extracts from the Indian Post Office Act, the Bihar Public Works Department Code, the Bihar Financial Rules, the Bihar Treasury Code, and the Bihar Municipal Accounts Rules, 1928.

3. The book has been written from the practical point of view and the practising lawyer should find useful guidance in the several difficulties which invariably arise in the handling of such cases. Most of the available material has been marshalled in order to make the law intelligible not only to the professional lawyer but also to the lay public.

4. Apart from the printer's devil, who has been very busy at work, the get-up and language of the book could do, it would seem with quite some improvement. R.S.S.

THE REPUBLIC OF INDIA (The Development of its Laws and Constitution). By Alan Gledhill, M. A. (Cantab.), LL.D (London), I.C.S. (Retd.), formerly one of the Judges of the High Court at

Rangoon, Stevens and Sons, 11 Fetter Lane, London, 2nd Edition, 1954. pp. xi and 399. Price, Bound £3-10 S net; Paperback £1-15 S net; or Rs. 31-50.

The British Commonwealth Series, of which the present publication is No. 6, consisted in 1964 of eleven published volumes, giving a comprehensive and practical treatment of the constitutional and legal histories of a large area of the world. The present is the second edition of Prof. Gledhill's volume on India. It attempts to explain, for the benefit of the general reader, the new Constitution of the Republic of India and the body of law in force in this country. As the greater part of the first edition was written before the inauguration of the Republic, and many amendments were made after inauguration and there was a large and important body of case law, a second edition was found necessary. The Second Part of the first edition no longer gives a fair account of the Indian Statute Book, the Parliament having passed over 500 Acts between 1950 and 1956.

2. The author traces the evolution of the present Constitution of India from the time of the East India Company, explaining the present constitutional position and summarizing case law over the past thirty years. The development of the Indian Statute Book and the judicial system are examined from the same point. Since 1950, when the Constitution came into force, there have been sixteen Acts specifically described as constitutional amendments and several other legislative enactments affecting constitutional law. The present legislative programme receives particular attention. The substantive law is fully described, and, in addition to a detailed consideration of the civil and criminal law, there is also a full analysis of the personal law of the Hindus and Muslims.

3. Apart from the introductory chapter, the book has two Parts. The first one, on the Constitution, includes chapters on the development of Government, legislatures and the administrative system in the British period, the nature of the Indian Constitution, the distribution of legislative and executive powers, the Union executive, Parliament, the constitution of the Units, the fundamental rights and directive principles; there is a chapter on the Judiciary, under the heads of distribution of judicial powers, the composition, original appellate and advisory jurisdictions of the Supreme Court, Constitutional Writs, the High Courts and subordinate Courts. The second part, on the Indian Legal System, includes chapters on criminal law, civil procedure, laws relating to property, laws relating to contract, laws relating to industry, laws relating to communications and laws relating to the professions.

4. The adoption of western notions of law and government, the enactment of codes of law and the creation of an effective legal system have been among the results of British administration. The Indian Independence Act of 1947 only meant the removal of British control and the expansion of what was left of the existing structure to fill up the gaps. The same policy has been to a considerable extent continued in the Constitution in which there is much of fulfilment and little of rejection of British policy. The instrumentalities created by the Constitution try to abide by it and its laws, and the Supreme Court gives its ruling on doubtful points and other organs of State accept the Court's ruling; the recent Presidential election case afforded one an illuminating example of the prestige and powers of the Court, although there have also been cases where Parliament has checked constitutional development adumbrated by a decision of the Supreme Court.

5. Dealing with the subject in a book of this size involves a great deal of compression and omission, but the selection of material gives a fair outline of the general picture and of the trends of new legislation. The work is completed by a bibliography, tables of statutes and cases and full subject index. Written by an author with practical and teaching experience, the work should prove useful to legal practitioners and students of constitutional law. It should be of value to them also in North, West and East Africa, where codes of law have been based on Indian models. R.S.S.

CONSTITUTIONAL DOCUMENTS, VOL. I. BRITISH CONSTITUTIONAL DOCUMENTS RELATING TO INDIA. With an Introduction by Durga Das Basu. S. C. Sarkar & Sons (Private) Ltd, 1-C, College Square, Calcutta 12. 1969. (pp.) xlii & 444. Price, Rs. 30.

"Would such a suit lie against the East India Company, had the case arisen prior to 1858?" is a question which invariably arises in determining whether a suit or other legal proceeding would lie in an action against the Government of India or of a State. Many of the pre-Independence constitutional laws and statutes have not yet lost their importance to the busy constitutional lawyer, the framers of the present Constitution having adopted many of the provisions of the Government of India Act, 1935; the interpretation put on the corresponding provisions of this and other pre-Independence Statutes is found useful in interpreting the various provisions of the present Constitution. The author of

the volume under review has, therefore, collected the relevant pre-Independence British Statutes commencing from the Government of India Act, 1800, and ending with the Indian Independence Act, 1947, and the India (Consequential Provision) Act, 1949, with an Introduction giving a critical summary of their main provisions. After describing the constitutional position under the East India Company and the changes made by the Government of India Act, 1858, as a result of the transfer of sovereignty to the Crown, the author covers the Indian Councils Acts, 1861 & 1892, and proceeds to deal with the Morley-Minto Reforms and the Indian Councils Act, 1909, the Montague-Chelmsford Report and the Government of India Act, 1919, the Simon Commission and the main features of the Government of India Act, 1935, and the position and powers of the Governor-General of India and those of a Governor of a Province, and the latter's special responsibilities under it. This is followed by a description of Provincial Autonomy, history of Prerogative Writs in India and of State Liability, security of tenure of Government servants prior to Independence, effects of the Independence Act, 1947, on the Government of India Act, 1935, and finally, the making and adoption of the Indian Constitution.

2. Beginning with the Government of India Act, 1800, the volume under reference gives the reader the texts of as many as twenty-four pre-Independence Statutes, including the various Government of India Acts, the Indian Councils Acts, and the Indian High Courts Acts. Nearly a half of the book is devoted to the text of the Government of India Act, 1935, under its fourteen Parts, including those on the Federation of India, the Governors' Provinces, Legislative Powers, Administrative Relations between Federation, Provinces and States, Finance, Property, Contracts and Suits, the Federal Railway Authority, and the Judiciary. In his introduction the author traces the history of the Judiciary under the East India Co. from 1661 to 1765, describes the dual system of justice since 1765 and the history of the High Courts in two parts, prior to the Indian High Courts Act, 1861, and subsequent thereto. Part IX of the Government of India Act, 1935, has two chapters, one on the Federal Court and the other, on the High Court in British India. The different sections of the earlier chapter deal, inter alia, with the salaries of judges and their appointment, the seat of the Federal Court, its original and appellate jurisdictions, appeals to H. M. in Council, enforcement of decrees and orders, power of Governor-General to consult it, the rules of the Court and its expenses. The different sections of the second

chapter cover, among other things, the salaries of judges, jurisdiction of existing High Courts, their administrative functions, jurisdiction in revenue matters, the language of the proceedings, and their extra-Provincial jurisdiction. It is well that the author has included in the present publication Letters Patent granted for the High Courts of Calcutta, Bombay, Madras, Allahabad, Lahore and Nagpur.

3. Indian constitutional history is in great part made up of the various Government of India Acts, the Indian Councils Acts and the High Courts' Acts and the present volume should be of use, therefore, to the law student, for whom the study of the subject is compulsory, as well as to the busy lawyer who specialises in constitutional law.

R.S.S.

A. C. DUTT ON INDIAN CONTRACT ACT. By B. C. Mitra, B. A., LL. B., Sr. Advocate, Supreme Court, and Tagore Law Professor, University of Calcutta. Eastern Law House Private Ltd., Calcutta, 12. 4th Edition, 1969, Pp. 215 & 1156. Price, Rs. 55.

The Fourth Edition of Dutt's Commentaries on the Indian Contract Act has been found necessary, for, since the appearance of the previous edition in 1951, the volume of case law, both Indian and English, has greatly increased. The present editor has retained the identity of the original publication and has not interfered with the original text unnecessarily. He has confined himself to important Indian and foreign decisions and, as regards Indian decisions, he has relied mainly on Supreme Court decisions as they set at rest the diversity of decisions of the different High Courts on particular points. Within the prescribed compass, this Edition is fully revised, up to date and comprehensive. The author scrutinises and sifts all the more important law reports, and collects and arranges all available cases in their appropriate places. This Code is the work of English lawyers and embodies the main principles borrowed from the English law. A full exposition of these principles is possible only by reference to the authorities from which they have been deduced, but the numerous references to Indian decisions should check and counteract the tendency of too hasty an application of English rules.

2. Prior to the passing of the Act in 1872, the law generally applied by the High Courts was the Common Law of England and, where the Hindus and Muslims were concerned, all matters of contract were to be governed by their respective laws and usages. The principles of the Act apply to transfers and, indeed, S. 4 of the

Transfer of Property Act provides that the Sections and Chapters of that Act which relate to contracts shall be taken as part of the Contract Act. The general rule is that the law of the country where a contract is made governs its nature, obligation and interpretation. Section 2 of the Indian Act sets out the various elements which go to make a contract, which springs from the making of an offer and its acceptance, the "offer" being called a "proposal" according to it.

8. The 238 Sections of the Indian Contract Act have been divided, in the present volume, into ten chapters, the first three dealing with communication, acceptance and revocation of proposals, voidable contracts and void agreements, and contingent contracts. The fourth chapter on the performance of contracts deals with the subject under the heads of contracts which must be performed and by whom, time and place of performance of reciprocal promises and appropriation of payments. The next three chapters dwell on certain relations resembling those created by contract, the consequences of breach of contract, and indemnity and guarantee. The chapter on bailment has sections on bailments of pledges and suits by bailees or bailors against wrong-doers, while the last chapter, on agents, treats the subject under the heads of appointment and authority, agent's duty to principal and vice versa, and effects of agency on contracts with third persons. Although the commentaries contain illustrations and explanations and each Section is discussed under several heads printed in bold type, there is no synopsis at the head of each chapter. The table of cases and index are, however, full and exhaustive, and important decisions published while the book was in the press are included in the "Addenda."

4. The book is intended for use by the judge or lawyer who has generally to rely on authority for help and guidance. To him it will be helpful to know the various points of view from which a question has been approached, the considerations that have carried weight and the principles and authorities underlying the solution of the questions. All who are badly pressed for time and yet have to be familiar with the latest case law on the subject will find in this volume a wealth of information presented in condensed and lucid style by one who has already to his credit some good books on shipping, letter of credit and marine insurance.

R.S.S.

B.B. MITRA'S GUARDIANS & WARDS ACT. By Shambhudas Mitra, M. A., LL.B., Advocate, Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13. 11th Edition, 1969. pp. xxiv & 442. Price, Rs. 26.

Having appeared for the first time in 1921, Mitra's book on the Guardians & Wards Act has gone through ten editions, the present one being the eleventh. The latest edition has been thoroughly revised and brought up-to-date, all recent decisions having found their proper place in it. The Hindu Minority and Guardianship Act of 1956, with notes and commentaries thereon, has been incorporated in it. Several High Court Rules and new forms and precedents have also been added. The Allahabad High Court Rules and the Rules of the High Courts of Bombay, Calcutta, Madras, Nagpur, Patna, Punjab and Mysore are to be found in Appendix A, while of the specimen forms included in Appendix B, mention may be made of petition for appointment of a guardian, Application for guardianship, Form of Bond, Form of renunciation of guardianship, General Notice, Form of Release, and Application for leave to transfer the property of a minor. The first edition was greatly improved upon in subsequent editions by the incorporation of not only Indian but also important English decisions, by the incorporation of the amendments introduced by Government of India (Adaptation of Indian Laws) Order, and by considerable additions to the original Notes.

2. Prior to the passing of the Guardians & Wards Act, 1890, there was no all-India Act on the subject, and the Act was passed as a complete code defining the rights and remedies of guardians and wards. According to the Act a "guardian" means a person having the care of the person of a minor or of his property, or both his person and property. A "ward" means a minor for whose person or property, or both, there is a guardian. Section 84 of the Act lays down the obligations of a guardian of property to render accounts, and the new S. 84A, inserted in 1930, lays down that the Court may appoint a person to audit the accounts and may direct that remuneration for it be paid out of the income of the property. The paucity of judicial decisions on the latter section, even four years after its incorporation, was deplored by the author before he died in 1935. He inferred that the Courts treated the section as an enabling provision for auditing the accounts. Its real object, according to him, was to remove the conflict of judicial opinion on the interpretation of the phrase "balance due", whether it was the balance due according to the accounts rendered by the guardian or

whether it was the balance found to be due after the accounts are duly audited by the Court's appointee.

3. The volume under review gives the text of the Guardians & Wards Act 1890 with the author's commentaries, in the form of Notes. The 53 sections of the Act have been grouped under four chapters, the appointment and declaration of guardians being the subject of Chapter II. It includes the sections on the power of the Court to make order appointing a guardian, persons entitled to apply for order, form of application, procedure and hearing of evidence before making of order, and matters to be considered by the Court in appointing guardian. The 3rd Chapter lays down the duties, rights, and liabilities of guardians, including their fiduciary relation to the ward, remuneration of the guardian, duties of the guardian, title to custody of the ward, removal of ward from jurisdiction, and powers of testamentary guardian, and termination of guardianship. Chapter IV, on Supplemental Provisions, deals, *inter alia*, with penalties, costs and the rule-making powers of the Court.

4. Towards the end of the book is given the text of the Indian Majority Act, 1875 with commentaries. A table of cases and a detailed index are useful features of the volume.

R.S.S.

IN SEARCH OF JUSTICE. (Law, Society and the Legal System). (By Brian Abel-Smith and Robert Stevens. Allen Lane The Penguin Press, London, 1968. (In India; D-338, Defence Colony, New Delhi-3), pp. 384 Price, 63 S net.

"All men are equal before the law". "A man is innocent until proved guilty." The British way of life stands for the rule of law." These are axiomatic, but in practice the law as a social service is believed to fall below these ideals. The present volume, which is a comprehensive outline of the English legal system, draws particular attention to the points where that system fails to serve the public interest, suggesting, in the process how in the future it might be made more responsive to changing needs. In trying to explain the obstacles which face the citizen on the road to justice, the authors attempt to answer the questions how the system came to be the way it is, why the British legal profession and the Courts have escaped major modernization, and what prevents reform. All aspects of the profession, legal education, legal aid, the Courts and Judges, are evaluated against the needs of modern society, and it is proved to the hilt that what is wanted is not patch-work reform but a wholesale reconstruction of the system.

For an understanding of the existing pattern of British Courts and tribunals and the existing structure and practices of the legal profession, they must be seen in a historical context, and the first two chapters, therefore, out of the 11 chapters in the book, give a concise history of the Courts and tribunals, and of the legal profession and its training and education; the 2nd chapter shows how the barristers evolved as the senior group within the legal profession. In the succeeding three chapters there is a comprehensive description of how the British legal system works at present; the barrister's education for the Bar, its regulations, and the rules of etiquette which have an important effect on the quality of service received by the public, are clearly explained, while the next chapter is devoted to solicitors, their education, regulation and organization. Barristers do not take up practical conveyancing and they tend to specialise in particular branches of the law and in the skill of advocacy. In chapter 6, on Judges and the law, the questions of how efficient and impartial they are as deciders of fact, how far they make law, and what their role is in a democracy, are examined. The next chapter discusses the various directions in which the structure of Courts and tribunals might develop in future. There are three streams of adjudication: Civil Courts, Criminal Courts, and administrative tribunals. Should they be united or nationalised?

2. Chapter 8 is concerned with legal aid and advice scheme and the question of costs. It is suggested that legal advice could be made more readily available and legal aid more widely extended, it being urged that a far greater proportion of the work of lawyers should be financed by the State. How far should the services of the law be available gratis? Should there be a National Legal Service? These are clearly examined. In the next chapter the authors discuss how far the profession should be allowed to control its own future, this leading, in the 10th chapter, to the future role of the legal profession and to the requisite type of education and training. As to its control, the authors would seem to consider the establishment of a General Legal Council and a Review Body for the Legal Profession as the most practicable mechanism for stopping abuses. Finally, the authors explain why reform of the legal system has been so long in coming and assess the obstacles in the way.

3. The authors, Prof. Brian Abel-Smith, of the London University, and Professor Robert Stevens, of the Yale University, have made several valuable suggestions in this book. They have suggested the establishment of a National Citizens' Rights Corporation, offering both

social and legal advice, and have argued for a major extension in the right to free representation before Courts and Tribunals. A suitable realignment of the adjudicating bodies at the different levels, removal of certain restrictions on lawyers appearing in particular Courts, and sweeping changes in the education of lawyers, are suggestions that call for deep study and consideration from the appropriate quarters.

The Index and Notes at the end are useful.
R.S.S.

STRIKES AND MORALE IN INDUSTRY (IN INDIA AND HER PRINCIPAL STATES). By Mrs. P. Chakraborty, M.A., C.A.P. (Cal), M.A. (Edin.), D. Phil. (Cal.), Deputy Labour Commissioner, Government of West Bengal, Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13, June 1969, pp. xiv & 475, Price Rs. 25.

As research thesis meant for submission to the University, the present publication is a psychologist's objective study of the causal factors making for strikes and industrial unrest in India, with special reference to West Bengal, Maharashtra, Madras, and Uttar Pradesh. Considered as indicators of social and industrial maladjustment, appropriate remedial measures are discussed in order to meet changing situations. The study is confined mainly to those groups where industrial strife has been raging most intensely, and, for the examination of job morale, the interview and questionnaire method has been adopted. Strikes are regarded as industrial fever and tentative palliative measures do not root out the trouble. In order, therefore, to understand the real significance of industrial unrest generally, the writer examines not only the immediate causes but also the contributory circumstances.

2. Morale and industrial conflict are closely connected; one signifies the positive aspect of the industrial relations system and the other its negative, and destructive aspect. As low morale springs from job dissatisfaction, this book tries to identify the factors which are conducive to job satisfaction and dissatisfaction, indicating that job dissatisfaction predisposes the worker to participate in trade unions. The author deals with the magnitude of industrial militancy, establishes patterns of strike behaviour and explains the main factors which influence these patterns. In order to do so, the writer undertook an investigation among workers, union leaders and business executives of West Bengal, to determine the underlying causes of the wide-spread discontent and frustration among the workers. After

assessing the extent of the industrial malady and making its diagnosis, she proceeds to outline the remedial measures from the viewpoints of managements, labour leaders and workers. Finally, she develops a hypothesis which may facilitate the interpretation of industrial militancy, which is, after all, one form of social behaviour.

3. Of the six Chapters in the book, those on morale in West Bengal industry, based on survey study, under the headings of motivations, attitude survey and job satisfaction, on the improvement of labour-management relations, and on production, nutrition and efficiency, form part Three, while the first Chapter on the general influences on strike activity, under the heads of employment structure, workers' organisation, urge for trade unionism, employers' organisation and attitude, and the role of Government in industrial relations and labour legislation forms part One. Chapter 2, which forms part Two, deals with the features of industrial conflict under the heads of measures of strike activity, pattern of strike behaviour and factors which influence them and other features of industrial militancy. The first chapter traces the changes in Government policy and their attitude to labour; Government recognise that trade unions have come to stay, while the worker considers unionism essential for economic gains, job security and protection against unfairness. In this connection the author refers to two recent decisions of the Supreme Court, which have, in effect, provided encouragement for the formation of a multiplicity of unions. The second chapter establishes and explains the general trend and pattern of the activity of work-stoppages in India normally from the year 1948, and explores differences in pattern between one State and another. Few strikes have a single immediate cause and they occur on a multiplicity of issues. The author dwells ably on the immediate results and long term effects of a strike; and examines how far the worker has achieved his objective through the use of the strike weapon. On the whole the conclusion seems to be inescapable that most of the industrial and white-collared workers in West Bengal are not satisfied with their work and that economic need is not the sole cause of their frustration.

4. A number of illuminating graphs have been interspersed through the volume, while the Tables on strike-lockout statistics in the Appendix are useful; there is also an Index.

5. The volume should be interesting and instructive to everyone concerned with the smooth running of industry, employer, worker, and Government alike.

R.S.S.

imposed by way of penalty under the provisions of Sections 17, 31, 37, or, where any assessee is in default the amount assessed as agricultural income-tax, as if it were an arrear of land revenue.

(2) No proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the date on which the last instalment fixed under Section 30 falls due:

Provided....."

It was common ground before the High Court and has not been disputed before us that the date of last instalment for the years 1360 F. to 1362 F. was June 28, 1960. The date of last instalment for the year 1363 F. was September 19, 1958. The order of attachment having been made on March 10, 1962 was clearly beyond one year from June 28, 1960 and September 19, 1958. The question which arose was whether the recovery proceedings were commenced before March 10, 1962. According to the assessee the recovery proceedings commenced only when the attachment was effected and not earlier and that they could be said to commence only when some actual process was issued under the provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1950, Act I of 1951.

5. Now as regards the years 1360 F. and 1361 F. the evidence which was admitted by the Division Bench showed that the Deputy Commissioner, who was the assessing authority, had made orders directing the Tahsildar to realise various sums as arrears of land revenue. Thus, according to the High Court, the proceedings for recovery commenced with the making of these orders, (Annexures A-1 to A-5). It was pointed out that these orders were made on various dates ranging between October 9, 1960 to December 2, 1960. These dates were within one year from June 28, 1960 which was the last date of instalment for the years 1360F and 1361F.

6. The question which falls for determination is whether proceedings can be said to commence for recovery when the assessing authority makes a motion within Section 32 (1) to the Collector for recovery of the agricultural income tax and penalty as an arrear of land revenue. The Allahabad High Court has consistently held that proceedings for recovery of tax under the Act should be deemed to commence from the date of the request made by the assessing authority under the Act

to the Collector to take steps for realization of the arrears of tax and other dues; (see Lal Bhan Pratap Narain Bahadur Pal v. State of Uttar Pradesh, 1962 All LJ 358). This view is based on various decisions under the Indian Income-tax Act 1922. Section 46 (7) of that Act provided that no proceedings for the recovery of any sum payable under that Act could be commenced after the expiration of one year from the last day of the financial year in which the demand was made under that Act. Under Section 46 (2) the Income-tax Officer was empowered to forward to the Collector a certificate specifying the amount of arrears due from an assessee and the Collector on receipt of such certificate had to proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. This provision together with Section 46 (7) came up for consideration in a number of cases before the High Courts and there appears to be unanimity of opinion that when the certificate is forwarded by the Income-tax Officer to the Collector for recovery of the dues the recovery proceedings commence from that point of time. Some of these have been referred to in Kishorilal v. Tirloki Nath, 1962 All LJ 360 and it is pointless to refer to them again.

7. In our judgment there is hardly much difference between the provisions of Section 32 of the Act and the corresponding provisions of Section 46 of the Income-tax Act, 1922. Both these statutes relate to taxation of income and the provisions in question are in pari materia although the words employed may not be exactly the same. The proceedings for recovery, therefore, in the present case, were rightly held to have commenced with the making of the orders contained in annexures A-1 to A-5.

8. As regards the assessment for the year 1362F it has been pointed out on behalf of the assessee that the original orders passed for taking proceedings for realization of tax were missing from the record. The High Court, however, relied on the entries of the registers of demand and collection and was satisfied that "some order for realization of tax for 1362F was received by the Tahsildar of Lakhimpur in July or August 1960". That date being within one year from June 28, 1960 the recovery proceedings were held to be within time. It appears that the departmental authorities did not produce satisfactory evidence relating to the making of orders for realization of the

tax in respect of the year 1362F inasmuch as the original orders were not produced. The learned Judges of the High Court, as stated before, saw the register and after examination of the entries therein were satisfied that an order had been made for realization of tax within one year from June 28, 1960. We would be most reluctant to interfere with that finding. So far as the year 1363F was concerned the date of last instalment was September 19, 1958. According to annexure A-5 the Sub-Divisional Officer, Lakhimpur, made an order on October 1, 1959 with regard to the demand for that year. The High Court found that the Deputy Commissioner had made an endorsement on October 5, 1959. As the order was made on October 1, 1959 it was beyond one year from September 19, 1958. In the appeal filed by the departmental authorities it has not been shown in what manner the High Court was in error in holding that the proceedings for recovery of tax and penalty for the year 1363F were barred by time.

9. In the result both appeals fail and are dismissed. In view of the unsatisfactory nature of the evidence produced with regard to the year 1362F by the departmental authorities we make no order as to costs in the appeal filed by the assessee. The assessee shall, however, be entitled to his costs in the appeal filed by the departmental authorities.

Appeal dismissed.

AIR 1970 SUPREME COURT 1362

(V 57 C 286)

(From: Bombay)

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

V. R. Bhate and others, Appellants v. The State of Maharashtra, Respondent.

Criminal Appeal No. 145 of 1967, D/- 13-3-1970.

Penal Code (1860), Section 282 — Conveying person by water for hire in unsafe or over-loaded vessel.

Where the overloading of the launch had not caused danger to the passengers but the launch capsized on account of sudden onrush of persons waiting at the jetty on to the deck of the launch and passengers on the launch wanting to get down at the port which caused the

launch to tilt and resulted in displacement of balance.

Held that the capsizing could not be held to be due to negligence of the owner or the master of the launch and that the conviction under Section 282 was not proper. (Para. 15)

The following Judgment of the Court was delivered by

RAY, J.: This is an appeal by special leave from the judgment dated 26th June 1967 of the High Court at Bombay convicting Vishwanath Raghunath Bhate, Yeshwant Krishna Karmarkar and Ismail Shaikh Daud Pawaskar, accused Nos. 1, 4 and 5 respectively under Section 282 of the Indian Penal Code. Accused No. 1, Bhate was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000 and in default to undergo a further rigorous imprisonment for one month. Accused No. 4 Yeshwant Krishna Karmarkar was sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 1,000 and in default to undergo a further rigorous imprisonment for one month. Accused No. 5, Pawaskar who was the captain of the launch was sentenced under section 282 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for one month.

2. The High Court also convicted accused Nos. 1, 2, 4 and 5, viz., V. R. Bhate, Ganesh Krishna Karmarkar, Yeshwant Krishna Karmarkar and Ismail Shaikh Daud Pawaskar, for offences under section 58 of the Inland Steam Vessels Act. No separate sentence was passed on accused Nos. 1, 4 and 5 viz., V. R. Bhate, Yeshwant Krishna Karmarkar and Ismail Shaikh Daud Pawaskar under Section 58 of the Inland Steam Vessels Act, 1917 though their convictions under the said section were confirmed and the separate sentences imposed by the Sessions Judge were set aside. The fine of Rs. 990 at the rate of Rs. 10 per extra passenger was imposed on Ganesh Krishna Karmarkar, accused No. 2 and in default simple imprisonment for one month.

3. V. R. Bhate, Ganesh Krishna Karmarkar, Madhusudan Krishna Karmarkar and Yeshwant Krishna Karmarkar, accused Nos. 1, 2, 3 and 4 respectively and one Anant Krishna Karmarkar since deceased were partners of a firm under the name and style of Shrikrishna Motor Launch Service. The said firm had its head office at Veavi and also another

office at Bombay. The firm used to ply its motor launches, whereof M. L. Hyderi was one, in the Bankot creek in Kolaba District, Bombay and used to carry passengers on hire from Bagamandale to Dasgaon. There are 28 ports in all in this creek. Bagamandale is the first and Dasgaon is the last port. Port Mhapral where the incident forming the subject matter of this appeal took place on 1st January, 1962 is the 26th Port. Accused No. 5 Pawaskar was the master of the launch. Accused No. 6 Ramchandra was the ticket collector. The other five accused formed the crew of the launch in question.

4. The prosecution case is that all the accused were continuously overloading the Hyderi launch during its journey in the Bankot creek and in the month of October, 1961 all the accused entered into an agreement with one another for doing an illegal act, namely, conveying for hire on Hyderi launch several passengers in excess of the number prescribed in the certificate of survey. It is alleged that in pursuance of the said conspiracy between them accused Nos. 5 and 6 the master and the ticket collector illegally overloaded the launch Hyderi on 1st January, 1962 and actually carried 187 passengers by the said launch. It is further alleged that because of this overloading the launch capsized at Mhapral jetty resulting in the death of 68 persons.

5. The alleged incident took place at about 1 p. m. on the New Year's day 1962 at Mhapral. The charges framed against the accused were under Sections 120B and 282 of the Indian Penal Code and Section 58 of the Inland Steam Vessels Act, 1917 and Section 54 of the Indian Ports Act read with Rule 19 of the Bombay Minor Ports Passengers Vessels Rules. The crew accused Nos. 5 to 11 were also charged for offences under Section 63 of the Inland Steam Vessels Act and Section 304A of the Indian Penal Code.

6. On the New Year's Day, 1962 the launch Hyderi capsized at Mhapral port. The principal question which falls for consideration is whether the launch Hyderi capsized at Mhapral port because of overloading of the launch or because of stampede caused by persons from the jetty on the one hand who rushed on to the launch and got on to its deck and passengers on the launch of the other who went to the deck for disembarking at the port.

7. On the relevant date the launch was carrying 125 passengers when it reached Mhapral. The certificate of survey issued on 3rd November, 1961 by the Principal Officer, Mercantile Marine Department, Bombay District under the Inland Steam Vessels Act, 1917 (Exhibit 166) showed that besides the crew of 6 persons the launch was authorised to carry 46 passengers. The launch was 42 feet 6 tenths in length and 42 feet 2 tenths in breadth, 3 feet 9 tenths in depth. The gross tonnage was 12.21. It was an open launch. It had roof which was 32 feet in length and 11½ feet in breadth. The roof was known as sun-deck or awning.

8. On the crucial date a large number of persons were present at the Mhapral jetty at the time of the arrival of launch Hyderi. When the launch reached Mhapral port and after it had been tied to the stones of the jetty with ropes, persons from the jetty rushed on to the deck of the launch and the passengers on the launch including those who wanted to get down at Mhapral also thronged on the deck. This assembly of so many persons on the deck caused the sudden shifting of weight on one side. The launch first tilted towards the jetty and water gushed into the launch. Because of this the passengers on the launch were frightened and they moved to the other side with the result that the ropes gave way and the launch tilted on the other side and capsized. This was the evidence of the majority of the witnesses.

9. One of the expert witnesses Donald Dyer said that when the passengers in the launch out of fright moved from one side to the other and thus caused the launch to heel to that side, the heeling was due to the shift of weight inside the launch. It was also the evidence of the expert witness that there was no possibility for such a shift of weight to take place when the launch was packed to its capacity. He also said that 182 passengers could be accommodated on the launch but 129 of the 182 could sit at the bottom of the launch either on seats or on the floor and the rest could stand. The witness said that the vessel capsizes when its centre of gravity goes above the point of metacentre. The metacentre is a point round which the vessel might be said to rotate transversely. Centre of gravity is that point above which all loads on the vessel are assumed to be acting.

10. 68 persons died when the launch capsized. Six of them were among the many who rushed on to the deck of the launch from the jetty at Mhapral. The other 62 who died consisted of passengers. About 30 passengers on the launch wanted to get off at Mhapral. They had come on to the deck at the port side for disembarkation. There were no barricades at Mhapral jetty. There was no policeman or any other person in authority or any person on behalf of the firm to regulate and control the entry and exit of the passengers. More than 100 persons were waiting on the jetty for the arrival of the launch. The people scrambled for entry on the launch and they rushed on with rapidity. When the persons from the jetty rushed on to the deck regardless of disembarkation of passengers, the weight of the crowd resulted in the launch heeling towards the port side. Water flowed into the launch. There was panic. Particularly passengers sitting at the bottom of the launch were seized by fear of life. Those passengers as also persons who were at the deck went to the other side of the deck, namely the opposite side of the jetty in the hope of adjusting the balance. The result was that the launch again heeled on the other side of the jetty and the ropes with which the launch had been tied snapped and broke. The launch capsized.

11. The trial Court found that accused No. 5 Ismail Shaikh Daud Pawaskar, the master and accused No. 6 Ramchandra, the ticket collector were responsible for overcrowding of the launch and for carrying a large number of passengers in excess of the licensed number. The trial court did not accept the charge of conspiracy.

12. The trial Court, however, found that accused Nos. 1, 2 and 4, V. R. Bhate, Ganesh Krishna Karmarkar and Yeshwant Krishna Karmarkar, partners of the firm should have had knowledge of overcrowding and therefore they were negligent in not taking due care to stop overcrowding and were therefore guilty of an offence under Section 282 of the Indian Penal Code. The excess number of passengers however was held by the trial Court not to be the immediate cause of directing the capsize of the launch. The trial Court also found accused Nos. 5 and 6 guilty of an offence under Section 282 of the Indian Penal Code. The trial Court convicted each of the accused Nos. 1, 2, 4, 5 and 6 under Section 282 of the Indian Penal Code and sentenced

each of them to pay a fine of Rs. 500 and in default simple imprisonment for one month.

13. The trial Court held that under Section 58 of the Inland Steam Vessels Act the owner and the master were liable. Accused No. 5 was held liable because he was the master. Accused Nos. 1 and 2 were found to be partners of the firm which was in ownership of the launch and accused No. 4 who was the certified owner of the launch was also held liable under Section 58 of the Inland Steam Vessels Act. The trial Court convicted accused Nos. 1, 2, 4 and 5 under Section 58 of the Inland Steam Vessels Act and sentenced each of them to pay a fine of Rs. 495 and in default simple imprisonment for one month.

14. The High Court, however, found that the death of 68 persons was the result of the capsizing of the launch in the circumstances which could be said to be materially but not solely contributed by the overloading of the launch. The High Court said that because of the overloading of the passengers the crew of the launch was not in a position to regulate the entry of the incoming passengers or the exit of the outgoing passengers who were to disembark at the Mhapral port.

15. It cannot be denied that the number of passengers was in excess of the permissible limit. The overloading did not cause danger to the passengers of the launch at all in the year 1961 when it was overloaded at all seasons. Again the overloading did not endanger the passengers on the fateful day when the launch plied from the port of origin to the 26th port. It was only when the launch arrived at port Mhapral which was the 26th port that there was a sudden onrush of persons waiting at the jetty on to the deck of the launch. That happened after the launch had been tied to the jetty. The persons from the jetty rushed on to the launch and the passengers on the launch who wanted to get down at Mhapral port had also assembled on the deck of the launch. It is because of this shifting of weight on one side that the launch became tilted towards the jetty and water flowed into the launch. The passengers on the launch were frightened and they moved to the other side. The weight was then suddenly shifted to the other side. The launch tilted and as a result thereof the ropes gave way and the launch capsized. It cannot, therefore, be said that the cap-

sizing of the launch was because of any negligence of the owners or the master. The launch capsized by reason of the stampede that followed the sudden rush of persons waiting at the jetty on to the launch which resulted in displacement of the balance of the launch and breaking away of the ropes and capsizing of the launch. We are, therefore, of opinion that the conviction under Section 282 of the Indian Penal Code cannot be sustained.

16. The next question is whether the appellants are liable under Section 58 of the Inland Steam Vessels Act. Accused Nos. 1 and 2 have been found to be the partners and accused No. 4 is the owner of the vessel. The courts found that there was no evidence to hold that accused No. 3 was a partner. Accused No. 5 was the master. The liability under Section 58 is penalty for carrying excessive number of passengers on board. If an inland steam vessel has on board or in any part thereof a number of passengers which is greater than the number set forth in the certificate of survey as the number of passengers which the vessel or the part thereof is, in the judgment of the surveyor, fit to carry, the owner and the master shall each be punishable with fine which may extend to Rs. 10 for every passenger over and above that number. The evidence is that the launch was permitted to carry 46 passengers. That was the limit of passengers. It is true that the licence at the relevant date was not in evidence. In the trial Court as also in the High Court the case proceeded on that basis. It is also in evidence that the number of passengers on the launch at the relevant date was 125. The number of passengers in excess was 79. The liability is at the rate of Rs. 10/- per passenger. Therefore accused Nos. 1 and 2 the partners and accused No. 4 the owner of the launch and accused No. 5, the master are each liable. A fine of Rs. 790 is imposed on each of the accused Nos. 1, 2, 4 and 5. The conviction of the appellants under Section 282 of the Indian Penal Code is set aside. The conviction of the appellants under section 58 of the Inland Steam Vessels Act is upheld but the imposition of fine is altered.

17. The appeal is allowed as far as conviction under Section 282 of the Indian Penal Code is concerned and the conviction under Section 58 of the Inland Steam Vessels Act is confirmed with

the modification of the imposition of the fine.
Appeal partly allowed.

AIR 1970 SUPREME COURT 1365
(V 57 C 287)

(From: Assam and Nagaland)

M. HIDAYATULLAH, C. J., A. N. RAY
AND I. D. DUA, JJ.

State of Assam, Appellant v. Abdul Noor and others, Respondents.

Criminal Appeal No. 20 of 1968, D/- 13-3-1970.

(A) Constitution of India, Article 134 (1) (c) — Certificate of fitness — High Court must be satisfied that the appeal involves some substantial question of law.

The right to appeal to the Supreme Court in criminal matters is regulated by Article 134. The power under subclause (c) conferred on the High Court discretion which is to be exercised on judicial principles. The jurisdiction under Article 134 (1) (c) is not that of an ordinary court of criminal appeal. Before granting a certificate under Article 134 (1) (c) the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication what substantial question of law or principle is involved in the appeal to bring it within the scope of Article 134 (1) (c). Where the certificate is not in compliance with the requirements of Article 134 (1) (c) the Supreme Court will decline to accept it. However the Supreme Court after declining to accept the certificate can allow the appellant to apply under Article 136 in proper cases. (Para 7)

(B) Constitution of India, Article 136 — Supreme Court declining to accept certificate under Article 134 (1) (c) can allow appellant to apply under Article 136, in proper cases. (Para 7)

(C) Criminal P. C. (1898), Section 190 — Magistrate can ask for investigation under Section 156 (3) of the Code before taking cognizance.

The Magistrate can under Section 190 before taking cognizance, ask for investigation by the police under Section 156 (3). The Magistrate can also issue warrant for production before taking cognizance. If after cognizance has been taken, the Magistrate wants any investigation, it will be under Section 202 of the Code.

(Para 13)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1467 (V 52)=
1965-2 SCR 771= 1965 (2) Cri
LJ 539, Babu v. State of U. P. 7.

The following Judgment of the Court was delivered by

RAY, J.:— This is an appeal by certificate under Article 134 (1) (c) of the Constitution against the judgment dated 22 December, 1966 of the High Court of Assam and Nagaland quashing proceedings in G. R. case No. 683 of 1964 and G. R. case No. 701 of 1964.

2. The respondents made an application to the High Court for quashing G. R. case No. 701 of 1964 pending in the Court of Additional District Magistrate, Silchar and G. R. case No. 683 of 1964 pending in the Court of the Magistrate, Tezpur.

3. G. R. case No. 701 of 1964 related to a complaint alleging that the respondent Jamurddin Ahmed, in collusion with a doctor and a nurse caused forcible abortion on a minor girl.

4. The other case G. R. No. 683 of 1964 related to a complaint filed by one Sabitri Das alleging that her minor daughter was employed as a maid-servant in the house of the respondent Jamurddin Ahmed and was forcibly given in marriage to a Muslim.

5. The High Court quashed both the proceedings on the ground that the Magistrate sent the complaint petitions to the officer-in-charge of the police station for investigation without examining the complainant.

6. In the application for leave to appeal to this Court the State submitted, inter alia, in the grounds of appeal that the High Court erred in law by quashing the proceedings on the ground that the complainant was not examined. The High Court passed an order stating that the certificate applied for is granted in the circumstances of the case.

7. The right to appeal to this Court in criminal matters is regulated by Article 134. In the present case, we are concerned with sub-clause (c) and not sub-clauses (a) and (b) of clause (1) of Article 134. The scope of sub-clause (c) of clause (1) of Article 134 has been considered in several decisions of this Court and we shall refer only to the last one. In Babu v. State of Uttar Pradesh, 1965-2 SCR 771= (AIR 1965 SC 1467) this Court said that the power under sub-clause (c) conferred on the High Court discretion which is to be exercised on judicial prin-

ciples. The jurisdiction under Article 134 (1) (c) is not that of an ordinary Court of Criminal appeal. It is manifest that before granting a certificate under sub-clause (c) the High Court must be satisfied that it involves some substantial question of law or principle. The certificate itself should give an indication what substantial question of law or principle is involved in the appeal to bring it within the scope of Article 134 (1) (c). Where this Court has found that the certificate is not in compliance with the requirements of Article 134 (1) (c), it has declined to accept the certificate. There are instances where however this Court after declining to accept the certificate has allowed the appellant to apply under Article 136 in proper cases.

8. In the present case the certificate does not indicate any reason as to why the High Court granted the certificate. The jurisdiction of this Court is attracted by reason of this certificate. We decline to accept the certificate in the present case.

9. The complainants Satindra Mohan Deb and T. P. Bhattacharjee both Members of the Legislative Assembly in G. R. case No. 701 of 1964 complained to the Additional Deputy Commissioner, Cachar, Silchar on 10th July, 1964 that a Hindu girl brought from Tezpur and living in the family of Jamurddin, Executive Engineer, conceived and while in an advanced stage of pregnancy was stealthily removed to the Civil Hospital in collusion with Dr. Noshaid Ali and a nurse and they caused a forcible abortion on the girl and thereafter removed the girl to an unknown destination. On 11th July, 1964, Amina Khatoon the girl in question made a statement that she was a maid-servant of Jamurddin Ahmed. Her mother married someone after the death of her father. She was brought up by Asmat Ali. She was recruited as maid-servant by Ahmed. In the winter of 1963 she married one Noor and she lived with her husband and conceived a child by her marriage. She was taken to the hospital after profuse bleeding. She was no longer in a stage of pregnancy. She wanted to go back and live at the house of her master.

10. It is also in evidence that when Amina was working at the house of Jamurddin Ahmed, Engineer, Asmat Ali wrote letters both to Ahmed and his wife that they were taking good care of Amina. Amina was the adopted daughter of Asmat Ali. Asmat Ali married the elder sister of Amina's mother Sabitri. Asmat Ali

affirmed an affidavit on 12th September, 1964, that Amina's mother Sabitri had married Gopesh Nath and Amina who was called Lakhi was born to Gopesh Nath in or about the year 1943. After the death of Gopesh Nath, Sabitri lived with Cheniram son of her father Nilkanta's brother. Lakhi was not able to pull on well with her mother. Sabitri gave Lakhi to Asmat Ali and his wife Swadeshi. Lakhi was then given the name of Amina. In 1962 Amina was employed in the service of Ahmed. Amina was married to Abdul Noor. This affidavit was affirmed by Asmat Ali on 12th September, 1964 in answer to the complaint filed by Amina's mother Sabitri that Jamurddin Ahmed, Executive Engineer had married her daughter by changing her name.

11. The complaint as to forcible abortion is completely repelled by the affidavit of Amina herself that she married Noor and conceived by him and thereafter there was a miscarriage.

12. The complaint of Amina's mother Sabitri that Amina had been given in marriage to a Muslim by conversion is utterly baseless by reason of the affidavit of Asmat Ali that Amina had been taken in adoption by Asmat Ali and then given in marriage to Noor.

13. In the present case, it is not necessary to go into the question as to whether cognizance was taken without examination of the complainant. The Magistrate can under Section 190 of the Criminal Procedure Code before taking cognizance ask for investigation by the police under Section 156 (3) of the Criminal Procedure Code. The Magistrate can also issue warrant for production before taking cognizance. If after cognizance has been taken, the Magistrate wants any investigation, it will be under Section 202 of the Criminal Procedure Code. The investigation which was ordered in the present case elucidated facts as to the marriage of Amina Khatoon whereupon it is clear the complaints do not disclose any offence.

14. No useful purpose can be served by allowing these cases to be proceeded with. Both the cases appear to typify the tale of a woman who is lawfully married and the complaints are baseless and do not disclose any offence.

15. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1367

(V 57 C 288)

(From: Kerala)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Lakshmi Amma and another, Appellants
v. Talengala Narayana Bhatta and another, Respondents.

Civil Appeal No. 156 of 1967, D/- 10-3-1970.

Contract Act (1872), Section 16 — Deed of settlement — Entire property settled in favour of one of the grandsons by executant to the exclusion of his own issues and other grand children — Negligible provision made for wife, who was his third wife, the first two having died before executant married her — No provision made regarding her right to reside in the residential house till her death — Executant himself debarred from dealing with property as an owner during lifetime — Executant found to be of advanced age and in state of senility and suffering from diabetes and other ailments — Facts and circumstances leading to execution of deed raising grave suspicion as to genuineness of execution — Grandson, the settlee, failing to discharge the burden of establishing that deed was executed by executant voluntarily and without any external pressure or influence while he was not of infirm mind and was fully aware of dispositions — Held that settlement deed was invalid. Decision of Kerala High Court, Reversed. (Paras 5, 12)

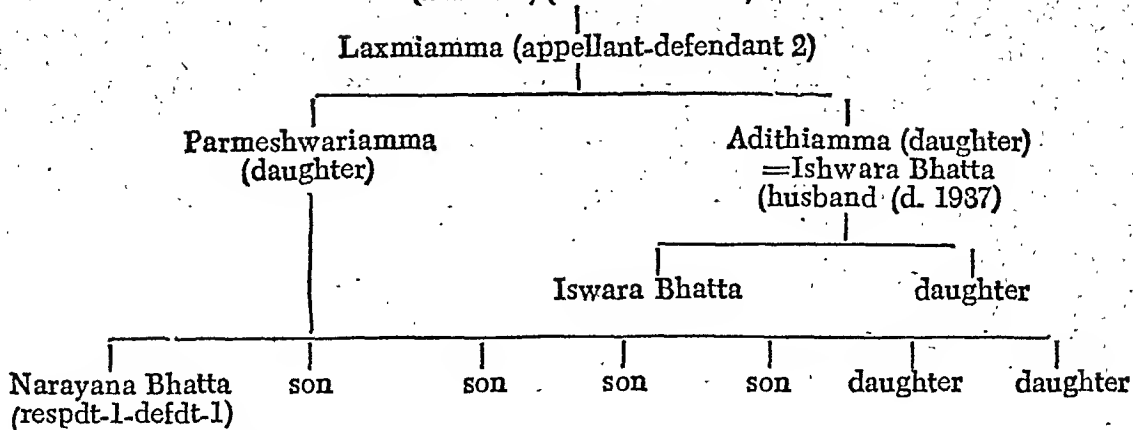
The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal by special leave from a judgment and decree of the Kerala High Court whereby the appeal preferred by respondent No. 1 herein was allowed and the suit was dismissed. The following pedigree table will be helpful in understanding the facts:

(For Pedigree see next page.)

2. The suit out of which the appeal has arisen was instituted in the name of Narasimha Bhatta who was stated to be of weak intellect by his next friend and daughter Adithiamma for a declaration that the will dated September 30, 1955 said to have been executed by him was invalid and also for the cancellation of the deed of settlement dated December 13, 1955, which had also been executed by Narasimha Bhatta in favour of the first respondent and for other incidental reliefs.

NARASIMHA BHATTA
(Plaintiff) (died 8.10.1959)



The case as laid in the plaint was that the plaintiff, who was of advanced age, was suffering from diabetes for a long time and his physical and mental condition was very weak. Respondent No. 1 was at first unsuccessful in getting a will executed by him by which he bequeathed almost all his properties to the said respondent. In December 1955 he was taken to Mangalore by respondent No. 1 and there the latter managed to get executed Ext. B-3 by him. By this deed of settlement the entire properties which were considerable were given to respondent No. 1; the plaintiff reserving only a life interest for himself besides making some provision for the maintenance of his wife Lakshmiamma. Respondent No. 1 was able to obtain benefits under the settlement deed for himself owing to the weak intellect and old age of the plaintiff. A declaration was thus claimed that the will and the settlement deed was null and void and were not binding on the plaintiff. Respondent No. 1 contested the suit. He denied the existence of the will and maintained that the deed of settlement was not executed under undue influence or when the plaintiff was in a weak state of mind.

3. A number of issues were framed on the pleadings of the parties. The trial Court by its judgment dated March 31, 1959, decreed the suit holding that the will was invalid and that the deed of settlement Ext. B-3 was also invalid. It was held that the plaintiff was a person of weak intellect and was not in a position to take care of himself and manage his affairs properly on the date of the execution of the aforesaid documents. The respondent preferred an appeal to the High Court. After hearing the parties the High Court directed that the evi-

dence of three persons, two of whom were doctors and the third was a document writer, should be recorded by the trial Court and the record submitted to it. After the receipt of the record the appeal was again heard. During the pendency of the appeal the plaintiff died on October 8, 1959 and his widow Lakshmiamma and two daughters, Adithiamma and Parmeshwariamma were impleaded as legal representatives by an order dated November 30, 1959. The High Court reversed the judgment of the Court below holding that the gift contained in Ext. B-3 was a spontaneous act of the plaintiff and he had exercised an independent will in the matter of its execution.

4. It appears that before the High Court the decision of the trial Court relating to the will was not challenged. At any rate since the will was never produced the sole question which we are called upon to decide is whether the deed of settlement Ext. B-3 was executed in circumstances which rendered it invalid and void. It was stated in this document that on September 30, 1955 a will had been executed by the executant but he considered it advisable to execute a settlement deed in respect of his immovable and movable properties and also for the discharge of his debts etc. This, it was stated, was being done in supersession of the will. It was stated that respondent No. 1 had been nursing the executant and looking after him and therefore he was conferring full rights over his properties on him subject to the certain conditions. He was to have full right to enjoy the said properties and collect their income till his lifetime. After his death Narayana Bhatta was entitled to take possession of his properties and get the pattas executed in his name and he was to have absolute and

perpetual rights in them. Lakshmiamma was to be maintained by Narayana Bhatta. If she found it inconvenient to live with him he was to pay to her annually till her death two candies of Areca which was to be the first charge on the properties. If he failed to give arecanuts on the due dates he was to pay the price thereof at the prevailing market rate together with interest @ 5½% per annum. Certain debts were mentioned which were intended to be paid off by the executant but if that was not done Narayana Bhatta was to discharge them. The following portion of the deed may be reproduced:

"Besides, only the right of enjoying the properties till my lifetime and collecting their income and using the same for myself, I have no other right, title or interest whatsoever over the properties. I have no right to cancel this deed for any other reason, and such right also I have completely lost and to this intent this deed of settlement has been executed by me out of my free will and pleasure."

5. The first noticeable feature is that the deed of settlement on the face of it was an unnatural and unconscionable document. Narasimha Bhatta made negligible provision for his wife who was his third wife, the first two having died before he married her. She was left mainly to the mercy of respondent No. 1. Admittedly there was a residential house and no provision was made regarding her right to reside in that house till her death. Apparently there was no reason why he should have left nothing to his two daughters or to his other grand-children and given his entire estate to only one grandson namely respondent No. 1.

6. The circumstances leading to the execution of the deed may next be considered. It is common ground that Narasimha Bhatta was in his seventies at the time of its execution. He was suffering from diabetes which had rendered him weak in body. He was living in his house in a village called Sodankur. He was taken in a taxi accompanied by his wife by respondent No. 1 to Mangalore. There he was got admitted into Ramakrishna Nursing Home where he remained from December 10 to December 18, 1955. An application was made to the Joint Sub-Registrar, Mangalore, for registering the document at the Nursing Home on December 15, 1955, apparently on the ground that Narasimha Bhatta was not in a fit condition to go to the office of the Registrar. The deed of settlement was then

presented to the Joint Sub-Registrar on that very day between 5 and 6 p. m. and the registration proceedings took place there. It was subsequently registered in the book kept by the Joint Sub-Registrar on December 16, 1955.

7. According to the trial Court Upendra Naik D. W. 5 was the brain behind respondent No. 1 in the matter of getting Ext. B-3 executed and registered which contained disposition in favour of respondent No. 1. Upendra Naik was an attesting witness and according to him and respondent No. 1 it was Narasimha Bhatta himself who gave the instructions to draft the document; a draft was prepared which was read over to him and Ext. B-3 was written only after the draft had been approved by him and that respondent No. 1 was not even present at the time the draft was prepared or the document was registered. The scribe had originally not been examined in the trial Court. Under the directions of the High Court his statement was recorded on July 12, 1961. According to him no draft was prepared and that he wrote out the document Ext. B-3 at his own house. He put his own signature also as an attesting witness at his own house. He deposed that he wrote out the document Ext. B-3 on December 13, 1955, when certain documents of title were handed over to him. Respondent No. 1 and another person Adakala Ramayya Naik who was his friend came to him and it was Ramayya Naik who asked him to write out Ext. B-3. He further stated that he met Narasimha Bhatta only on the date of the registration and not on the date when he wrote out Ext. B-3. He had known Narasimha Bhatta from a long time and used to write out documents for him. He stated that normally he consulted the person on whose behalf the document was to be written but in this particular case Ramayya Naik told him that Narasimha Bhatta was in the Nursing Home and that Naik himself would give instructions for preparing the document.

8. It would, therefore, appear that Narasimha Bhatta was not even consulted by the scribe nor was any draft made with his approval which was given to the scribe from which he prepared the document Ext. B-3. The trial Judge did not place any reliance and in our opinion rightly on the evidence of K. Shaik Ummar, D. W. 4, the Joint Sub-Registrar of Mangalore. His statement has not impressed us as reliable. He said that the wife of Narasimha Bhatta, namely,

Lakshmiamma was present during the proceedings for registration and she raised no objection to the document being registered. He admitted that the hands of the executor were trembling at the time he appended signature. There had been a number of complaints against him and with regard to one of them it was stated by him "I was Sub-Registrār, Kasaragod between 1946 and 1948, at the time I registered a deed authorising adoption. It was an authority given by Mr. K. P. Subba Rao to his wife. It was registered at the residence of the executant in the evening hours. A little earlier the same day I had attended another house registration at Kumbala about 8 or 10 miles from here. To go there one has to cross a river also. There was a complaint against me that Subba Rao's registration took place at night at a time when he was unconscious. I do not know whether the said Subba Rao died the next day. The District Registrar held an enquiry in the matter".

9. We may next advert to the evidence of Lakshmiamma the wife of Narasimha Bhatta who was also present at the Nursing Home at the time of the execution of document Ext. B-3. According to her statement in the beginning of 1955 Narasimha Bhatta who was suffering from diabetes had a fall after which his left arm and left leg could not be moved by him. His mental faculties were also affected. Since then his condition was getting worse. Five or six months before he fell down respondent No. 1 managed to get a will executed by him in which the dispositions were mainly in his favour. When the will was executed Narasimha Bhatta was not in a condition in which he could understand what he was doing. As regards the registration proceedings in the Nursing Home, she stated, that it was the first respondent who gave the document into the hands of an officer who asked Narasimha Bhatta to sign the document and also to affix his thumb impression. Narasimha Bhatta looked scared but respondent No. 1 shouted "sign this and give your thumb impression grandfather". According to her she protested against the document being executed in this manner but respondent No. 1 told her to keep quiet. In spite of a lengthy cross-examination nothing was brought out to show why this lady who is the grandmother of Respondent No. 1 and who would be expected to be impartial in the dispute between her children and

grandchildren should perjure herself and make a false statement. It is true that she would be interested, to a certain extent, in getting the document cancelled or set aside but we see no reason to brush aside her statement with regard to the condition of Narasimha Bhatta at the time the document was executed and the circumstances in which it was got registered. It may be mentioned that the trial Court also relied on her evidence. We do not find any cogent or convincing reasons in the judgment of the High Court for disbelieving Lakshmiamma nor are we satisfied that the reasons given for accepting the evidence of Upendra Naik D. W. 5 and discarding the testimony of the Scribe C. W. 1 are satisfactory. It is also difficult to comprehend how the High Court thought that the terms of Ext. B-3 were not unconscionable enough as to raise a fair amount of suspicion in the matter. In view of the unnatural character of the dispositions made in Ext. B-3 coupled with the other facts and circumstances mentioned above the burden shifted to respondent No. 1 to establish that Ext. B-3 was executed by Narasimha Bhatta voluntarily and without any external pressure or influence while he was not of infirm mind and was fully aware of the dispositions, or gifts which he was making in favour of respondent No. 1.

10. On behalf of respondent No. 1 main reliance has been placed on the evidence of certain doctors who were the attesting witnesses. The first was Dr. K. P. Ganessan D. W. 1. He was a highly qualified doctor and according to his statement he was taken to the house of Narasimha Bhatta in the village (Sodhan-kur) to examine him accompanied by Dr. Vishwanath Shetty. It was stated by Dr. Ganessan that he was not suffering from partial paralysis and was able to understand the questions put to him. This was towards the end of 1955. He examined him again in the Nursing Home at Mangalore where he found him mentally healthy. He had also attested the document Ext. B-3. He could not produce any record of the examination made by him nor was any record of the Nursing Home produced at the trial. He admitted that he had never attested any document like Ext. B-3 before and he attested the same at the request of respondent No. 1. He admitted that he did not conduct any examination of Narasimha Bhatta with a view to discovering his capacity to execute the

document nor did he know the contents of the documents. The impression he got was that it was a will. The evidence of Dr. Ganesan was not accepted by the trial Court in view of the discrepancy between his statement and that of Dr. U. P. Mallayya D. W. 7 as also the lack of responsibility shown by the doctor in attesting a will or a document of the nature of Ext. B-3 in the manner enjoined by certain books on medical jurisprudence and in particular Taylor's Medical Jurisprudence. The view of the trial Court was that these doctors had not given any satisfactory explanation as to why they did not properly examine the mental condition of Narasimha Bhatta at the time he executed the document and that they had merely done the attestation and had never cared to ascertain whether the signature had been subscribed by the executant while he was of a sound disposing mind. Now Dr. Ganesan was a consulting physician of the Nursing Home. He was quite guarded in his statement relating to the mental condition of Narasimha Bhatta because he stated that when he first examined him towards the end of 1955 in the village which was only a short time before he was taken to Mangalore Nursing Home he found him mentally alright to the best of his knowledge. He further stated that there was no reason to suspect any mental deformity in the executant at the time he attested the document. Dr. M. Subraya Prabhu C. W. 2 who was working as a doctor in the Nursing Home in 1955 deposed that case sheets were maintained in the hospital and that the case sheet relating to Narasimha Bhatta had been taken by Dr. U. P. Mallayya at the time the latter was examined as a witness. According to Dr. Prabhu Narasimha Bhatta would sometimes answer questions put to him and sometimes his wife used to answer the questions put by the doctor. The case sheets, if produced, would have shown what were the exact ailments from which Narasimha Bhatta was suffering when he was in the Nursing Home and what treatment was given to him under the directions of Dr. Ganesan who maintained that his suspicion was that a liver abscess had ruptured into the lung due to dysentery. In the absence of the record of the Nursing Home or any other record we find it difficult to accept what Dr. Ganesan has stated about the mental condition of Narasimha Bhatta at the time when the document Ext. B-3 was executed and registered. Dr. U. P. Mallayya's evidence was also not believed

by the trial Court and after going through his evidence we are not satisfied that his statement could be relied upon with regard to the true condition, physical as well as mental, of Narasimha Bhatta at the time Ext. B-3 was executed.

11. On behalf of the plaintiff certain doctors were produced. The trial Court had, while deciding the question whether the suit should be permitted to proceed in forma pauperis, recorded an order on March 15, 1957. In those proceedings Dr. Kambli had been examined as a witness. That doctor treated Narasimha Bhatta from March 6, 1956 to March 12, 1956 and he had issued a certificate Ext. A-1 wherein it was stated that Narasimha Bhatta was in a weak condition and was subject to loss of memory attended by mental derangement and dotage. The observation of the trial Court itself was that when Narasimha Bhatta, under its directions, was brought to the Court on March 11, 1957, he looked blank and did not answer when the Court asked him what his name was. According to what Narasimha Bhatta stated he was 25 or 30 years of age, at that time. He could not tell the name of his wife and he was bodily carried by two persons to the judge's chamber. It was, therefore, found that he was a person of weak mind and was incapable of making his own decisions and conducting his affairs. It may be that the condition of Narasimha Bhatta on March 11, 1957 may not throw much light on what his condition was in December 1955 but the evidence of Dr. Kambli who had examined him only a couple of months after the execution of the document shows that Narasimha Bhatta was suffering from various symptoms which are to be found in a case of advanced senility particularly when a person is also suffering from a disease like diabetes — a wasting disease.

12. We are satisfied that Narasimha Bhatta who was of advanced age and was in a state of senility and who was suffering from diabetes and other ailments was taken by respondent No. 1 who had gone to reside in the house at Sodhankur village a little earlier in a taxi along with Lakshmiamma to the Nursing Home in Mangalore where he was got admitted as a patient. No draft was prepared with the approval or under the directions of Narasimha Bhatta nor were any instructions given by him to the Scribe in the matter of drawing up of the document Ext. B-3. An application was also made

to the Joint Sub-Registrar, Mangalore for registering the document at the Nursing Home by someone whose name has not been disclosed nor has the application been produced to enable the Court to find out the reasons for which a prayer was made that the registration be done at the Nursing Home. Lakshmiamma the wife of Narasimha Bhatta who was the only other close relation present has stated in categorical terms that the document was got executed by using pressure on Narasimha Bhatta while he was of an infirm mind and was not in a fit condition to realize what he was doing. The hospital record was not produced nor did the doctor who attended on Narasimha Bhatta at the Nursing Home produce any authentic data or record to support their testimony. Even the will was not produced by respondent No. 1 presumably because it must have contained recitals about the weak state of health of Narasimha Bhatta. The dispositions which were made by Ext. B-3, as already pointed out before, were altogether unnatural and no valid reason or explanation has been given why Narasimha Bhatta should have given everything to respondent 1 and even deprived himself of the right to deal with the property as an owner during his lifetime. All these facts and circumstances raised a grave suspicion as to the genuineness of the execution of the document Ext. B-3 and it was for respondent No. 1 to dispel the same. In our opinion he has entirely failed to do so with the result that the appeal must succeed and it is allowed with costs in this Court. The decree of the High Court is set aside and that of the trial Court restored.

Appeal allowed.

AIR 1970 SUPREME COURT 1372 (V 57 C 289)

(From: Punjab and Haryana)

A. N. RAY AND I. D. DUA, JJ.

Chaman Lal, Appellant v. The State of Punjab, Respondent.

Criminal Appeal No. 138 of 1967, D/- 6-3-1970.

(A) Penal Code (1860), Section 499 — Defamation — Good faith and bona fide — Proof.

In order to establish good faith and bona fide it has to be seen first the cir-

cumstances under which the letter was written or words were uttered; secondly, whether there was any malice; thirdly, whether the accused made any enquiry before he made the allegations; fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the accused acted in good faith. (Para 10)

(B) Penal Code (1860), Section 499 First Exception — Defamation — Exception — Imputation of truth for public good — Truth of imputation and publication of imputation for public good must be proved by accused. (Para 15)

(C) Penal Code (1860), Section 499 Ninth Exception — Defamation — Exception — Imputation for protection of interest — Interest of the person has to be real and legitimate when communication is made. (Para 17)

(D) Evidence Act (1872), Section 124 — Official communications — Privilege — Extent.

A privilege extends only to a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise of the right or safeguard of the interest which creates the privilege. (Para 18)

(E) Penal Code (1860), Section 500 — Punishment for defamation — Conviction of President of Municipal Committee — Facts found by Courts dispelling any semblance of good faith and on the contrary indicating lack of prudence and dignity with which a person occupying the office of President should act — Reduction of simple imprisonment from three months to two months so that it would save him from disqualification for continuing as President of the Municipality held not warranted. (Para 20)

The following Judgment of the Court was delivered by

RAY, J.:— This appeal is by special leave from the judgment of the High Court of Punjab and Haryana dated 26th May, 1967.

2. The High Court upheld the conviction of the appellant under Section 500 of the Indian Penal Code and sentenced him to three months simple imprisonment and imposed a fine of Rs. 1000/- and in default thereof a further simple imprisonment for three months.

3. The case started on a complaint filed by Bishan Kaur on 23rd October, 1963. The complaint was that the appellant Chaman Lal who was at that time

President of Municipal Committee, Sujanpur in the District of Gurdaspur had made defamatory remarks against her character at a public meeting held at Sujanpur on 29th July, 1962 and that he further wrote a letter on 2nd August, 1962 to the Civil Surgeon, Gurdaspur which contained defamatory statements against her character and further that on 27th August, 1962 the appellant repeated those defamatory allegations before the Civil Surgeon.

4. The appellant pleaded justification under Exceptions 1, 8 and 9 to Section 499 of the Indian Penal Code. The First Exception states that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact. The Eighth Exception states that it is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation. The Ninth Exception states that it is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

5. The letter written by the appellant dated 2nd August, 1962 which was marked as Exhibit P. W. 4/A, inter alia, states,

"It is a matter of grave concern and consideration that Smt. Bishan Kaur, Nurse Dai attached with Civil Dispensary is earning very bad reputation having illegal relations with one Shri Prakash Chand, a cycle repairer of Sujanpur. A meeting of the Co-ordinate Civic-body of Sujanpur was convened, to create civic sense on 29th July at 8 A. M. in the Town Hall wherein leading men of all communities were present. The issue about the character of Smt. Bishan Kaur was discussed in open house and the public felt this point seriously. The matter has been brought to the notice of the worthy Deputy Commissioner, Gurdaspur personally by me on 1st August, 1962 and he assured to take immediate action against her. I feel my assumption to bring to your notice and request for immediate transfer of her in the public interest".

6. The appellant claimed that the residents of Ward-5 of Sujanpur had submitted a complaint in writing dated 25th

July, 1962, against the serious misbehaviour of the respondent Bishan Kaur and that allegations were made against the character of Bishan Kaur in that application. The appellant further claimed that the said application marked Exhibit D. W. 1/A was read by the Secretary of the Municipal Committee, Sujanpur at the meeting on 29th July, 1962. The further defence of the appellant was that a resolution was passed at that meeting requesting the appellant to approach the higher authorities regarding the said application and it was pursuant to that resolution that the appellant wrote the letter dated 2nd August, 1962 forming the subject-matter of the complaint. The resolution on which the appellant relied was marked as Exhibit D. C.

7. Counsel for the appellant contended that good faith of the appellant was established by two features; first that as President he had to act in public interest, and, secondly, large number of people who signed the application and passed the resolution were present at the meeting on 29th July, 1962 and there were allegations against the respondent. It was, therefore, said by counsel for the appellant that the appellant acted not only in good faith but also for public good.

8. Public good is a question of fact. Good faith has also to be established as a fact.

9. The concurrent findings of fact by the Sessions Court and the High Court with regard to meeting on 29th July, 1962, are three-fold; first that there was no record of the proceedings of the meeting alleged to have been held on 29th July, 1962 at the Town Hall of Sujanpur. It was not therefore dependable to rely only on the oral evidence of the complainant that the appellant had defamed the complainant at the meeting, and, therefore, benefit of doubt was given to the appellant on that charge. The second finding is that the application dated 29th July, 1962, alleged to have been made by the residents of Sujanpur and further alleged to have been read over by the Secretary of the Municipal Committee at the meeting on 29th July, 1962, was a manufactured document. Thirdly, the resolution alleged by the appellant to have been passed by the residents of Sujanpur at the meeting on 29th July, 1962, was also a forged document. One of the reasons given by both the Courts for rejecting both the application and the resolution from consideration was that none of these alleged documents was put to any of the

prosecution witnesses some of whom admittedly attended the meeting on 29th July, 1962. The genuineness of the documents was rightly disbelieved.

10. In the background of these findings of fact the plea of good faith of the appellant that he wrote the letter dated 2nd August, 1962, pursuant to the application and the resolution of the residents of Sujampur loses all force and has no foundation. In order to establish good faith and bona fide it has to be seen first the circumstances under which the letter was written or words were uttered; secondly, whether there was any malice; thirdly, whether the appellant made any enquiry before he made the allegations; fourthly, whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the appellant acted in good faith.

11. The appellant said that he verified the allegations and then wrote the letter forming the subject-matter of the complaint. The appellant has not given any evidence as to what steps he took for verifying the allegations. On the contrary, it appears to be established on evidence that during five years preceding the letter written by the appellant to the Civil Surgeon there was not a single instance or occasion of any complaint against the respondent Bishan Kaur. The further finding is that the appellant in defence sought to produce witnesses who tried to establish that the respondent was a woman of doubtful virtues. Three of the witnesses on behalf of the appellant were a potato chop seller, a tongawala and a petty shop-keeper and they went to the extent of saying that they had illicit connection with her. These defence witnesses were disbelieved. That also proved that the appellant did not act in good faith. The appellant was the President of the Municipal Committee and it would not be an act of good faith or prudence and caution to rely on such persons as a tongawala or a petty shop-keeper in making allegations against the character of the respondent.

12. Counsel for the appellant relied on Exhibits D. A. and D. B. and submitted that the High Court did not take these two letters into consideration in finding out the good faith of the appellant. Exhibit D. A. is dated 18th September, 1962 and is a letter addressed by the Civil Surgeon to the appellant. Exhibit D. B. is a memorandum by the resi-

dents of Sujampur to the Civil Surgeon and bears the date 27th August, 1962. In Exhibit D. B. the alleged signatories wrote to the Civil Surgeon that they had to attend the enquiry by the Civil Surgeon into the conduct of Bishan Kaur and that the enquiry was at the demand of the general public and further that there were complaints against the respondent and it was not desirable to retain such a person on the noble job of a nurse. The letter of the Civil Surgeon dated 1st September, 1962, was that a large number of people were present and bulk of them expressed their views against Bishan Kaur and some of the persons met the Civil Surgeon subsequent to the enquiry at his office. The High Court found that some of the persons who submitted the alleged representation against the respondent to the Civil Surgeon later on controverted the allegations against the respondent and this evidence established that the complainant was an ordinary nurse and that is how the appellant had manoeuvred discussion of the complainant's character at the enquiry before the Civil Surgeon on 27th August, 1962.

13. The appellant cannot rely on Exhibit D. B. dated 27th August, 1962 to establish good faith in writing the letter dated 1st August, 1962. Furthermore, Exhibit D. B. which is alleged to have been written by the residents of Sujampur was not proved by calling persons who are alleged to have signed. Documents do not prove themselves. Exhibit D. B. was not proved by the persons who are alleged to have signed the same nor was the truth of statements contained in Exhibit D. B. proved. The enquiry made by the Civil Surgeon on 27th August, 1962, was found by the High Court to have been engineered by the private animus of the appellant against the respondent by sending some residents to the place of enquiry. This finding not only disproves good faith but establishes total lack of care and prudence on the part of the appellant.

14. The letter written by the appellant indicates that the appellant was setting his seal of approval to matters contained in that letter. There is no proof that the appellant made any enquiry about the matters before he wrote the letter. There is no evidence that the appellant acted with reasonable care. On the contrary, circumstances suggest that the appellant acted without any sense of responsibility and propriety. The appellant was a President of the Municipal

Committee and therefore he was required to act with utmost prudence and caution.

15. In order to come within the First Exception to Section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the publication of the imputation for the public good is on the appellant. The appellant totally failed to establish these pleas. On the contrary, the evidence is that the imputation concerning the respondent is not true but is motivated by animus of the appellant against the respondent.

16. The Eighth Exception to Sec. 499 of the Indian Penal Code indicates that accusation in good faith against the person to any of those who have lawful authority over that person is not defamation. We have already expressed the view that there is utter lack of good faith in accusation.

17. The Ninth Exception states that if the imputation is made in good faith for the protection of the person making it or for another person or for the public good it is not defamation. There is no evidence whatever to support the plea that the imputation was for the public good. The accusation was not also made in good faith. Good faith requires care and caution and prudence in the background of context and circumstances. The position of the person making the imputation will regulate the standard of care and caution. Under the Eighth Exception statement is made by a person to another who has authority to deal with the subject-matter of the complaint whereas the Ninth Exception deals with the statement for the protection of the interest of the person making it. Interest of the person has to be real and legitimate when communication is made in protection of the interest of the person making it.

18. Counsel for the appellant contended that the communication to the Civil Surgeon was privileged, because as the President of the Municipal Committee he had to write to the Civil Surgeon about the work of the complainant. It will be a question of fact as to what the duty of the appellant was in relation to the work of the respondent in making a

statement to the Civil Surgeon. This plea was not taken and there is no evidence to support it. Furthermore, the privilege extends only to a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise of the right or safeguard of the interest which creates the privilege. In the present case, the concurrent findings of fact repel any suggestion of protection of the interest of the appellant in making the insinuations contained in the letter forming the subject-matter of the complaint. There is also no material to show as to how the letter was written by the appellant in protection of his interest.

19. The letter written by the appellant contains imputations and insinuations against the character of the respondent. One of the allegations was that a cycle repairer was on intimate terms with the respondent. This was a serious allegation against the character of the respondent. The appellant made baseless and reckless allegations. They are baseless because they have not been proved. They are reckless because the appellant claimed to be the President of the Municipal Committee but he acted in a totally irresponsible manner by having gone out of his way to make the allegations against the character of a poor and helpless widow. The appellant was a man of power and wealth. That is all the more why he should have acted with restraint and decorum. He failed in both. There was no good faith. The appellant cannot be said to have acted in public good.

20. Counsel for the appellant submitted that if there was a reduction of sentence from three months to two months that would save him from disqualification. There is no merit in that submission. This is not a case where there should be a reduction of sentence particularly when the Courts have found facts which dispel any semblance of good faith and indicate on the contrary lack of prudence and dignity with which a person occupying the office of the President should act.

21. The appeal, therefore, fails and is dismissed. The appellant is directed to surrender to the bail bond to undergo the unexpired term of his imprisonment.

Appeal dismissed.

AIR 1970 SUPREME COURT 1376
(V 57 C 290)

(From: Jammu and Kashmir)*

M. HIDAYATULLAH, C. J., J. C. SHAH,
K. S. HEGDE, A. N. GROVER,
A. N. RAY AND I. D. DUA, JJ.G. R. Baqual, Appellant v. State of
Jammu and Kashmir, Respondent.Civil Appeal No. 1584 of 1968, D/- 4-3-
1970.

Civil Services — Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956), R. 24 — In matters of promotion and seniority, substantive posts matter — Seniority to be determined by date of first appointment to such post and not to post held on deputation by selection.

The appellant held the substantive post of a Superintendent in the Civil Secretariat J. and K. but was admittedly junior to other Superintendents. He was subsequently selected on deputation as P. A. to Chairman Legislative Council which post is equated to an Under-Secretary under the J. and K. Legislative Council Secretariat (Regulation and Conditions of Service) Rules, 1959. The Government promoted the respondents who were Under-Secretaries but who were admittedly senior to appellant in the substantive posts of Superintendents, to the posts of Deputy Secretaries, while the appellant was not so promoted.

Held that neither on the basis of statutory rule nor on the basis of any practice or convention the appellant was entitled to seniority from the post of Superintendent to the next grade. On matters of promotion and ranking the substantive posts matter and the appellant's appointment as P. A. being by selection could not confer on him any privilege beyond holding that post as long as the Chairman would have him as his Personal Assistant.
(Para 4)

A. S. R. Chari, Sr. Advocate, (M/s. K. R. Chaudhari and K. Rajendra Chaudhari, Advocate with him), for Appellant; Mr. N. S. Bindra Sr. Advocate (M/s. R. N. Sachthey and B. D. Sharina, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— This appeal arises from the judgment and order

*(Writ Petn. No. 40 of 1965, D/- 21-12-1966 — J. & K.)

DN/DN/B181/70/KSB/M

of the Jammu & Kashmir High Court, December 21, 1966, dismissing a petition under Article 32 (2-A) of the Jammu & Kashmir Constitution filed by the petitioner/appellant G. R. Baqual for certain reliefs on the ground that he has been discriminated against and punished without recourse to statutory provisions and procedure. The facts of the case are as follows:

2. The appellant who is a Graduate of the Punjab University entered the Secretariat service of the Jammu & Kashmir State on November 8, 1946, as a clerk. Later he was promoted as Superintendent on September 26, 1957 and was holding a grade of Rs. 150-15-300 (revised 200-20-300-25-400). He was then appointed as Personal Assistant in gazetted rank in the grade of Rs. 200-400 (revised 250-25-350-30-500) and became P. A. to the Chairman of the Legislative Council by his order dated October 23, 1959. The appellant was then transferred to the Civil Secretariat as an Under-Secretary on September 30, 1963, under Government orders in the same grade of Rs. 250-500. He claimed seniority against other Under-Secretaries when on April 14, 1964, the Government promoted four Under-Secretaries to the post of Deputy Secretaries in the pay scale of Rs. 450-800 which included three of the respondents in this appeal. He was not promoted and he claimed that he was so entitled both on his seniority and under the statutory rules.

3. The case of the appellant is almost entirely based upon his appointment as Personal Assistant to the Chairman of the Legislative Council which is equated with an Under-Secretary under the Jammu and Kashmir Legislative Council Secretariat (Regulation and Conditions of Service) Rules, 1959. Under these rules, a P. A. to the Chairman of the Legislative Council is equated to a P. A. to a Minister and he is in his turn equated with an Under-Secretary and enjoys the same scale of pay. This scale of pay is certainly higher than the scale of pay which the Superintendent gets.

4. It was admitted before us that the appellant was not senior to the other Superintendents in the substantive post of Superintendent. In other words, if everything had been equal, he would be junior to respondents Nos. 2, 3 and 4 and would take his turn for promotion after them. He claims seniority on the basis of his deputation as P. A. to the Chairman of the Legislative Council and his supposed equation to an Under-Secretary. As a

matter of fact, he was not promoted as Under-Secretary. He was only selected to serve as P. A. and that carried the pay and the gazetted rank. It happens frequently in service that such selections are made particularly in Secretarial line by Ministers, Chairman of Legislative Council or Speaker. Even in this Court such selections are made of persons to serve as Secretaries to the Hon'ble Judges. This selection carries more pay while it lasts and gives a rank which the holder enjoys as a gazetted officer, but it does not confer any more privilege. In matters of promotion and ranking, the substantive posts matter, and here, the appellant admits that he was junior to the others. His appointment to a post which in emoluments was equal to that of an Under-Secretary was not in the regular line. It was by selection and could not therefore confer on him any privilege beyond holding that post as long as the Chairman of the Legislative Council would have him as his Personal Assistant. The appellant tried to prove his case by reference to Rule 24 of the Jammu & Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956. But that rule also says that the seniority of a person has reference to the service, class, category or grade with reference to which the question had arisen and that such seniority shall be determined by the date of his first appointment in such class, service, category or grade as the case may be. Here the service on which emphasis should be placed is the post of Superintendent and there, the appellant admits that he is junior to respondents 2, 3 and 4. Therefore, neither on the basis of the statutory rule nor on the basis of any practice or convention is he entitled to seniority from the post of Superintendent to the next grade. He must take his turn in accordance with his seniority as Superintendent which was his substantive post when his deputation began. We see no force in this appeal which shall be dismissed. There shall be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1377
(V 57 C 291)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

M/s. Mund and Samont Co. (P) Ltd.,
Appellant v. C. I. T. Bihar, Orissa and
Patna, Respondent.

FN/FN/C374/70/RGD/P
1970 S. C./87 IX G—2

Civil Appeal No. 138 of 1967, D/- 6-5-1970.

(A) Income-tax Act (1922), S. 66-A (2) — Certificate that matter involves substantial question of law — Certificate must state what in view of the High Court, the substantial question of law is — Merely saying that it fulfils requirements under Section 66-A (2) and is a fit case for appeal to Supreme Court, is a defective certificate. Civil Appl. No. 376 of 1967 (SC), Foll. — (Appeal treated as one with Special leave). (Para 5)

(B) Income-tax Act (1922), Section 10 (4-A) — I. T. O. has jurisdiction to determine reasonableness of claim for remuneration paid to directors in terms of Articles of Association — Burden to show that claim is reasonable is on assessee.

Where under the Articles of Association, the rate of remuneration to be paid to the Managing Director and the Deputy Managing Director was fixed, the case is clearly covered by the terms of Section 10 (4-A), and the Income-tax Officer has jurisdiction to consider whether the allowance was excessive or unreasonable having regard to the legitimate business needs of the Company and the benefit derived by or accruing to it therefrom.

(Para 7)

It is, however, for the tax-payer to establish by evidence that a particular allowance is justifiable. It cannot be said that even if the tax-payer does not produce any evidence in support of the claim for allowance, the Income-tax Officer must independently collect evidence and decide that the allowance claimed is excessive or unreasonable having regard to the legitimate business needs of the assessee before the power under Section 10 (4-A) may be exercised. (Para 9)

Cases Referred: Chronological Paras
(1970) Civil Appeal No. 376 of 1967
(SC), India Machinery Stores (P)

Ltd. v. C. I. T. Bihar 5

The following Judgment of the Court was delivered by

SHAH, J.:— This appeal is filed with certificate under Section 66-A (2) of the Indian Income-tax Act, 1922.

2. The assessee is a private limited company carrying on business in "Mica Mining". Under Article 42 of its Articles of Association, remuneration payable to the Managing Director and the Deputy Managing Director of the assessee was fixed at 30% of the annual net profits subject to the minimum of Rs. 5,000/-. In

the year of account ending June 30, 1958, the assessee debited an amount of Rupees 66,106/- paid to the Managing Director and the Deputy Managing Director. For the assessment year 1959-60 the Income-tax Officer while computing the taxable income in exercise of his power under Section 10 (4-A) of the Income-tax Act allowed only Rs. 54,670/- as remuneration for the Managing Director and the Deputy Managing Director, and disallowed the balance of Rs. 11,436/-. He was of the view that the allowance paid to the two Directors was excessive or unreasonable having regard to the legitimate business needs of the Company and the benefit derived by or accruing to it therefrom. The Appellate Assistant Commissioner confirmed the order. In second appeal, the Tribunal held that the Income-tax Officer had jurisdiction under Section 10 (4-A) to determine the reasonableness of the claim for remuneration paid to the two Directors and on the materials on the record he was justified in disallowing the amount of Rs. 11,436/-.

3. The Tribunal referred the following question to the High Court of Patna for opinion:

"Whether in the facts and circumstances of the case, the Tribunal was correct in applying the provisions of Section 10 (4-A) of the Income-tax Act to the case of the assessee and in disallowing Rupees 11,436/- out of the remuneration paid to the Managing Director and Deputy Managing Director in accordance with the provisions of the Articles of Association of the Company?"

The High Court held that the Income-tax Officer had jurisdiction under Section 10 (4-A) to disallow a part of the remuneration, and that the disallowance of a part of the claim cannot be said "to be unjustifiable or illegally disallowed by the authorities".

4. In an application filed by the assessee the High Court certified the case under Section 66-A (2) stating that "as regards the value and nature of the case, it fulfils the requirements under Section 66-A (2) of the Income-tax Act, 1922, and is a fit case for appeal to the Supreme Court."

5. In this appeal the Solicitor-General has contended that the certificate was defective in that it did not set out the substantial question of law which, in the view of the High Court, fell to be determined by this Court. For reasons which we have stated in Civil Appeal No. 376

of 1967 (SC): India Machinery Stores (P) Ltd. v. C. I. T. Bihar, we are of the view that the certificate is defective.

6. Mr. Chagla appearing on behalf of the assessee has offered to file a petition for special leave in this case. We have accepted the undertaking given by the Advocate on record to file a special leave petition.

7. We have heard counsel on the merits of the appeal. Section 10 (4-A) of the Indian Income-tax Act which was added by the Finance Act of 1956 with effect from April 1, 1956, provides, insofar as it is material:

"Nothing in sub-section (2) shall, in the computation of the profits and gains of a company, be deemed to authorise the making of—

(a) any allowance in respect of any expenditure which results directly or indirectly in the provisions of any remuneration or benefit or amenity to a director or a person who has a substantial interest in the company within the meaning of sub-clause (iii) of clause (6C) of Section 2, or

(b) x x x x x x if in the opinion of the Income-tax Officer any such allowance is excessive or unreasonable having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom."

Under the Articles of Association, the rate of remuneration to be paid to the Managing Director and the Deputy Managing Director was fixed. The case was clearly covered by the terms of Section 10 (4A), and the Income-tax Officer had jurisdiction to consider whether the allowance was excessive or unreasonable having regard to the legitimate business needs of the Company and the benefit derived by or accruing to it therefrom. Counsel for the assessee submits that the decision of the taxing authorities and the Tribunal that in the circumstances of the case the allowance was excessive or unreasonable having regard to the legitimate business needs of the Company and the benefit derived by or accruing to it therefrom is erroneous.

8. It appears that the Income-tax Officer had, for the assessment years 1957-58 and 1958-59 disallowed a part of the remuneration paid to the Directors. The matter was carried to the Tribunal. For the assessment year 1957-58 the Tribunal allowed the claim in full; in respect of the year 1958-59 the Tribunal allowed

an amount of Rs. 48,000/- as against the claim for Rs. 74,190/-. The assessment orders for the years 1957-58 and 1958-59 are not before the Court. In his order relating to the assessment year 1959-60 the Income-tax Officer adopted the reasons recorded in his previous order relating to the earlier years, and held that the remuneration paid to the Directors was excessive or unreasonable having regard to the legitimate business needs of the Company and the benefit derived by and accruing to it therefrom. The Appellate Assistant Commissioner agreed with that view. He rejected the contention of the Company that the Managing Director and the Deputy Managing Director "had practically built up the business and it was due to their whole-time service and effort that large profits were earned by the Company." Apparently there was no evidence in support of such a case. He agreed with the Income-tax Officer that the remuneration allowed to the Directors should be at an average rate of the last three years. The Tribunal held that even though it was not proved that the remuneration was "influenced by extra-commercial considerations" the Income-tax Officer had determined the appropriate allowance by striking an average of remuneration charged in the account for the immediate preceding three years.

9. Mr. Chagla contends that in striking an average for three years the Tribunal erred. Counsel contended that under Section 10 (4-A) of the Act, the Income-tax Officer must reach a conclusion that the allowance was excessive or unreasonable having regard to the legitimate business needs of the Company and the benefit derived by or accruing to it therefrom. It is however for the tax-payer to establish by evidence that a particular allowance is justifiable. Apparently no evidence was tendered by the assessee relating to the duties of the Managing Director and the Deputy Managing Director, the services rendered by them, the manner in which the profits earned by the assessee were enhanced by reason of their special aptitude or qualifications, the legitimate business needs of the assessee and the benefit derived by or accruing to the assessee in consequence of the services rendered by the Managing Director and the Deputy Managing Director. In the absence of any such evidence, the finding recorded by the Income-tax Officer and confirmed by the Appellate Assistant Commissioner and the Tribunal must

be accepted. We are unable to agree with counsel for the assessee that even if the tax-payer does not produce any evidence in support of the claim for allowance, the Income-tax Officer must independently collect evidence and decide that the allowance claimed is excessive or unreasonable having regard to the legitimate business needs of the assessee before the power under Section 10 (4-A) may be exercised.

10. The appeal therefore fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1379
(V 57 C 292)

(From Calcutta: (1964) 1 ITJ 530)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Standard Refinery and Distillery Ltd., Appellant v. Commissioner of Income-tax, (Central) Calcutta, Respondent.

Civil Appeal No. 1586 of 1968, D/- 6-5-1970.

Income-tax Act (1922), Section 24 (2) — "Same business" — Determination of — Considerations.

In determining whether two lines of business constitute the "same business" within the meaning of Section 24 (2) the Income-tax authorities must consider the inter-connection, inter-lacing, inter-dependence and unity furnished by the existence of common management, common business organisation, common administration, common fund and a common place of business. AIR 1967 SC 853, Foll. (Para 3)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 853 (V 54)=
63 ITR 632, Commr. of I. T.,
Madras v. Prithvi Insurance Co.,
Ltd. 3, 5

The following Judgment of the Court was delivered by

SHAH, J.:— The Income-tax Appellate Tribunal referred the following question for opinion to the High Court of Calcutta under Section 66 (2) of the Income-tax Act, 1922:

"Was there any evidence before the Tribunal on which it could hold that the business in dealing with shares was dis-

distinct and separate from the business of sugar manufacturing and distillery?"

The High Court recorded their answer in the affirmative. The assessee appealed to this Court with certificate granted by the High Court under Section 66-A (2) of the Income-tax Act, 1922. At the hearing of the appeal this Court was of the view that the statement of the case was insufficient to determine the question raised. The Court observed:

"In the present case however it is not possible for us to satisfactorily dispose of this appeal because the statement of the case submitted by the Tribunal is incomplete and has omitted to state material facts bearing upon the question referred. For instance, it is not clear as to whether the assessee adduced any evidence as to why it started purchasing the shares of the lessor company about six months after the commencement of the lease. It is also not stated by the Tribunal whether there is any evidence of inter-relation between the purchase of shares and the manufacture of sugar."

The Court ordered that the Tribunal be directed to submit the supplementary statement of the case on the following points:

"1. What is the nature and description of the refinery acquired by the assessee in 1943?"

2. What are the dates of commencement of various ventures carried on by the assessee company?

3. What is the date of the commencement of the share business? Did the share business of the assessee company relate only to the shares of the lessor company or whether it related to shares of other companies?

4. The Articles of Association of the assessee company and the Memorandum be made part of the case.

5. Was the manufacture of sugar by the assessee company in any way benefited by the purchase of the shares of the lessor company?

6. For what reason was the entire block of shares sold in April 1947 to the Produce Exchange Corporation?"

2. The Tribunal has submitted a supplementary statement of the case and has annexed thereto the Articles of Association of the assessee. Even after considering those findings, we find ourselves unable to record our opinion on the question referred. We may observe that the question which the Tribunal was directed to and did refer was defective and

restricted the scope of the enquiry. In our judgment, the question should have been in the following form:

"Whether the business of the Company of dealing in shares and the business of manufacturing sugar and other commodities constitute the same business within the meaning of Section 24 (2) of the Indian Income-tax Act, 1922, in force in the year of assessment?"

We re-frame the question accordingly.

3. As pointed out by this Court in *Commr. of I. T., Madras v. Prithvi Insurance Co., Ltd.*, 63 ITR 632 = (AIR 1967 SC 853) in determining whether two lines of business constitute the "same business" within the meaning of Section 24 (2) of the Income-tax Act, the Income-tax authorities must consider the inter-connection, inter-lacing, inter-dependence and unity furnished by the existence of common management, common business organisation, common administration, common fund and a common place of business.

4. In the present case the statement of the case does not refer to the evidence relating to the existence or otherwise of inter-connection, inter-lacing or inter-dependence between the two lines of business. There is no reference to the evidence about the method of management, the business organisation, the administration, the fund and the place of business in the statement of the case or even in the judgments of the income-tax authorities. Since, however, a restricted question was framed, it is probable that in submitting the statement of the case the Tribunal was misled into assuming that it was not necessary to set out the evidence relating to the management, business organisation, the administration, the fund and the place of business which may not have found place in the statement of the case.

5. In order to enable us to answer the question as re-framed, we deem it necessary to direct that the Tribunal should state a case on the amended question in the light of the tests suggested by this Court in *Prithvi Insurance Company's case*, 63 ITR 632 = (AIR 1967 SC 853). The Tribunal will submit the statement of the case within three months from the date on which the papers reach the Tribunal. We may state that the Tribunal will restrict itself to the materials on the record and will not allow fresh evidence to be led.

Order accordingly.

AIR 1970 SUPREME COURT 1381
(V 57 C 293)

(From: Allahabad)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.Lalta and others, Appellants v. The
State of U. P., Respondent.Criminal Appeal No. 185 of 1966, D/-
25-10-1968.Criminal P. C. (1898), Section 403 —
Issue — Estoppel and autre fois acquit —
Distinction — Finding on issue of fact in
favour of accused bars reception of evi-
dence to disturb the finding in any subse-
quent trial of different offence permis-
sible under Section 403 (2). Judgment in
Cri. Revn. Applns. Nos. 410 and 413 of
1964, D/- 3-6-1966 (All), Reversed.

Where an issue of fact has been tried
by a competent Court on a former occa-
sion and a finding of fact has been reach-
ed in favour of accused, such a finding
would constitute an estoppel or res judi-
cata against the prosecution, not as a bar
to the trial and conviction of the accused
for a different offence but as precluding
the reception of evidence to disturb that
finding of fact when the accused is tried
subsequently even for a different offence
which might be permitted by the terms
of Section 403 (2) Criminal P. C. Sec-
tion 403 does not preclude the applicabi-
lity of this rule of issue estoppel. Judgment
in Cri. Revn. Applns. Nos. 410 and 413
of 1964, D/- 3-6-1966 (All), Reversed. AIR
1956 SC 415 & AIR 1965 SC 87 & (1900)
2 QB 758 & 77 CLR 511 & 96 CLR 62
& 1950 AC 458, Rel. on. (Para 5)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 87 (V 52) =
(1964) 7 SCR 123, Manipur Ad-
ministration v. Thokchom Bira Singh 5
(1956) AIR 1956 SC 415 (V 43) =
1956 Cri LJ 805, Pritam Singh v.
State of Punjab 4, 5

(1950) 1950 AC 458 = 66 TLR
(Pt 2) 254, Sambasivam v. Public
Prosecutor, Federation of Malaya 5
(1900) 1900-2 QB 758 = 69 LJQB
918, The Queen v. Ollis 5
96 CLR 62, Marz v. The Queen 5
77 CLR 511, The King v. Wilkes 5

M/s. R. K. Garg, S. C. Agarwala, Miss
S. Chakravarti and Mr. S. S. Shukla, Advo-

*(Cri. Revn. Applns. Nos. 410 and 413 of
1964, D/- 3-6-1966 — All.)

CN/DN/F507/68/GGM/B

cates, for Appellants; M/s. O. P. Rana
and Ravindra Bana Advocate, for Respon-
dent.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.: This appeal is
brought, by special leave, from the judg-
ment of the Allahabad High Court dated
June 3, 1966 dismissing the Criminal
Revision Applications Nos. 410 and 413
of 1964.

2. The appellant, Lalta filed a money
suit No. 54 of 1955 in the Court of Civil
Judge, Gonda against Swami Nath on the
basis of a pronote and receipt dated July
1, 1952 on the allegation that Swami Nath
had taken a loan of Rs. 250 from him
and executed a promissory note and a
receipt in lieu thereof. Swami Nath filed
a written statement in that suit denying
to have taken any loan or to have exe-
cuted any pronote and receipt in favour
of Lalta. It appears that prior to the
institution of this suit Swami Nath had
filed a complaint on January 24, 1955
against Lalta and others alleging that
they had forcibly taken his thumb im-
pressions on a number of blank forms of
pronotes and receipts. The case arising
out of the Criminal complaint came to
be heard by a Magistrate Second Class
who by his judgment dated May 31, 1956
acquitted Lalta and the other persons com-
plained against. The Criminal case against
Swami Nath proceeded on the charges
framed under Sections 342 and 384,
Indian Penal Code. In the Civil Suit
which was filed by Lalta, the defendant
Swami Nath moved an application for a
report being called from the Superinten-
dent, Security Press, Nasik regarding the
year of the revenue stamps affixed on
the pronote and the receipt. The matter
was accordingly referred to the Superin-
tendent, Security Press, Nasik and the
report received was that the stamps in
question had been printed on December
21, 1953 and were issued for the first
time on January 16, 1954 to the Treasury.
Subsequent to the receipt of the report
Lalta did not put in appearance and the
suit was dismissed for default on June 1,
1956. The Civil Judge was moved for
filing a complaint against the appellants
for committing forgery. The Civil Judge
Gonda actually filed a complaint on
November 9, 1956 against Lalta for of-
fences under Sections 193, 194, 209, 465,
467 and 471, Indian Penal Code and
against Tribeni and Ram Bharosey for
an offence under Section 193, Indian

Penal Code. The complaint was enquired into by a First Class Magistrate who committed the appellants to the Court of Session. By his judgment dated November 27, 1963, the Assistant Sessions Judge, Gonda convicted Tribeni and Ram Bharosey under Section 467 read with Section 109, Indian Penal Code and sentenced them to 3 years rigorous imprisonment. He found Lalta guilty under Section 467, Indian Penal Code and sentenced him to 3 years rigorous imprisonment. Lalta was also convicted under Sec. 471, Indian Penal Code and sentenced to 2 years rigorous imprisonment. He was also found guilty under Section 193, Indian Penal Code and sentenced to rigorous imprisonment for two years. The appellants took the matter in appeal to the Sessions Judge, Gonda who by his order dated October 17, 1964 set aside the conviction of Lalta under Section 193, Indian Penal Code but maintained the conviction of the appellants under the other sections. Tribeni Lalta and Ram Bharosey filed Revision Applications before the Allahabad High Court which by its order dated June 3, 1966 affirmed the order of the Sessions Judge, Gonda and dismissed the Revision Applications.

3. In support of this appeal Mr. Garg put forward the argument that in view of the fact that Swami Nath's complaint had been dismissed by the Second Class Magistrate on May 31, 1956, the prosecution case with regard to the act of forgery must fail and the conviction of Lalta under Sections 467 and 471, Indian Penal Code was not sustainable. It was also pointed out that the charge of abetment against Ram Bharosey and Tribeni under Section 467 read with Section 109, Indian Penal Code and Section 471 read with Section 109, Indian Penal Code must fail for the same reason. In our opinion, the argument put forward on behalf of the appellants is well founded and must be accepted as correct.

4. In *Pritam Singh v. The State of Punjab*, AIR 1956 SC 415 it was pointed out by this Court that the effect of a verdict of acquittal passed by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence but to that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. In that case, the appellant had been acquitted of the charge under Section 19 (f), Arms Act for

possession of a revolver. There was a subsequent prosecution of the appellant for an offence under Section 302, Indian Penal Code and the possession of the revolver was a fact in issue in the later case which had to be established by the prosecution. It was held that the finding in the former trial on the issue of possession of the revolver will constitute an estoppel against the prosecution, not as a bar to the trial and conviction of the appellant for a different offence but as precluding the reception of evidence to disturb the finding of fact.

5. Section 403, Criminal Procedure Code embodies in statutory form the accepted English rule of *autre fois acquit*. The section reads as follows:

"403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sec. 236, or for which he might have been convicted under Section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Sec. 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts, which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall effect the provisions of Section 26 of the General Clauses Act, 1897, or of Section 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping of proceedings under

Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section." Section 26 of the General Clauses Act which is referred to in Section 403, Criminal Procedure Code enacts as follows:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

It is manifest in the present case that the appellants cannot plead the bar enacted in Section 403 (1) of the Criminal Procedure Code. It is equally manifest that the prosecution of the appellants would be permitted under sub-section (2) of Section 403, Criminal Procedure Code. The question presented for determination in this appeal is, however, different. The question is whether where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of S. 403 (2), Criminal Procedure Code. The distinction between the principle of *autre fois* acquit and the rule as to issue-estoppel, in other words, the objection to the reception of evidence to prove an identical fact which has been the subject-matter of an earlier finding between the same parties is clearly brought out in the following passage from the judgment of Wright, J. in *The Queen v. Ollis*, (1900) 2 QB 758 at pp. 768-769:

"The real question is whether this relevant evidence of the false pretence on July 5, or 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial, at which the prisoner was charged with having obtained money from Ramsey on that false pretence, and was acquitted of that charge."

Speaking of this type of estoppel, Dixon, J. stated in *The King v. Wilkes*, 77 CLR 511 at p. 518:

"Whilst there is not a great deal of authority upon the subject, it appears to

me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright, J. in *R. v. Ollis*, (1900) 2 QB 758 which in effect I have adopted in the foregoing statements..... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should not apply. Such rules are not to be confused with those of *res judicata* which in criminal proceedings are expressed in the pleas of *autre fois* acquit and *autre fois* convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

The same question was the subject-matter of consideration by the High Court of Australia in a later case *Marz v. The Queen*, 96 CLR 62 at pp. 68-69. The question at issue was the validity of a conviction for rape after the accused had been acquitted on the charge of murdering the woman during the commission of the act. In a unanimous judgment by which the appeal of the accused was allowed, the High Court stated as follows:

"It is a negation in the alternative upon which, so long as the verdict stood in its entirety, the applicant was entitled to rely as creating an issue-estoppel against the Crown. He was entitled to rely upon it because when he pleaded not guilty to the indictment of murder the issues which were thereby joined between him and the Crown necessarily raised for determination the existence of the three elements we have mentioned and the verdict upon those issues must, for the reasons we have given, be taken to have affirmed the existence of the

third and to have denied the existence of one or other of the other two elements. It is nothing to point that the verdict may have been the result of a misdirection of the judge and that owing to the misdirection the jury may have found the verdict without understanding or intending what as a matter of law is its necessary meaning or its legal consequences. The law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact; it does not matter that the finding may be thought to be due to the jury having been put upon the wrong track by some direction of the presiding judge or to the jury having got on the wrong track unaided. It is enough that an issue or issues have been distinctly raised and found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other."

It is therefore clear that Section 403, Criminal Procedure Code does not preclude the applicability of this rule of issue-estoppel. It was contended by Mr. Rana on behalf of the respondent that the decision of this Court in Pritam Singh's case, AIR 1956 SC 415 was based on the observations of the Judicial Committee in Sambasivam v. Public Prosecutor, Federation of Malaya, 1950 AC 458 and the decision in Pritam Singh's case, AIR 1956 SC 415 required reconsideration because the principle could have no application to India where the principle of autre fois acquit is covered by a statutory provision viz., Section 403, Criminal Procedure Code which must be taken to be exhaustive in character. We are unable to accept this contention as right. We have already pointed out that Section 403, Criminal Procedure Code does not preclude the applicability of the rule of issue-estoppel. In any event the rule is one which is in accordance with sound principle and supported by high authority and there are already two decisions of this Court, viz., Pritam Singh's case, AIR 1956 SC 415 and a latter case—Manipur Administration v. Thokchom, Bira Singh, (1964) 7 SCR 123 = (AIR 1965 SC 87)—which have accepted the rule as a proper one to be adopted. We therefore do not see any reason for casting any doubt on the soundness of the rule or for tak-

ing a different view from that adopted in the two earlier decisions of this Court referred to.

6. If the rule of issue-estoppel is applied to the present case, it follows that the charge with regard to forgery must fail against all the appellants. The reason is that the case of Swami Nath is solely based upon the allegation that his thumb impressions were obtained on blank forms of promissory notes and receipts on January 7, 1955 by the use of force. If the finding of the Second Class Magistrate on this issue is final and cannot be reopened, the substratum of the present prosecution case fails and the charges of forgery under Sections 467 and 471, Indian Penal Code cannot be established against any of the appellants.

7. For these reasons we hold that this appeal must be allowed the judgment of the Allahabad High Court dated June 3, 1966 must be set aside and the convictions of each of the appellants and the sentence imposed upon them should be quashed. If the appellants are still in jail they should be set at liberty forthwith.

Appeals allowed.

AIR 1970 SUPREME COURT 1384 (V 57 C 294)

(From: Allahabad)

J. C. SHAH AND K. S. HEGDE, JJ.

Hindusthan Commercial Bank Ltd., Appellant v. Punnu Sahu (dead) through legal representatives, Respondents.

Civil Appeal No. 1694 of 1966, D/- 1-12-1969.

(A) Civil P. C. (1908), O. 21, R. 90 Proviso (as amended by Allahabad H. C.) — Expression "entertain" in Proviso — Meaning — It means "adjudicate upon" or "proceed to consider on merits" and does not refer to initiation of proceedings. AIR 1968 SC 488, Foll.; Decision of Allahabad H. C., Affirmed. (Para 4)

(B) Civil P. C. (1908), Order 21, Rule 90 Clause (b) to Proviso (as introduced by Allahabad H. C.) — Application to set aside sale made prior to amendment — No compliance with Clause (b) even after its introduction — Effect — Power conferred upon Court by Clause (b) — Nature — Decision of Allahabad H. C., Reversed.

CN/DN/A94/70/DVT/G

The power conferred on the court under Clause (b) to the Proviso is discretionary. Ordinarily the Court has to give an opportunity to the applicant to comply with Clause (b) of the proviso and can reject the application to set aside sale if Clause (b) is not complied with. This is particularly so when the application is made prior to incorporation of Clause (b) to the Proviso. (Para 5)

Where the application to set aside sale is made prior to amendment of the proviso and all the parties had proceeded on the basis that Clause (b) to Proviso did not apply to the proceedings, the application cannot subsequently be set aside on ground that Clause (b) is not complied with. Decision of Allahabad H. C., Reversed; AIR 1962 All 547, Approved. (Para 5)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 488 (V 55) =
 (1968) 1 SCR 505, Lakshmiratan Engineering Works Ltd. v. Asst. Commr. Sales Tax, Kanpur 4
 (1964) AIR 1964 All 289 (V 51),
 Mahavir Singh v. Gauri Shankar 4
 (1963) AIR 1963 All 320 (V 50) =
 ILR (1963) 2 All 368, Haji Rahim Bux and Sons v. Firm Samiullah and sons 4
 (1962) AIR 1962 All 543 (V 49) =
 1962 All LJ 729, Dhoom Chand Jain v. Chamanlal Gupta 4
 (1962) AIR 1962 All 547 (V 49) =
 ILR (1962) 2 All 256, Kundan Lal v. Jagan Nath Sharma 4, 5

The following Judgment of the Court was delivered by

HEGDE, J.: This is an appeal by special leave. It arises from Execution Case No. 16 of 1956 in the court of the First Additional Civil Judge, Varanasi. Therein certain properties belonging to the judgment-debtor were sold. The appellant moved the executing court under Order 21, Rule 90, Code of Civil Procedure to set aside the sale. His application was dismissed on the ground that he was not an interested party. Aggrieved by that order he went up in appeal to the High Court of Allahabad. The High Court reversed the finding of the lower court that the appellant was not an interested party but at the same time dismissed the appeal on the ground that as the appellant had not complied with the requirements of Rule 90, Order 21, Code of Civil Procedure, as amended by the Allahabad High Court his application was not maintainable.

2. The amended proviso with which we are concerned in this appeal reads thus:

"Provided that no application to set aside a sale shall be entertained—

(a) upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; and

(b) unless the applicant deposits such amount not exceeding twelve and half per cent of the sum realised by the sale or furnishes such security as the Court may, in its discretion, fix except when the Court for reasons to be recorded dispense with the requirements of this clause:

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

3. Clause (b) of the proviso was added on June 1, 1957. The application with which we are concerned in this case was made on January 2, 1957. The applicant did not give security as provided in the newly amended clause nor did the court call upon him to do so. Before the executing court all the parties proceeded on the basis that the application was regularly made. The objection as to the maintainability of the application appears to have been taken for the first time in the High Court.

4. Before the High Court it was contended on behalf of the appellant and that contention was repeated in this Court, that Clause (b) of the proviso did not govern the present proceedings as the application in question had been filed several months before that clause was added to the proviso. It is the contention of the appellant that the expression "entertain" found in the proviso refers to the initiation of the proceedings and not to the stage when the court takes up the application for consideration. This contention was rejected by the High Court relying on the decision of that court in Kundan Lal v. Jagan Nath Sharma, AIR 1962 All 547. The same view had been taken by the said High Court in Dhoom Chand Jain v. Chamanlal Gupta, AIR 1962 All 543 and Haji Rahim Bux and Sons v. Firm Samiullah and Sons, AIR 1963 All 320 and again in Mahavir Singh v. Gauri Shankar, AIR 1964 All 289. These decisions have interpreted the expression

"entertain" as meaning 'adjudicate upon' or 'proceed to consider on merits'. This view of the High Court has been accepted as correct by this Court in *Lakshmiratan Engineering Works Ltd. v. Asst. Commr., Sales Tax, Kanpur*, AIR 1968 SC 488. We are bound by that decision and as such we are unable to accept the contention of the appellant that Cl. (b) of the proviso did not apply to the present proceedings.

5. In the High Court, the appellant prayed for an opportunity for complying with the requirements of Clause (b) of the proviso to Order 21, Rule 90, Code of Civil Procedure but the High Court refused to grant him that opportunity as in its opinion, the compliance of the proviso had to be made prior to the disposal of the application on merits. It proceeded on the basis that the compliance of the proviso is mandatory and as such the court is incompetent to permit the applicant to comply with the same, once the application has been disposed of on merits. In our judgment this view of the High Court is erroneous. Clause (b) of the proviso confers on court considerable discretion. It is left to the court to decide the quantum of deposit to be made subject to the maximum prescribed therein. The court is also conferred with the power to dispense with the requirements of making a deposit, for reasons to be recorded. From the language of the proviso, it is clear that the power conferred on the court is a discretionary power. As observed by the Allahabad High Court in *Kundan Lal's case*, AIR 1962 All 547 (supra) it is expected that the court would ordinarily give an opportunity to the applicant to comply with Clause (b) of the proviso and could reject the application if the same were still not complied with. That should be particularly so in an application made before Clause (b) was incorporated into the proviso. As seen earlier before the executing court all the parties had proceeded on the basis that the clause in question did not apply to the present proceedings. Under the circumstances, we are of the opinion, that in the interest of justice the High Court should have remanded the case to the executing court leaving it to that court to exercise its discretion under Cl. (b).

6. For the reasons mentioned above we allow this appeal and set aside the order of the High Court and remit the case to the executing court for dealing with the same in accordance with law.

The costs of this appeal shall be costs in the cause.

Appeal allowed.

AIR 1970 SUPREME COURT 1386
(V 57 C 295)

**J. C. SHAH, V. RAMASWAMI,
G. K. MITTER, K. S. HEGDE AND
A. N. GROVER, JJ.**

The Premier Automobiles Ltd., Petitioner v. S. N. Srivastava, Income Tax Officer Companies Circle I (3), Bombay and another, Respondents.

Writ Petn. No. 67 of 1965, D/- 10-10-1968.

Income Tax Act (1961), Sections 207, 208, 160 — Liability of assessee to pay advance tax as agent of non-resident — Procedure — Provisions do not infringe equality clause — Constitution of India, Article 14.

Under the Income Tax Act 1961 a person is liable to be assessed to tax as a representative assessee. A representative assessee by sub-section (1) of Section 160 includes amongst others, the agent of a non-resident in respect of the income of a non-resident specified in Section 9 (1) (i) and also a person who is treated as an agent under Section 163. Of the liability to pay advance tax it is not predicated that the previous year should have come to an end before liability can arise. The previous year of an assessee may in some cases end after the commencement but before the end of a financial year in which advance tax is payable; it may in other cases commence and end with the financial year. The liability to pay advance tax of a representative assessee does not depend upon determination of the total income for the previous year.

Liability to submit an estimate necessarily implies the duty to secure the requisite information from the non-resident for submitting the estimate. The tax is assessed on the agent for and on behalf of the principal, and the Act has made an express provision enabling the agent to recover from the principal the tax so paid by him. Once the Income Tax Officer treats a person as an agent of non-resident, liability to pay tax on regular assessment arises, and his liability as a representative assessee to pay advance tax is not excluded by any provision of the Act.

Sections 207, 208 and 212 (3) apply to every person whether he is assessed in respect of his own income or as a representative assessee and an unexpressed limitation on the express words of the statute in favour of an agent of a non-resident principal cannot be implied.

(Paras 3 to 6)

It cannot be assumed that an assessee whose year of account coincides with the financial year is not in respect of that year liable to pay advance tax. The computation of advance tax is not dependent upon the completion of the previous year; it depends upon the rules prescribed by Sections 209, 210 and 212. Every person who has been previously assessed to tax is liable when ordered by the Income Tax Officer to pay advance tax, subject to the right to make an estimate under Section 212 (1). A person who has not been previously assessed but whose income is likely to exceed the specified amount is also liable to pay advance tax. The Act does not accord discriminatory treatment between different assessees. Payment of advance tax is on account and is always liable to be adjusted against the tax assessed on regular assessment. That again applies to all assessees. The plea that the provisions imposing liability to pay advance tax upon an agent of a non-resident infringe the equality clause of the Constitution has no substance.

(Para 8)

Mr. M. C. Chagla, Senior Advocate, (M/s. F. N. Kaka and O. P. Malhotra, Advocates and Mr. J. B. Dadachianji, Advocate of M/s. J. B. Dadachanji and Co. with him), for Petitioner; Mr. B. Sen, Sr. Advocate (M/s. T. A. Ramachandran and R. N. Sachthey, Advocates with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: On February 25, 1965, the Income-tax Officer, Companies Circle I (3), Bombay, directed that for the purpose of the Income-tax Act, 1961, the Premier Automobiles Ltd.—hereinafter called 'the Company'—be treated as an agent of M/s Dodge Brothers of United Kingdom—a non-resident Company. On the same day the Income-tax Officer issued a notice of demand under Sec. 156 read with Sec. 210 of the Act calling upon the Company to pay on or before March, 1965, advance-tax of Rs. 11,51,235.91 as agent of the foreign principal during the financial year 1964-65. The Company then moved a petition in this

Court for an order quashing and setting aside the order under Section 163 and notice of demand under Section 156 for the assessment year 1965-66 and for an injunction or prohibition restraining the Income-tax Officer from enforcing or implementing the order under Section 163 and the notice under Section 156 read with Section 210 of the Income-tax Act, 1961. The petition was resisted by the Income-tax Officer.

2. In support of the petition counsel for the Company raised two contentions:

(1) that under Sections 209 and 210 of the Indian Income-tax Act 1961, no order for payment of advance-tax can be made against an agent of a non-resident; and

(2) that a provision which authorises collection of advance-tax from an agent of a non-resident infringes the equality clause of the Constitution and is on that account void.

Sections 207 and 208 of the Income-tax Act, 1961, insofar as they are material, provide:

207—“(1) Tax shall be payable in advance in accordance with the provisions of Sections 208 to 219 in the case of income other than income chargeable under the head ‘Capital gains.’”

208—“Advance tax shall be payable in the financial year:—

(a) where the total income exclusive of capital gains of the assessee referred to sub-clause (i) of Clause (a) of Section 209 exceeded the maximum amount not chargeable to income-tax in his case by two thousand five hundred rupees; or

(b) x x x x x x x x
Section 209 sets out the rules for computation of amount of advance-tax payable by an assessee in the financial year. Section 210 provides by sub-section (1)—

“Where a person has been previously assessed by way of regular assessment under this Act or under the Indian Income-tax Act, 1922, the Income-tax Officer may, on or after the 1st day of April in the financial year by order in writing, require him to pay to the credit of the Central Government advance tax determined in accordance with the provisions of Sections 207, 208 and 209.”

Sections 207, 208, 209 and 210 prescribe machinery for imposition of liability for and determination of the quantum of advance-tax in respect of income which is chargeable to income-tax in the hands of a person on regular assessment.

3. Under the Income-tax Act 1961 a person is liable to be assessed to tax in

respect of his own income, and also in respect of certain classes of income received by or accruing or arising to others. He is also liable to be assessed to tax as a representative assessee. That is expressly so enacted by Section 161 (1) which provides:

"Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, x x."

A representative assessee by sub-sec. (1) of Section 160 includes amongst others, the agent of a non-resident in respect of the income of a non-resident specified in Section 9 (1) (i), and also a person who is treated as an agent under Section 163. By sub-section (2) a representative assessee is deemed to be an assessee for the purpose of the Act. By Section 162 the representative assessee, who as such pays any sum under the Act, may recover the sum so paid from the person on whose behalf it is paid. Section 163 (1) defines for the purposes of the Act an "agent" in relation to a non-resident. Resort to the machinery for assessing a representative assessee is however not obligatory: it is open to the Income-tax Officer to make a "direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable" or to recover "from such person the tax payable in respect of such income".

4. On regular assessment an agent of a non-resident is, by virtue of Sec. 160 (1) read with Section 163 liable to be assessed to tax and the tax so assessed may be recovered from him. The agent, if assessed to tax, has the right to recover tax paid by him from the person whom he represents: Section 162. Since a non-resident is in respect of income which forms part of his total income liable to be assessed to tax, he may also be called upon to pay advance-tax in respect of the income accruing to or received by him which forms part of his total income chargeable to tax by virtue of Sections 4, 5 and 207. So far there is no dispute. Counsel for the Company however urged that an agent of a non-resident may be assessed in regular assessment in respect

of the income accruing or arising to his principal, but he cannot be called upon to pay advance-tax even though he is by virtue of Section 160 (2) deemed an assessee for the purposes of the Act. Diverse reasons were suggested in support of that argument. It was said that since under Section 209 (1) the amount of advance-tax payable by an assessee in the financial year is to be computed on his total income of the latest previous year in respect of which he has been assessed by way of regular assessment, an agent cannot be directed to pay advance-tax, the incidence of liability whereof depends upon the determination of total income of the principal. We fail to see any substance in this argument. Section 207 imposes liability for payment of advance-tax, and Section 208 prescribes the conditions of liability to pay advance-tax. Determination of total income of the previous year of the assessee is not made a condition of the liability to pay advance-tax. Advance-tax payable by an assessee is computed in the manner provided by Section 209 when the assessee has been previously assessed to tax. The income-tax Officer is also enjoined by Section 210 to issue a notice to a person who has been previously assessed "by way of regular assessment" to pay advance-tax for the financial year. If the assessee has not been previously assessed by way of regular assessment, he is required by Section 212 (3) to make an estimate of his total income—excluding capital gains—if it is likely to exceed the maximum amount not chargeable to tax by two thousand five hundred rupees. These provisions apply to all assessees. If an assessee is chargeable to tax in respect of his own income or income of others which is chargeable to tax as his own income, those provisions indisputably apply. It is expressly enacted by Section 161 that as regards income in respect of which a person is a representative assessee, he shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially. It is clearly implicit therein that a representative assessee is not exempt from liability to pay advance-tax. Of the liability to pay advance-tax it is not predicated that the previous year should have come to an end before liability can arise. The previous year of an assessee may in some cases end after the commencement but before the end of a financial year in which advance-tax is payable:

it may in other cases commence and end with the financial year. But the liability to pay advance-tax is not in any manner affected because the previous year ends before or with the financial year. Where an assessee's previous year is the financial year, his total income may not be determined for the previous year before the commencement of the financial year, but on that account no exemption from payment of advance-tax is granted by the Act. On the commencement of a financial year, a person who is previously assessed to tax is liable to pay advance-tax on demand by the Income-tax Officer under Section 210. The quantum of tax will be determined by Section 209 and will be adjusted in the manner provided by Section 210 (3). That applies to every assessee whether the tax is liable to be paid by him on his own total income, or on the income assessed in his hands as a representative assessee. If he has not been previously assessed in the character in which he is liable to pay tax, an obligation is imposed by Section 212 (3) upon him to make an estimate of his income and to pay advance-tax. That provision applies to his own income and also to the income in respect of which he is a representative assessee. There is nothing in the Act under which the liability to pay advance-tax of a representative assessee depends upon determination of the total income for the previous year.

5. An argument of hardship was also raised. It was said that an agent of a non-resident may not normally have in his possession any materials on which he may estimate the income in respect of which he may be chargeable to advance-tax, if he had not been previously assessed to tax as an agent of a non-resident. That again, in our judgment, is not a ground which exempts an agent from liability to pay advance-tax on behalf of his principal. Liability to submit an estimate necessarily implies the duty to secure the requisite information from the non-resident for submitting the estimate. The tax, it must be remembered, is assessed on the agent for and on behalf of the principal, and the Act has made an express provision enabling the agent to recover from the principal the tax so paid by him. Once the Income-tax Officer treats a person as an agent of non-resident, liability to pay tax on regular assessment arises; and his liability as a representative assessee to pay advance-tax is not excluded by any provision of the Act.

6. In our judgment, Sections 207 and 208 which impose liability to pay advance-tax in a financial year, Section 210 which authorises the Income-tax Officer to make a demand for payment of advance-tax from a person who is previously assessed, and Section 212 (3) which imposes the duty to make an estimate of the total income likely to be received or to accrue or arise and to pay advance-tax if the total estimated income exceeds the maximum amount not chargeable to tax in his case by Rs. 2,500, apply to every person whether he is assessed in respect of his own income or as a representative assessee, and we are unable to imply an unexpressed limitation on the express words of the statute in favour of an agent of a non-resident principal.

7. In the present case by order dated February 25, 1965, for the assessment year 1964-65 the Company was treated as an agent of the non-resident principal. Since the Company was treated as an agent of the non-resident it became liable to pay advance-tax in the financial year 1964-65. By virtue of Section 207 read with Section 208 the declaration that the Company was an agent involved liability to pay advance-tax as well as tax assessed on regular assessment. We are unable to hold that the liability to pay advance-tax did not arise against the Company.

8. The plea that the provisions imposing liability to pay advance-tax upon an agent of a non-resident infringe the equality clause of the Constitution has no substance. As already observed, the liability to pay advance-tax arises under Sections 207 and 208 and its quantum is determined by Ss. 209, 210 and 212 (3) and it is not predicated of the accrual of liability that the total income of the previous year should be ascertained or precisely ascertainable when demand is made by the Income-tax Officer under Section 210, or when the assessee is required to make an estimate. The assumption that an assessee whose year of account coincides with the financial year is not in respect of that year liable to pay advance-tax is not warranted. The computation of advance-tax is not dependent upon the completion of the previous year: it depends upon the rules prescribed by Sections 209, 210 and 212. Every person who has been previously assessed to tax is liable when ordered by the Income-tax Officer to pay advance-tax, subject to the right to make an estimate

under Section 212 (1). A person who has not been previously assessed but whose income is likely to exceed the specified amount is also liable to pay advance-tax. The Act does not accord discriminatory treatment between different assessees. Payment of advance-tax is on account and is always liable to be adjusted against the tax assessed on regular assessment. That again applies to all assessees. It is then difficult to appreciate the grounds on which the plea of denial of equal protection may be sustained. The only ground urged, that an assessee may escape liability to pay advance-tax where his previous year coincides with the financial year, is without substance, and no other ground is set up in support of the plea of violation of the guarantee of equality under Article 14 of the Constitution.

9. The petition therefore fails and is dismissed with costs.

Petition dismissed.

AIR 1970 SUPREME COURT 1390
(V 57 C 296)

(From: Bombay)*

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Chandrakant Kalyandas Kakodkar, Appellant v. The State of Maharashtra and others, Respondents.

Criminal Appeal No. 170 of 1967, D/- 25-8-1969.

(A) Penal Code (1860), Section 292 — Obscene books etc. — Question of obscenity — Does not altogether depend on oral evidence but must be judged by the Court.

The question whether particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when

the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story, as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though the verdict as to whether the book or article or story considered as a whole panders to the purient and is obscene must be judged by the Courts. (Para 4)

(B) Penal Code (1860), Section 292 — Obscene books etc. — Obscenity — Determination — Aspects to be considered by Court. Criminal Appeal No. 805 of 1965, D/- 25-10-1966 (Bom), on facts Reversed.

What is obscenity has not been defined either in Section 292, I. P. C. or in any of the Statutes prohibiting and penalising mailing, importing, exporting, publishing and selling of obscene matters. It is the duty of Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprive and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary Society. (Para 5)

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels stories and pieces of literature which have a content of sex, love and romance. In the field of art and cinema also the adolescent is shown situations which even a quarter of century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What the Court has to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or became depraved by reading it or might have impure and lecherous

* (Cri. Appeal No. 805 of 1965, D/- 25-10-1966—Bom.)

thoughts aroused in their minds. (1868) 3 QB 360 and AIR 1965 SC 881, Rel. on; Criminal Appeal No. 805 of 1965, D/-25-10-1966 (Bom), on facts, Reversed.

(Para 13)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 881 (V 52) =

1965 (2) Cri LJ 8, Ranjit D.

Udeshi v. State of Maharashtra 5
(1868) 1868-3 QB 360 = 37 LJMC

89, R. v. Hicklin 5

Mr. S. S. Kavalekar, Sr. Advocate (M/s. K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates with him), for Appellant; M/s. H. R. Khanna, B. D. Sharma and S. P. Nayar, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.:— This appeal is by special leave directed against the judgment of the Bombay High Court.

2. The appellant is the author of a short story entitled Shama published in the 1962, Diwali Issue of Rambha, a monthly Marathi Magazine, which story is said to be obscene. Criminal proceedings were, therefore, initiated before the first class Magistrate, Poona by the complainant Bhide under Section 292, Indian Penal Code against the Printer and Publisher accused 1, the writer of the story accused 2 and the selling agent accused 3. The complainant stated that he had read the aforesaid Diwali issue of Rambha and found many articles and pictures in it to be obscene which are calculated to corrupt and deprave the minds of the readers in general and the young readers in particular. The complainant further referred to several other articles in the same issue such as the story of Savitri and certain cartoons but we are not now concerned with these because both the Magistrate as well the High Court did not think that they offended the provisions of Section 292, Indian Penal Code. The Magistrate after an exhaustive consideration did not find the accused guilty of the offence with which they were charged and, therefore, acquitted them. The complainant and the State filed appeals against this judgment of acquittal. Before the High Court it was conceded that there was no evidence that accused No. 3 had sold any copies of the issues of Rambha and accordingly the order of acquittal in his favour was confirmed. In so far as the other two accused are concerned it reversed the order of acquittal and convicted the printer and publisher

accused No. 1 and the writer accused No. 2 under Section 292, Indian Penal Code but taking into consideration the degree of obscenity in the passage complained of a fine of Rs. 25 only was imposed on each of the accused and in default they were directed to suffer simple imprisonment for a week. It was also directed that copies of the magazine Rambha in which the offending story was published and which may be in possession and power of the two accused be destroyed.

3. The allegation against the accused is that certain passages in the story of Shama at pp. 111-112, 114, 116, 118-121, 127, 128, 131 and 134 are said to be obscene. In support of this the complainant examined himself and led the evidence of Dr. P. G. Sahstrabudhe and Dr. G. V. Purohit in support of his allegation that the novel is obscene and that the writer and publisher contravened the provisions of Section 292, Indian Penal Code. Accused No. 1 stated that the story of Shama was written by an able writer which depicted the frustration in the life of a poet and denied that it was obscene. The writer Kakodkar, accused No. 2 claims to have written about 60 such stories which are published in different periodicals by reputed publishers. He also denies that Shama is obscene and states that he has introduced certain characters in order to condemn the worst and glorify the best and it was never his intention to titillate the sex feelings of the readers, but on the other hand his attempt was to achieve the literary and artistic standard which was in keeping with the style of some of the able and successful writers of Marathi literature. In support of his defence, he examined Shri Keluskar and Prof. Madho Manohar D. Ws. 1 and 2 respectively. The Court on its own summoned and examined Prof. N. S. Phadke and Acharya P. K. Atre. Both the Magistrate as well as the learned Judge of the High Court were conversant with Marathi and they seem to have read the story of Shama in the original, an advantage which we have not got. However, on a consideration of the offending passages in the story to which we shall refer presently, they came to different and opposite conclusions.

4. It is apparent that the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence because it is the duty of the Court to ascertain whether

the book or story or any passage or any passages therein offend the provisions of S. 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the Courts and ultimately by this Court.

5. What is obscenity has not been defined either in Section 292, Indian Penal Code or in any of the statutes prohibiting and penalising, mailing, importing exporting, publishing and selling of obscene matters. The test that has been generally applied in this country was that laid down by Cockburn, C. J., in Hicklin's case, (1868) 3 QB 360 and even after the inauguration of the Constitution and considered in relation to the fundamental right of freedom of speech and expression this test, it has been held, should not be discarded. In Hicklin's case, (1868) 3 QB 360 while construing statutes 20 and 21 Victoria, a measure enacted against obscene books, Cockburn, C. J., formulated the test in these words:

"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publication of this sort may fall. It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thought of most impure and libidinous character."

This Court has in *Ranjit D. Udeshi v. State of Maharashtra*, 1965-1 SCR 65= (AIR 1965 SC 881) considered the above test and also the test laid down in certain other American cases. Hidayatullah, J., as he then was, at the outset pointed out that it is not easy to lay down a true test because "art has such varied facets and

such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross." It was also pointed out in that decision at p. 74 (of SCR)=(at p. 887 of AIR).

"None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angles and saints of Michaelangelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act."

It is, therefore, the duty of the Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary society. We can do no better than to refer to this aspect in the language of Hidayatullah, J., at p. 76 (of SCR)=(at p. 888 of AIR):

"An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall."

Referring to the attempt which our national and regional languages are making to strengthen themselves by new literary standards after a deadening period under the impact of English, it was further observed at p. 77 (of SCR)=(at p. 889 of AIR),

"that where obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerise all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way."

Bearing in mind these observations and the tests laid down in *Udeshi's case*, (1965) 1 SCR 65= (AIR 1965 SC 881), we propose to examine, having regard to our national standards, the passages in *Shama* to ascertain in the light of the work as a whole whether they treat with sex in such a way as to be offensive to public decency and morality as can be considered likely to pander to lascivious, prurient or sexually precocious minds.

6. The second appellant writes about the life of a poet Nishikant who left school in the days of freedom struggle, wrote revolutionary poems, but as the freedom struggle waned he did not join school as others had done notwithstanding his brother's advice that he should pass the matric so that he could be employed in service. As he was mostly unemployed, he was living on his brother and on the bounty of his sister-in-law who was kind and considerate to him. Nishikant, it will appear, is emotional, sensitive and has the power to discern right from wrong. The story starts with his being employed as a teacher and his meeting Shama, the Music teacher in the school. His attraction for her and the opportunity she gives him to meet her alone in her room fills him with a sense of foreboding lest he may have to endure the pangs of suffering which he had to undergo in his two earlier affairs with Neela and Vanita. The poet recalls these two affairs individually and we get the impression that the pain which he underwent should not be repeated. It is more as a repellent to any further involvement with Shama that these experiences are related.

7. Neela who is about 17 years of age is the daughter of a distant maternal cousin of his mother. As she had reached the marriageable age, her father in Goa, Wasudeo who always treated Nishikant's mother like his own sister is anxious to get her married to some eligible youngman, but evidently the opportunity for choosing the right person was remote. So he suggests to Nishikant's mother that Nishikant should come and bring Neela to Bombay to live with them where they would have better opportunity of choosing a youngman for her to be married. Nishikant who was appointed in a newspaper office was at first reluctant but his sister-in-law persuades him and so he goes to Goa. When he meets Neela, she had changed and was not as ugly as when he had seen her earlier. The author then depicts the slow but steady maturing of the love between them, the seeking of and getting of opportunities to be near to each other, their having to sleep in the same bed while on the boat coming to Bombay and ultimately falling in love with each other which developed during Neela's stay in Bombay. During Neela's stay with Nishikant's family the love between her and Nishikant became intense as a result Nishikant proposes to marry her and writes to her father for his consent. They wait for a reply but unknown to Nishikant, Neela receives a reply from her father rejecting the proposal on the ground that Nishikant is unemployed and would not join Government service even though he had suggested it to him. He says in that letter that poetry may bring him fame but would not give him a livelihood. As he was entirely dependant on his brother for his maintenance, the father refused to give his consent in the interest of Neela's happiness and told her that he was coming back to fetch her. As Neela was in love with Nishikant but she knew that she would not be married to him, she encourages him to bring their love to culmination. This state of affairs lasted for a few days before her father took her away. About two months later Nishikant receives an invitation card for Neela's marriage and thereafter he received another letter written by Wasudeo to his daughter to which we have earlier referred and which also contained at the back of it Neela's message to Nishikant asking him to forget her.

8. Even after four years he was unable to forget Neela and had taken to drinking and coming home late. He was idle for long spells and whenever he thought

of Neela he wrote a poem. Then one day he was introduced to Vanita who was a graduate and a married woman who had left her husband. She was a critic of stories and novels. When they met she had praised his poems and had invited him to come to her room ostensibly to discuss his poetry. Vanita is shown as an oversexed woman, experienced and forward, making advances and suggestions. Ultimately she and Nishikant have several affairs till one morning he finds that the person who had introduced her to him was coming out of her room and when he went in he found Vanita sleeping naked. His spirit revolted seeing her in that condition. He was greatly upset at her recalcitrance when he asked her how many more men she had. She replied that it had nothing to do with him, that he had got what he wanted and she does not want to be a slave to any person. He retorted with indignation that he did not wish to see her face and walked out. He had then made up his mind not to have any relations with any woman.

9. It was with such unpleasant experiences that when he met Shama and was attracted to her he was hesitating and avoiding meeting her alone but circumstances conspired to bring them together and again another affair developed between them. He encourages Shama to sing, writes lyrics for her songs and when she gives a performance in school he arranges for a radio and gramophone representatives to be present there. Her music was appreciated and she began to get audition from these sources. It appears one of the school teachers Kale had earlier attempted to make love to Shama and she had slapped him. When Kale informs Nishikant that he knows about his affairs with Shama, Nishikant gets angry and tells him that he knows how he was slapped by Shama for making advances to her. This enraged Kale and he seems to have taken his revenge by maligning the character of Shama to the Principal. As a result of this, the principal dismissed her. Hearing this, Nishikant gets angry, goes to the Headmaster and accuses him of being an accomplice of Kale and leaves the service. He then persuades Shama to start a music school, later gets her engagements in films as a playback singer for which he was asked to write lyrics. Shama's reputation as a singer grows rapidly in the Marathi public. It was then that her uncle knowing of it comes to see her and makes insinuations against Nishikant who is offended

and hurt because Shama does not prevent her uncle but listens to him without a demur. Periodical quarrels are witnessed because Shama becomes more status minded, begins to think of her wealth and position and moves into wealthy quarters all of which are against Nishikant's outlook and temperament. Both began to fall apart and the visits of Nishikant to Shama became rare. Even though Nishikant lives in poverty, he is too proud to ask her for money and is not willing to live with her on her conditions. He stays away from her, showing that he has pride, self respect and spirit of sacrifice. Suddenly a realisation comes to Shama that she had wronged Nishikant and that she owed everything to him, and therefore has an intense desire for reconciliation. In this state of affairs when she hears that he is taking part in the Kavi Samelan on the radio she gets into the car and asks her driver to drive fast to the radio station. On this pitch of expectant reconciliation and ultimate reunion the story ends.

10. The story read as a whole does not, in our view, amount to its being a pornography nor does it pander to the prurient interest. It may not be of a very high literary quality and may show immaturity and insufficient experience of the writer, but in none of the passages referred to by the complainant do we find anything offending public order or morality. The High Court itself did not consider the description of Neela when Nishikant meets her in Goa (at p. 107) objectionable, nor the narration and the description of the situation which is created for Nishikant and Neela on the way back to Bombay from Goa when for want of room they had to sleep on a single bed (p. 112) as obscene. The passages at pp. 112, 114, 119-120 and 131 have been found by the High Court to come within the mischief of Section 292, Indian Penal Code. We have been taken through the corresponding passages in the English Translation and even allowing for the translation not bringing out the literary or artistic refinement of the original language we find little in these passages which could be said to deprave or corrupt those in whose hands the book is likely to fall, nor can it be said that any of the passages advocates, as the High Court seems to think, a licentious behaviour depraving and corrupting the morals of adolescent youth. We do not think that it can be said with any assurance that merely because adolescent youth read situation of

the type presented in the book, they would become depraved, debased and encouraged to lasciviousness. It is possible that they may come across such situations in life and may have to face them. But if a narration or description of similar situation is given in a setting emphasising a strong moral to be drawn from it and condemns the conduct of the erring party as wrong and loathsome it cannot be said that they have a likelihood of corrupting the morals of those in whose hands it is likely to fall — particularly the adolescent.

11. In the passage at pp. 113-114 Nishikant takes Neela out to show the sights of the City of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his girl friend in front kissing, they also indulge in kissing. Then as we said earlier, when the love between them develops Nishikant wanted to marry but the father of the girl was unwilling. Neela realising that their love could never be consummated encourages him to bring it to a culmination. In this way they enjoy unmarried bliss for a few days until Neela's father takes her away.

12. We agree with the learned Judge of the High Court that there is nothing in this or in the subsequent passages relating to Neela, Vanita and Shama which amounts to pornography nor has the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done is done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. To the literate public there are available both to the adults and the adolescents innumerable books which contain references to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instil a moral.

13. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the stan-

dard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescents and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow literatures and artists to give expression to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udeshi's case, if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore be judged from this aspect.

14. We do not think that any of the impugned passages which have been held by the High Court as offending Section 292, Indian Penal Code can be said to pervert the morals of the adolescent or be considered to be obscene. In this view, we allow the appeal, set aside the conviction and fine. The fine if paid is directed to be refunded.

Appeal allowed.

AIR 1970 SUPREME COURT 1396
(V 57 C 297)

(From Gujarat: (1968) 9 Guj LR 278)

J. C. SHAH, V. RAMASWAMI,
A. N. GROVER, JJ.

Bai Radha, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 1 of 1967, D/- 20-11-1968.

(A) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 15 (1) — Power to search — Power is conferred by statute and not derived from recording of reasons — Omission to record reasons before or after search — Trial is not vitiated unless it is shown that prejudice is caused. (Para 5)

(B) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 15 (1) and (2) — Search — Non-compliance with sub-sections (1) and (2) — It is mere irregularity — Trial is not vitiated unless it is shown that prejudice is caused by non-compliance — AIR 1965 Andh Pra 176, Overruled; (1968) 9 Guj LR 278, Affirmed. Case law discussed.

(Paras 5, 7)

(C) Criminal P. C. (1898), Section 537 — Section governs investigation, inquiry and trial of offences under Suppression of Immoral Traffic in Women and Girls Act (1956). (Paras 6, 7)

(D) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 15 — Search — Non-compliance with Section 15 — It is irregularity curable under Section 537, Criminal P. C. (Paras 6, 7)

Cases Referred: Chronological Paras (1965) AIR 1965 Andh Pra 176.

(V 52)= 1965 (1) Cri LJ 543, Public Prosecutor Andhra Pradesh v. Nageswararao

(1964) AIR 1964 SC 221 (V 51)= (1964) 3 SCR 71= 1964 (1) Cri LJ 140, State of Uttar Pradesh v. Bhagwati Kishore Joshi

(1962) AIR 1962 SC 63 (V 49)= (1962) 2 SCR 694= 1962 (1) Cri LJ 106, Delhi Administration v. Ram Singh

(1960) AIR 1960 SC 210 (V 47)= (1960) 1 SCR 991= 1960 Cri LJ

286, State of Rajasthan v. Rehman

(1955) AIR 1955 SC 196 (V 42)= (1955) 1 SCR 1150= 1955 Cri LJ

536, H. N. Rishbud v. State of

U.P.

For S. Datta, Advocate for M/s. J. B. It was and Co., for Appellant; M/s. comes to against K.S. N.V.T/D.

H. R. Khanna and B. D. Sharma, Advocates, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.:— The sole point which arises for decision in this appeal by special leave is whether the trial became illegal by reason of the search not having been conducted strictly in accordance with the provisions of Section 15 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act CIV of 1956), hereinafter called the "Act".

2. The facts need not be stated in detail. The appellant and two other persons were tried for various offences under the provisions of the Act, the charge substantially against her being that she was keeping a brothel in her house and knowingly lived on the earnings of the prostitution of women and girls. All the three accused persons were acquitted by the Magistrate. The State preferred an appeal to the High Court against the appellant and the third accused only. The High Court set aside the order of acquittal in respect of the appellant and convicted her for offences punishable under Sections 3 (1) and 4 (1) of the Act. She was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 200/-, (in default to suffer further rigorous imprisonment for six months) and to suffer rigorous imprisonment for six months on the second count, the sentences of imprisonment being concurrent.

3. The prosecution case was that on receiving complaints from several residents of the locality a raiding party was organised. The services of a decoy witness Kishan Taumal were requisitioned and he agreed to work as the punter. After ascertaining that he had no money he was given Rs. 8/- in all. That amount included a currency note of Rs. 5/- and three currency notes of Re. 1/- each, the numbers of notes having been noted down in the first part of the panchanama. The punter was instructed to hand over the amount for the charges that would have to be paid for having sexual intercourse with any girl or woman in the appellant's house. He was, however, only to engage himself in talk and not the actual act. A punch witness Prem Singh Hiraji was also to accompany the raiding party. The raid was ultimately made according to the original plan and Kishan, the punter managed to engage a woman in conversation in a room in the house of the appellant. The raiding party found that

she had opened the buttons of her blouse and she was found with her clothes in such a disordered condition that it was apparent that she was getting ready to have sexual intercourse with Kishan; but on seeing the police party she got up and dressed herself. The seven currency notes i. e., one five rupee note and two of one rupee currency notes were recovered from the appellant which were marked and which had been given by Kishan. Sub-sections (1) and (2) of Section 15 of the Act provide as follows:

"(1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a woman or girl living in any premises, and that such search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.

(2) Before making a search under sub-section (1) the special police officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do."

What has been stressed greatly by learned counsel for the appellant is that the Act being a special Act its provisions should have been strictly followed. It is pointed out that the panch witness Prem Singh was not an inhabitant of the locality in which the place to be searched was situate. Another panch witness had also been taken who was a woman (Bai Shanta) to satisfy the requirement of sub-section (2) of Section 15 but she also was not an inhabitant of the locality where the house of the appellant was situate. It has been pointed out that in *Public Prosecutor, Andhra Pradesh v. Nageshwararao*, AIR 1965 Andh Pra 176 it was held by Sharfuddin Ahmed, J., that the Act being a special piece of legislation enacted with a specific purpose all the directions contained in Section 15 were mandatory. According to the learned Judge while the recording of reasons for proceeding without obtaining the search warrant might not be done, which was a matter of discretion, so far as the requisition of the services of the respectable inhabitants was concerned the direction was mandatory

and the legislature by insisting on the presence of one woman mediator at the time of search had undoubtedly chosen to safeguard the interests of the persons with whom the Act was intended to deal. In that case the services of a woman mediator had not been requisitioned at all. The search was held to be altogether illegal with the result that the accused person in that case was acquitted and his acquittal was upheld by the High Court.

4. In the present case two main defects have been pointed out in the matter of search; one is that the special police officer Shri Mankad has been found both by the Magistrate and the High Court to have prepared the document Ext. 8/A long after the search. As found by the High Court this document contained reproduction of Section 15 (1) and it hardly contained any ground on which the police officer had formed the belief with regard to the matters stated in sub-section (1). The other point which has been pressed on behalf of the appellant relates to contravention of sub-section (2) inasmuch as the panch witnesses were not inhabitants of the locality in which the appellant's house was situate. The High Court was of the view that power to conduct the search was derived from the statute and not from the recording of reasons and therefore the search was not rendered illegal, in the present case, on account of contravention of Section 15 (1) of the Act. On the second point it was held that there was no provision in law which rendered the evidence of the panch witnesses inadmissible even though Section 15 (2) had been contravened. The High Court did not agree with the decision of the Andhra Pradesh High Court that the directions contained in sub-section (2) were of a mandatory nature.

5. Our attention has been drawn to *State of Rajasthan v. Rehman*, (1960) 1 SCR 991= (AIR 1960 SC 210) in which a Deputy Superintendent of Central Excise who had received information that the respondent in that case had cultivated tobacco but had not paid the excise duty, went to search his house. He was obstructed, while making the search with the result that he fell down and was injured. The respondent was prosecuted under Section 353, Indian Penal Code. It was held that Section 165 of the Code of Criminal Procedure was applicable to such a search and the search being in contravention of that section it was illegal. The respondent therefore had been rightly acquitted. In this case, however,

it was observed that the recording of reasons under Section 165 did not confer on the officer jurisdiction to make search though it is a necessary condition for doing so. Jurisdiction or power to make a search was conferred by the statute and not derived from the recording of reasons. These observations are sufficient to dispose of the first point which has been pressed about the omission to record the reasons before the search or even thereafter in a proper way. This case cannot be of much assistance to the appellant because no question is involved in the present case of any public servant having been obstructed in the course of a search conducted under Section 165 of the Criminal Procedure Code. The trial of the appellant was for contravention of certain provisions of the Act and the search was made in respect of those offences. The trial having taken place the question of the applicability of Sec. 537 of the Criminal Procedure Code will at once arise. If the non-observance of the provisions of Section 15 (2) is not an illegality but is a mere irregularity then the sentence cannot be set aside unless it can be shown that such irregularity has caused failure of justice. As will be presently seen we are of the opinion that non-compliance with the directions contained in Section 15 (2) in the matter of search would only be an irregularity and not such an illegality which will vitiate the trial. The decision in *Delhi Administration v. Ram Singh*, (1962) 2 SCR 694= (AIR 1962 SC 63) which concerned offences committed under the Act and on which reliance has been placed on behalf of the appellant involved a different point. There the police officer who had entered the premises where the offences were alleged to be committed was not a special police officer who alone is authorised to do the various things mentioned in the provisions of the Act. It was observed that the Act created new offences and provided for the forum before which they would be tried. Necessary provisions of the Code of Criminal Procedure had been adopted fully or with modification. As the Act provided machinery to deal with the offences created, the necessary implication must be that the new machinery was to deal with those offences in accordance with the provisions of the special Act. The entire police work in connection with the purposes of the Act within a certain area had been put in the charge of a special police officer. According to the majority judgment in that

case, only the special police officer was competent to investigate and as the investigation had been conducted by a regular police officer who did not come within the category of a special police officer the order of the Magistrate quashing the charge-sheet was upheld. This case certainly supports one part of the submission of the counsel for the appellant that the Act is a complete Code with respect to what has to be done under it. In that sense it would be legitimate to say that a search which is to be conducted under the Act must comply with the provisions contained in Section 15; but it cannot be held that if a search is not carried out strictly in accordance with the provisions of that section the trial is rendered illegal. There is hardly any parallel between an officer conducting a search who has no authority under the law and a search having been made which does not strictly conform to the provisions of Section 15 of the Act. The principles which have been settled with regard to the effect of an irregular search made in exercise of the powers under Section 165 of the Code of Criminal Procedure would be fully applicable even to a case under the Act where the search has not been made in strict compliance with its provisions. It is significant that there is no provision in the Act according to which any search carried out in contravention of Section 15 would render the trial illegal. In the absence of such a provision we must apply the law which has been laid down with regard to searches made under the provisions of the Criminal Procedure Code.

6. Now in *State of Uttar Pradesh v. Bhagwati Kishore Joshi*, (1964) 3 SCR 71= (AIR 1964 SC 221) this Court had to deal with a case where a booking clerk was stated to have committed an offence of criminal breach of trust. A Sub-Inspector of police made some investigation and submitted a report but this was done without obtaining the order of a Magistrate. Subsequently the permission of the Magistrate was obtained to investigate into the case as required by Section 5-A of the Prevention of Corruption Act. After making further investigation he submitted a charge-sheet. The respondent in that case was tried and convicted under Section 5 (2) of that Act. It was held by this Court (by the majority) that there was a contravention of Section 5-A of the Prevention of Corruption Act at the first stage of investigation when the requisite permission of the magistrate had

not been obtained but after the permission had been given there was practically a de novo investigation. Therefore, the accused not having been prejudiced by the illegality committed by the police, the conviction could not be set aside on the ground of mere irregularity or illegality in the matter of investigation. The following passage at p. 84 (of SCR)= (at p. 226 of AIR) may be usefully reproduced:

"The High Court set aside the conviction on the ground that there was a breach of the mandatory safeguards of the Act in that the first stage of the investigation was contrary to the provisions of the Act. But it did not consider the other question whether the said breach caused prejudice to the accused in the matter of his trial. In doing so, the High Court ignored the provisions of Sec. 537 of the Code of Criminal Procedure. Having carefully gone through the record for the reasons aforesaid, we are satisfied that no such prejudice has been caused to the accused. He had a fair trial and had his full say."

It is abundantly clear that Section 537 of the Criminal Procedure Code would be applicable to the proceedings in the present case. Section 5 (2) of the Code provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code. All offences under any other law shall be similarly investigated etc., according to the same provisions but subject to any enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. According to Section 22 no Court inferior to that of a Magistrate as defined in clause (c) of Section 2 shall try any offence under Sections 3 to 8 of the Act.

7. Thus all proceedings including investigation had to be conducted in accordance with the procedure laid down in the Criminal Procedure Code except to the extent of the specific provisions contained in the Act. No such provision has been brought to our notice nor indeed has it been contended that Section 537 of the Code of Criminal Procedure would not govern the investigation, inquiry or trial of the offences with which the appellant was charged. The ratio of the decision in the case of Bhagwati Kishore Joshi, (1964) 3 SCR 71= (AIR 1964 SC 221) must be followed and in

the absence of any prejudice having been shown by non-compliance with the provisions of sub-sections (1) and (2) of Section 15 of the Act, the order of the High Court must be upheld.

8. In conclusion it may be observed that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-sections (1) and (2) of Section 15 of the Act. The legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females. But the entire proceedings and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. The Court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until some prejudice is shown to have been caused to the accused person or persons the conviction and the sentence cannot be set aside. It may not be out of place to reiterate what was said in *H. N. Rishbud and Inder Singh v. State of Delhi*, (1955) 1 SCR 1150= (AIR 1955 SC 196), that a defect or an illegality in the investigation, however serious, has no direct bearing on the competency or the procedure relating to cognizance or trial of an offence and that whenever such a situation arises, Section 537 of the Code of Criminal Procedure is attracted and unless the irregularity or the illegality in the investigation or trial can be shown to have brought about a miscarriage of justice, the result is not affected.

9. For the above reasons this appeal fails and it is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1399
(V 57 C 298)

(From: Andhra Pradesh)

J. C. SHAH AND K. S. HEGDE, JJ.
Mohammad Ibrahim, Appellant v. The State of Andhra Pradesh and others, Respondents.

Civil Appeal No. 1185 (N) of 1969, D/- 4-12-1969.

Constitution of India, Article 226 — Writ petition to set aside reversion of Government employee — Plea of mala

CN/DN/A116/70/DVT/C

fide averred in petition and urged before Court — Dismissal of petition without considering that plea — No fair trial because plea was not considered — Dismissal set aside in appeal to Supreme Court — Decision of Andhra High Court (In L. P. Appeal), Reversed. (Para 6)

The following Judgment of the Court was delivered by

SHAH, J.:— Mohammad Ibrahim, appellant in this appeal entered service in the Public Works Department of the State of Hyderabad as a Sub-Overseer. In December, 1950, he was promoted to the post of a Supervisor. He was later promoted on November 23, 1963, as Assistant Engineer but was reverted on April 23, 1965 to his substantive post of Supervisor. The appellant filed a petition in the High Court of Andhra Pradesh for a writ quashing the order of reversion. Obul Reddy, J., dismissed the petition holding that the order of reversion was made on administrative grounds and the appellant being only a temporary employee and the emergency during which he was promoted as Assistant Engineer having ceased he could lawfully be reverted to substantive post. In appeal under the Letters Patent, the High Court confirmed the order passed by Obul Reddy, J., holding that the order of reversion did not amount to imposition of punishment. The High Court also held that merely because for administrative exigencies persons who were junior to the appellant in service were retained and the appellant was reverted did not amount to infringement of the guarantee of the equal protection under the Constitution. In the view of the High Court the appellant was reverted because his work was not found satisfactory and since the order on the face of it did not involve any penal consequences there was no violation of Article 311 or Article 14 of the Constitution.

2. The order reverting the appellant to the post of Supervisor does not involve any penal consequences nor does it cast any stigma upon the appellant. There was no violation of the protection of Article 311 of the Constitution, merely because the appellant was not given an opportunity to explain why he should not be reverted. Mr. Garg, for the appellant contends that the appellant had averred in the petition that the order was made with a view to harass the appellant because he had charged some officers of the Department with corruption, but the Trial Court did not consider that plea,

and the High Court in appeal after referring to that plea also did not deal with it. Counsel says that since the appellant had no fair trial of his case the order is liable to be set aside.

3. There is no reference in the order passed by Obul Reddy, J., to the plea that the order was made mala fide raised by the appellant in his petition. The High Court in appeal observed in the course of the judgment:

"The appellant was temporarily promoted as Assistant Engineer and was reverted by an order which merely state that he was appointed as Assistant Engineer under the Emergency provision of rules in G. O. Ms. 1130 dated 23-4-65 was reverted. xx xx"

4. The High Court then proceeded to set out the defence set out in paras 6 and 7 of the affidavit filed in reply, but did not consider the plea that the order was made maliciously or for a collateral purpose. In his petition the appellant has stated in paragraph 10 that the order of reversion "was motivated by malice and displeasure by the authorities in exposing corruption and wastage by the officers in the Electricity Department", and that "the punishment put upon him by passing the Constitutional guarantee was illegal". He also said that his work as Assistant Engineer was satisfactory. He then set out in paragraphs 16, 17 that he had reported to the Executive Engineer the corrupt practices of the Divisional Accountant, but no action was taken against him. In paragraphs 27 to 39, he made several allegations which if true may support his case that the order of reversion was "motivated by mala fides". In para 41 he averred that the order of reversion was passed upon him as punishment "by enraged authorities to shield the corrupt officers who had failed to prove anything against him and on the other hand reverted him from a Gazetted post to a non-Gazetted post" and that "the authorities had misused the Rule 10-A (1) of the Andhra Pradesh Services Rules". In para 42 he averred that the impugned order of reversion was passed to harass him, and that the authorities were trying to punish him and shield the corrupt practices of officers.

5. In reply to the allegations made by the appellant practically nothing was stated in the affidavit filed on behalf of the State. It was merely said that the appellant was "short tempered, quarrelsome" and that he had been censured by the

Chief Engineer, and that the allegations made against the officers were found baseless except one allegation against the Divisional Accountant which was referred to the Accountant-General. In para 5 it was stated that a warning memo was issued to the appellant for not joining at the new Station, in spite of repeated instructions and for "marking advance copies to the higher authorities".

6. A number of serious allegations were made by the appellant in his petition, in support of his plea that the order passed against him was made out of malice and practically no reply was submitted to that by the State. Apparently the plea was urged before the High Court. The High Court observed in the course of the judgment that the appellant had challenged the order on the "ground of mala fide" but did not proceed to consider that plea. We are of the view that there has been no fair trial of the petition filed by the appellant. The order of the High Court is set aside and the case is remanded for trial according to law.

7. Costs in this Court and in the High Court in the appeal under the Letters Patent will be costs in the petition.

Order accordingly.

AIR 1970 SUPREME COURT 1401 (V 57 C 299)

(From Orissa: AIR 1969 Orissa 252)

J. M. SHELAT AND C. A.
VAIDIALINGAM, JJ.

M/s. Hindustan Steels Ltd., Rourkela,
Appellants v. A. K. Roy and others, Res-
pondents.

Civil Appeal No. 2127 of 1969, D/- 18-
12-1969.

(A) Industrial Disputes Act (1947),
Sch. 3, Item 11 — Illegal discharge or
dismissal of workman — Awarding com-
pensation instead of reinstatement —
Discretionary — Mechanical exercise of
discretion by Tribunal in awarding rein-
statement — Refusal to interfere with
by High Court in writ jurisdiction held
unjustifiable. AIR 1969 Orissa 252, Re-
versed.

It is true that some of the decisions of
Supreme Court have laid down that
where the discharge or dismissal of a
workman is not legal or justified, the re-
lief which would ordinarily follow would
be reinstatement. The Tribunal, how-

ever, has the discretion to award com-
pensation instead of reinstatement if the
circumstances of a particular case are un-
usual or exceptional so as to make rein-
statement inexpedient or improper. The
Tribunal has, therefore, to exercise its
discretion judicially and in accordance
with well recognised principles in that
regard and has to examine carefully the
circumstances of each case and decide
whether such a case is one of those ex-
ceptions to the general rule. If the Tri-
bunal were to exercise its discretion in
disregard of such circumstances or the
principles laid down by Supreme Court
it would be a case either of no exercise
of discretion or of one not legally exer-
cised. In either case the High Court in
exercise of its writ jurisdiction can inter-
fere and cannot be content by simply
saying that since the Tribunal has exer-
cised its discretion it will not examine the
circumstances of the case to ascertain
whether or not such exercise was proper-
ly and in accordance with the well set-
tled principles made. If the High Court
were to do so, it would be a refusal on
its part to exercise jurisdiction. (Para 14).

It is not in every case where the em-
ployer says that he has lost confidence in
the workman and therefore, has terminat-
ed his service that reinstatement cannot
be granted and the Tribunal has to award
compensation. On the other hand, if on
an examination of all the circumstances
of the case, the Tribunal comes to the
conclusion that the apprehensions of the
employer were genuine and the employer
truly felt that it was hazardous or pre-
judicial to the interests of the industry
to retain the workman in his service on
grounds of security, the case would be
properly one where compensation would
meet the ends of justice. (Para 16)

Held, on facts and circumstances of
the case, that the Tribunal, in awarding
reinstatement, exercised its discretion
mechanically and that the refusal by the
High Court in writ jurisdiction to inter-
fere with the discretion exercised by the
Tribunal was equally mechanical and
amounted to refusal to exercise its juris-
diction. AIR 1969 Orissa 252, Reversed.

(Para 17)

(B) Constitution of India, Article 226
— Certiorari — If a statutory tribunal
exercises its discretion on the basis of
irrelevant considerations or without regard
to relevant considerations, certiorari may
properly issue to quash its order.

(Para 17)

(C) Industrial Disputes Act (1947), Sch. 3, Item 11 — Illegal discharge or dismissal of workman — Compensation instead of reinstatement found justifiable on facts of case — Assessment of compensation — Compensation for a period of two years at the rate of salary last drawn by the concerned workman, held, would meet the ends of justice. (Para 18)

Cases Referred: Chronological Paras

(1969) Civil Appeal No. 1735 of 1969, D/- 12-9-1969 (SC), Ruby General Insurance Co., Ltd. v. P. P. Chopra 10, 18

(1967) Civil Appeal No. 516 of 1966, D/- 26-10-1967= 1970-1 Lab LJ 70 (SC), Doomur Dulung Tea Estate v. Workmen 10

(1967) Civil Appeal No. 382 of 1966, D/- 14-8-1967= (1967) 2 SCWR 674, Workmen of Charottar Gramodhar Sahakari Mandali Ltd. v. Charottar Gramodhar Sahakari Mandali Ltd. 10

(1966) AIR 1966 SC 1051 (V 53)= (1966) 2 SCR 434, Management of Utkal Machinery Ltd. v. Workmen 10

(1960) AIR 1960 SC 1264 (V 47)= (1960) 3 SCR 457, Assam Oil Co. Ltd. v. Workmen 10, 18

(1959) 1959-2 Lab LJ 669 (SC), Punjab National Bank Ltd. v. Workmen 9

(1953) AIR 1953 SC 433 (V 40)= (1952) 2 LLJ 577, United Commercial Bank Ltd. v. U. P. Bank Employees Union 9

(1949) AIR 1949 FC 111 (V 36)= 1949 FCR 321, Western India Automobile Association v. Industrial Tribunal 9

Mr. H. R. Gokhale, Senior Advocate, (M/s. Gobind Das and G. S. Chatterjee, Advocates, with him), for Appellants; M/s. R. K. Garg and S. C. Agarwala, Advocates of M/s. Ramamurthi and Co. and Miss Sumitra Chakravarty, Advocate, for Respondents.

The following Judgment of the Court was delivered by

SHELAT, J.:— Respondent No. 1 was, in 1955, admitted as a trade apprentice by the appellant-company in its works, the company agreeing to bear the cost of his training as such apprentice, which it did for a period of 3 years. On completion of his training, he was appointed in September 1958 as a skilled workman; i.e., as a fitter. The letter of appointment under which he was engaged contained a clause which required him to execute a

bond to serve the company for five years at least. The object of that clause evidently was to ensure that he served the company at least for five years in consideration of the company having borne the expenses of his training.

2. The evidence produced before the Industrial Tribunal shows that the practice of the company, set up at the instance of the Government of India and the Company's Board of Directors, was to have a confidential inquiry made to verify the antecedents of its employees. Such verification not being practicable at the time of the appointment of each employee, it used to be done after a workman was appointed. The object of such verification was to ascertain whether it was desirable or not in the interests of the company to continue the service of the employee in respect of whom such verification was made. The inquiry was made through the police. On receipt of a verification report from the police, the Senior Security Officer of the company would make his recommendation and the company would terminate the service of an employee where it was considered desirable in the company's interests not to continue such an employee in service after giving 3 months' notice or salary for that period in lieu thereof.

3. Throughout the period of his service commencing from September 1958 no action was ever taken against respondent 1 although he had at one time joined a strike in the company's works and although he was an active member and the secretary of the workmen's union. A criminal case in relation to the said strike was filed against him but had been subsequently withdrawn. Prima facie, the fact that no action was taken against him indicated that the company did not consider his active participation in the union activities objectionable so as to warrant any interference on its part.

4. In accordance with the practice of the company, however, a verification report about him was called for as was done in the case of other workmen also. On such a report from the police, the Senior Security Officer recommended that it was not desirable to retain him in the company's service any longer. Respondent 1 at the time was working as a fitter in the blast furnace of the works. On December 9, 1960, he was served with an order by which his service was terminated and was informed that he would be entitled to 3 months' pay in lieu of a notice for that period.

5. On the union of which, as afore-said he was the secretary, having raised a dispute, alleging that the termination of his service was the result of victimisation and unfair labour practice, the dispute was referred by the Government of Orissa to the Industrial Tribunal. After inquiry, the Tribunal rejected the union's allegation as to victimisation or unfair labour practice on account of any union activities carried on by respondent 1. Nevertheless, the Tribunal held that it was improper on the part of the company not to have disclosed the said report to respondent 1 and not to have given him an opportunity to contest its contents and vindicate himself. The Tribunal held that though the said order was in form one of termination of service, it was in fact punitive in nature and considering the action taken against respondent 1 as disproportionate further held that it was a case of victimisation, that consequently the order was illegal and unjustified and directed reinstatement with full back wages.

6. The company filed a writ petition in the High Court for quashing the said order. Before the High Court the company urged: (a) that the termination of the service of respondent 1 was in bona fide exercise of the employer's right to do so, (b) that it did so only because of the said adverse report and (c) that even if it was held that the said order was not legal or justified, the proper relief to be granted to the respondent in the circumstances of the case was compensation and not reinstatement, which meant imposition of a workman against whom there was an adverse report and whom the company did not consider it desirable to retain in its service. The High Court rejected these contentions and held that the Tribunal was right in holding that the termination of service of respondent 1 was not in bona fide exercise of the power of the employer to terminate an employee's service, that it was punitive in character and was, therefore, not legal or justified. The High Court also held that ordinarily the relief against an illegal termination of service was reinstatement though in some cases it may be considered inexpedient to do so, in which event a suitable compensation would be the proper relief. Lastly, it held that the present case was not one of those exceptions to the general rule of reinstatement and the Tribunal having exercised its discretion it could not interfere with the Tribunal's order.

7. The company thereupon applied for special leave from this Court. Though it was granted, it was limited only to the question whether the relief to respondent 1 should have been reinstatement or compensation. It is, therefore, not possible for us to go into the question whether the Tribunal and the High Court were right in their conclusion that the termination of the service of respondent 1 was not in bona fide exercise of the company's right to order discharge simpliciter or whether the order was punitive in nature and therefore was not legal in the absence of any domestic inquiry having been held. Besides, this appeal is one against the High Court's order refusing certiorari under its writ jurisdiction and not a direct appeal under Article 136 of the Constitution against the Tribunal's order. These considerations will have to be kept in mind while we are considering this appeal.

8. Counsel for the appellant-company argued that even though he could not challenge, in view of the limited special leave granted to the company, the finding that the impugned order was not termination simpliciter in bona fide exercise of the employer's right to terminate the service of an employee, he was entitled to agitate the question whether or not the High Court, on the facts of this case, should have interfered and ordered compensation in place of reinstatement, particularly because: (a) the concerned employee was posted in the blast furnace, a crucial part of the company's works, in respect of which the company could not hazard any risk, (b) the Tribunal had given a clear and firm finding against the case that the workman had been victimised on account of his union activities, and (c) the Tribunal and the High Court had both set aside the company's order only because of their finding that it was punitive in nature and that the punishment was so disproportionate, that it amounted to victimisation. The proper order, counsel submitted, was to award compensation instead of imposing the service of an employee whom the company considered risky to retain in its service. Mr. Garg, on the other hand, argued that the company's action involved an important principle, in that, an employer cannot be allowed to terminate the services of his employees on police reports which are not disclosed to the workmen or before the Tribunal, and therefore, are not open to the workmen to challenge. Such a course, he argued,

ther the termination of service was legal or justified. We have, therefore, to proceed on the footing that the Tribunal's conclusion that it was not legal was right.

14. The question, however, still is whether the Tribunal was, in the circumstances of the case justified in directing reinstatement. It is true that some of the decisions of this Court have laid down that where the discharge or dismissal of a workman is not legal or justified, the relief which would ordinarily follow would be reinstatement. The Tribunal, however, has the discretion to award compensation instead of reinstatement if the circumstances of a particular case are unusual or exceptional so as to make reinstatement inexpedient or improper. The Tribunal has therefore, to exercise its discretion judicially and in accordance with well recognised principles in that regard and has to examine carefully the circumstances of each case and decide whether such a case is one of those exceptions to the general rule. If the Tribunal were to exercise its discretion in disregard of such circumstances or the principles laid down by this Court it would be a case either of no exercise of discretion or of one not legally exercised. In either case the High Court in exercise of its writ jurisdiction can interfere and cannot be content by simply saying that since the Tribunal has exercised its discretion it will not examine the circumstances of the case to ascertain whether or not such exercise was properly and in accordance with the well settled principles made. If the High Court were to do so, it would be a refusal on its part to exercise jurisdiction.

15. In the present case, there could be no dispute that the company, in accordance with its practice, called for a verification report about the concerned workman. The report was made by the police after investigation and on that being adverse, the company's security officer recommended to the company that it was not in the interests of the company to retain the workman's services. There can be no doubt that the company terminated the service of the workman only because it felt that it was not desirable for reasons of security to continue the workman in its service. This is clear from the fact that it was otherwise not interested in terminating the workman's service and had in fact insisted that the workman should bind himself to serve it at least for five years. The termination

of service was not on account of victimisation or unfair labour practice as was clearly found by the Tribunal. It is, therefore, abundantly clear that the company passed the impugned order of termination of service on account of the said adverse report; the recommendation of its own security officer and on being satisfied that it would not be in the company's interests to continue him in its service.

16. The Tribunal no doubt felt that it was not established whether the investigation and the report following it were properly done and made, that the company ought to have disclosed it to the workman and given him an opportunity to vindicate himself and that the non-disclosure of the report made the termination illegal and unjustified. That may or may not be right. But what was relevant, at the stage when the Tribunal came to decide what relief the workman was entitled to, was the question whether the management genuinely apprehended as a result of the report that it would be risky to retain the workman in the company's service. They may have gone wrong in the manner of terminating the workman's service as held by the Tribunal. But, if the management truly believed that it was not possible to retain the workman in the company's service on grounds of security and consequently could not place confidence in him any longer, the present case would be one of those exceptional cases where the general rule as to reinstatement could not properly be applied. This of course does not mean that in every case where the employer says that he has lost confidence in the workman, and therefore, has terminated his service that reinstatement cannot be granted and the Tribunal has to award compensation. On the other hand, if on an examination of all the circumstances of the case, the Tribunal comes to the conclusion that the apprehensions of the employer were genuine and the employer truly felt that, it was hazardous or prejudicial to the interests of the industry to retain the workman in his service on grounds of security, the case would be properly one where compensation would meet the ends of justice.

17. On a consideration of all the circumstances, the present case, in our view was one such case. The Tribunal exercised its discretion mechanically without weighing the circumstances of the case. That was no exercise of discretion at all. There is ample authority to the effect

that if a statutory tribunal exercises its discretion on the basis of irrelevant considerations or without regard to relevant considerations, certiorari may properly issue to quash its order. (See *S. A. de Smith, Judicial Review of Administrative Action*, (2nd ed.) 324-325). One such relevant consideration, the disregard of which would render its order amenable to interference, would be the well settled principles laid down in decisions binding on the tribunal to whom the discretion is entrusted. The refusal by the High Court to interfere was equally mechanical and amounted to refusal to exercise its jurisdiction. Its order, therefore, becomes liable to interference.

18. There is, therefore, no difficulty in holding that the order of reinstatement passed by the Tribunal was liable to be quashed and that the High Court erred in refusing to interfere with it merely on the ground that it could not do so as it was a case where the Tribunal had exercised its discretion. The question next is, having held that the order of reinstatement was not a proper order, in that, it was not in consonance with the decided cases, do we simply quash the order of the Tribunal and that of the High Court and leave the concerned workman to pursue his further remedy? The other alternative would be to remand the case to the Tribunal to pass a suitable order. In either case, in view of this judgment, no other order except that of compensation can be obtained by him. If the case is remanded and the Tribunal on such remand passes an order of compensation and fixes the amount such a course would mean further proceedings and a possible appeal. That would mean prolonging the dispute, which would hardly be fair to or conducive to the interests of the parties. In these circumstances we decided that it would be more proper that we ourselves should determine the amount of compensation which would meet the ends of justice. Having come to that conclusion, we heard counsel for both the parties. After doing so and taking into consideration all the facts and circumstances of the present case we have come to the conclusion in the light also of the decisions of this Court such as *Assam Oil Co. v. Its Workmen*, 1960-3 SCR 457 = (AIR 1960 SC 1264), *Utkal Machinery Ltd. v. Workmen*, 1966-2 SCR 434 = (AIR 1966 SC 1051) and the recent case of *C. A. No. 1735 of 1969, D/- 12-9-1969 (SC)* that compensation for a period of two years at

the rate of Rs. 160 per month, that being the last salary drawn by the concerned workman, would meet the ends of justice.

19. We accordingly allow the appeal, quash the order of the Tribunal and the High Court and instead direct the appellant-company to pay to the 1st respondent Rs. 3840 as and by way of compensation. There will be no order of costs.

Appeal allowed.

AIR 1970 SUPREME COURT 1407

(V 57 C 300)

(From (1) Central Govt. Labour Court, Delhi*; (2) Addl. Indl. Tri. Delhi**; (3) 1970 Lab I. C. 105 (Pat.))

M. HIDAYATULLAH, C. J., J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.

Civil Appeal No. 1705 of 1969.

The Management of Safdar Jung Hospital, New Delhi, Appellant v. Kuldip Singh Sethi, Respondent.

Civil Appeal No. 1781 of 1969.

Management of M/s. T. B. Hospital, New Delhi, Appellant v. The Workmen, Respondents.

And

Civil Appeal No. 1777 of 1969.

The Kurji Holy Family Hospital through the Administration, Appellant v. State of Bihar and others, Respondents.

Civil Appeals Nos. 1705, 1781 and 1777 of 1969, D/- 1-4-1970.

(A) Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — To constitute industry there must be collective enterprise in which employers follow their avocations detailed in definition and employ workmen to fulfil their occupations.

An 'industry' as defined in Sec. 2 (j) exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocations as detailed in the definition and employ workmen who follow one of the avocations detailed for workmen.

(Para 11)

*Central Govt. Labour Court, Delhi, D/- 21-2-1969.

**Addl. Industrial Tri. Delhi, D/- 24-2-1969.

But every case of employment is not necessarily productive of an industry. Domestic employment, administrative services of public officials, service in aid of occupations of professional men, also disclose relationship of employers and employees but they cannot be regarded as in the course of industry. (Para 12)

(B) Industrial Disputes Act (1947), Section 2 (k) — Essential of an industrial dispute.

Before an industrial dispute as defined in Section 2 (k) can be raised there must be first established a relationship of employers and employees associating together, the former following a trade, business, manufacture, undertaking or calling of employers in the production of material goods and material services and the latter following any calling, service, employment, handicraft, or industrial occupation or avocation of workmen in aid of the employers' enterprise. It is not necessary that there must be a profit motive but the enterprise must be analogous to trade or business in a commercial sense. (Para 19)

(C) Industrial Disputes Act (1947), Section 2 (s) — Workman — Word 'industry' in definition of workman must take colour from definition of that term in Section 2 (j). (Para 12)

(D) Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — Test to determine — Hospital or nursing home or dispensary — When can be treated as industry — AIR 1960 SC 610, Overruled.

Before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking resulting in material goods or material services. AIR 1968 SC 554, Foll.

(Para 20).

If a hospital, nursing home or dispensary is run as a business in a commercial way there may be found elements of an industry there. Then the hospital is more than a place where persons can get treated for their ailment. It becomes a business. (Para 21)

Hospitals run by Government and even by private associations, not on commercial lines but on charitable lines or as part of the functions of Government Department of Health cannot be included in the definition of industry. The first and the second parts of the definition are not to be read in isolation as if they were different industries but only as aspects of the occupation of employers and

employees in an industry. They are two counterparts in one industry. AIR 1960 SC 610, Overruled. (Para 22)

(E) Industrial Disputes Act (1947), Section 2 (n), Sch. I, Item 9 — Public utility service — Heading of Sch. I and Cl. (VI) of Section 2 (n) presuppose existence of industry which may be notified as public utility service for special protection under Act — Hence 'services in Hospitals and dispensaries' contemplated by Sch. I Item 9 can be declared to be public utility service only if they satisfy the test of industry. (Paras 25 to 28)

(F) Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — Safdar Jung Hospital, New Delhi is not industry — It is a department of Government — It is not embarked on economic activity analogous to trade or business — Order of Central Government Labour Court, Delhi, D/- 21-2-1969, Reversed. (Para 30)

(G) Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — Tuberculosis Hospital, New Delhi is not an industry — It is wholly charitable and its dominant purpose is research and training — Order of Additional Industrial Tribunal, Delhi, D/- 24-2-1969, Reversed. (Para 32)

(H) Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — Kurji Family Hospital is not an industry — It is entirely charitable institution carrying on work of training, research and treatment — 1970 Lab IC 105 (Pat.). Reversed. (Para 33)

Cases Referred: Chronological Paras

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|---|-------------------------------|
| (1969) AIR 1969 SC 276 (V 56) = | |
| 1969 Lab IC 458, Cricket Club of India v. Bombay Labour Union | 18 |
| (1969) 1969-1 WLR 697, Hotel and Catering Industry Training Board v. Automobile Proprietary Ltd. | 18 |
| (1968) AIR 1968 SC 554 (V 55) = | |
| (1968) 1 SCR 742 = 1968 Lab IC 547, Secy. Madras Gymkhana Club Employees Union v. Management of the Gymkhana Club | 5, 6, 7, 8, 10, 13, 18, 20 |
| (1963) AIR 1963 SC 1873 (V 50) = | |
| (1964) 2 SCR 703, University of Delhi v. Ramnath | 17 |
| (1962) AIR 1962 SC 1080 (V 49) = | |
| (1962) Supp 3 SCR 157, National Union of Commercial Employees v. M. R. Meher | 17 |
| (1960) AIR 1960 SC 610 (V 47) = | |
| (1960) 2 SCR 866, State of Bombay v. Hospital Mazdoor Sabha | 3, 4, 5, 6, 8, 17, 21, 22, 23 |

(1943) 1943 AC 166 = 111 LJ KB
674, National Association of Local
Govt. Officers v. Bolton Corpo-
ration

26 CLR 508, Federated Municipal
and Shire Council Employees of
Australia v. Melbourne Corpora-
tion

The following Judgment of the Court
was delivered by

HIDAYATULLAH, C. J.: This judg-
ment will dispose of Civil Appeals Nos.
1705 of 1969, 1781 of 1969 and 1777 of
1969. The first is an appeal by the
Management of Safdarjung Hospital,
New Delhi. The second by the Manage-
ment of Tuberculosis Hospital, New Delhi
and the third by the Kurji Holy Family
Hospital, Patna. The first two are filed
by special leave and the third by certi-
ficate. They call in question respectively
the order of the Central Government
Labour Court, Delhi dated 21st February,
1969 on an application under Sec. 33C (2)
of the Industrial Disputes Act, 1947, the
order of the Presiding Officer, Additional
Industrial Tribunal, Delhi dated 24th
February, 1969 and the judgment and
order dated 21st February, 1969 of the
Patna High Court. They raise a common
question of law whether these several
hospitals can be regarded as industries
within the meaning of the term in the
Industrial Disputes Act. They also raise
different questions on merits which will
be considered separately. The facts of
the three cases may be noticed briefly
before we begin to examine the common
question of law mentioned above.

C. A. No. 1705 of 1969.

2. The Management of Safdarjung
Hospital, New Delhi was the respondent
in a petition under Section 33C (2) of
the Industrial Disputes Act 1947 in a
petition by the present respondent Kuldip
Singh Sethi, a Lower Division Clerk in
the Hospital, for computation of the
amount of salary etc. due to him in the
pay scale of store-keepers. Kuldip Singh
Sethi was appointed as a Store-keeper on
October 26, 1956 in the pay scale of
Rs. 60-5-75. This scale was revised to
Rs. 110-180 on July 1, 1959 in accordance
with the recommendations of the Second
Pay Commission. Two or three months
later the pay was re-fixed and the time
scale was Rs. 110-131 with usual allow-
ances. On July 1, 1962 his basic pay was
fixed at Rs. 131. On November 26, 1962
the Government of India in the Ministry
of Health re-revised the pay scales of

Store-keepers to Rs. 130-5-160-8-200-EB
-8-280-10-300 with the usual allowances.
The order was to take effect from the
date of issue. Kuldip Singh Sethi complain-
ed by his petition that the Management of
the Hospital had failed to give him pay
in this scale and claimed Rs. 914 for the
period November 26, 1962 to May 31,
1968.

3. In reply to his petition the Manage-
ment contended that Kuldip Singh Sethi
was not a workman but a Government
servant governed by the Conditions of
Service for Government Servants and
hence he could not invoke the Industrial
Disputes Act since the Safdarjung Hospi-
tal was not an industry. The Tribunal,
following the decision of this Court in
State of Bombay v. Hospital Mazdoor
Sabha, (1960) 2 SCR 866 = (AIR 1960 SC
610) has held that the Hospital is an 'in-
dustry', that Kuldip Singh Sethi is a
'workman' and hence he is entitled to
take recourse to Section 33C (2) of the
Industrial Disputes Act. On merits his
claim is found sustainable and he is given
an award for Rs. 914. We need not men-
tion at this stage the grounds on which
the merits of his claim are resisted. The
point of law that arises in the case is
whether the Safdarjung Hospital can be
properly described as an 'industry' as de-
fined in the Industrial Disputes Act.

C. A. No. 1781 of 1969.

4. In this case there is a dispute be-
tween the Management of the Tuber-
culosis Hospital, New Delhi, and its
workmen represented by the Aspatal
Karmachari Panchayat regarding pay
scales, and other facilities demanded by
the workmen. The Management has
taken the preliminary objection that the
Industrial Disputes Act does not apply
since the Hospital is not an industry and
is not run as such. The Management,
therefore, questions the reference to the
Tribunal under Section 10 (1) (d) of the
Industrial Disputes Act. A preliminary
issue is raised: "Is T. B. Hospital an
industry or not?" In support of the case
that the Hospital is not an industry, the
Management emphasises the functions of
the Hospital. It is pointed out that the
Hospital is run by the Tuberculosis Asso-
ciation of India as a research institute
where training is given to Medical gra-
duates of the Delhi University for the
D. T. C. D. and D. C. H. Courses, and
post-graduates and under-graduates of the
All India Institute of Medical Sciences
are also provided training and nurses

from the Delhi College of Nursing, Safdarjung, Lady Hardinge and Holy Family Hospitals receive training. The Hospital, it is admitted, has paid and unpaid beds but it is submitted that treatment of Tuberculosis is a part of the research and training and education, and, therefore, the Hospital has affinity to a University and not to a Hospital proper. It is, therefore, contended that this Hospital is not an industry. The Tribunal holds that neither the research carried on, nor the training imparted, nor the existence of the Tuberculosis Association of India with which the Hospital is affiliated makes any difference and the case falls within the ruling of this Court in the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610). The Tribunal holds the Tuberculosis Hospital, New Delhi to be an industry.

C. A. No. 1777 of 1969.

5. The appeal arises from a writ petition filed in the High Court of Patna. The Kurji Holy Family Hospital took disciplinary action against two of its employees and the matter was taken up by the Kurji Holy Family Hospital Employees Association and the State of Bihar made a reference to the Labour Court, Patna under Section 10 of the Industrial Disputes Act. Before the Tribunal, the Management of the Hospital took the objection inter alia that a hospital was neither a trade nor a business, nor an industry as defined in the Industrial Disputes Act and as such the provisions of the Industrial Disputes Act were not applicable and the reference was incompetent. The High Court holds this point against the Management, following the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610). The later case of this Court reported in Seey. Madras Gymkhana Club Employees Union v. Management of the Gymkhana Club, (1968) 1 SCR 742 = (AIR 1968 SC 554) is held not to have weakened the effect of the decision in the case relied upon.

6. It is thus that the three cases came before us and were heard together. Counsel in these cases submit that the ruling in the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) has now been considerably shaken by the pronouncement in the Madras Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554) where it was observed that the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) was one which might be said to be on

the verge and that there were reasons to think that it took an extreme view of an industry. Relying on this observation, counsel in the three appeals asked for a reconsideration of the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) although they conceded that it was not yet overruled. We accordingly heard arguments on the general question whether a hospital can be said to be an industry falling within the Industrial Disputes Act and under what circumstances. We also heard arguments on the merits of the appeals to determine whether the decisions rendered therein could be upheld even if the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) was held applicable. We shall follow the same course here. We shall first consider the general proposition whether a hospital can be considered to fall within the concept of industry in the Industrial Disputes Act and whether all hospitals of whatever description can be covered by the concept or only some hospitals under special conditions. We shall then consider the merits of the individual cases in so far as may be necessary.

7. The Industrial Disputes Act was construed in the past on more than one occasion by this Court. A fairly comprehensive summary of the various cases with the ratio decidendi of those cases is to be found in the Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554). The tests applied to find out whether a particular establishment falls within the definition of 'industry' or not were not found to be uniform and disclosed a pragmatic approach to the problem. This Court, therefore, in Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554) fell back upon the statute for guidance pointing out that they were not concerned with a popular phrase but one which the statute had with great particularity defined itself. Examining the content of the definitions this Court came to certain conclusions and held in their light that a non-proprietary members' Club was not an industry.

8. The reasoning in the Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554) formed the basis of an attack on the former ruling in the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) by the Managements of the three Hospitals which are appellants here. The other side relied upon the ruling and the amendment of

the Industrial Disputes Act by which 'Service in hospitals and dispensaries' has now been added as Item No. 9 in the First Schedule, as one of the industries which may be declared to be public utility services under sub-clause (vi) of Clause (n) of Section 2 of the Act. It is claimed that this is a legislative determination of the question whether hospital is an industry or not. It has, therefore, become necessary to cover some of the grounds covered in the Gymkhana Club case, (1968). 1 SCR 742 = (AIR 1968 SC 554). To begin with we may once again refer to the relevant definitions contained in the Act for they must necessarily control our discussion.

9. The Industrial Disputes Act, as its title and indeed its whole tenor disclose, was passed to make provision for the investigation and settlement of industrial disputes and for certain other purposes appearing in the Act. The term 'industrial dispute' is defined by Section 2 (k) in the following words:

"'industrial dispute' means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

The definition discloses that disputes of particular kinds alone are regarded as industrial disputes. It may be noticed that this definition does not refer to an industry. But the dispute, on the grammar of the expression itself, means a dispute in an industry and we must, therefore, turn to the definition of 'industry' in the Act. That word is defined in Clause (j) and reads:

"'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

This definition is in two parts. The first part says that it 'means' (Original underlined, printed in this report in quotation marks—Ed.) any business, trade, undertaking, manufacture or calling of employers and then goes on to say that it 'includes' (Original underlined, printed in this report in quotation marks—Ed.) any calling, service, employment, handicraft or industrial occupation or avocation of workmen.

10. In dealing with this definition this Court in the Gymkhana Club case, (1968)

1 SCR 742 = (AIR 1968 SC 554) attempted to keep the two notions concerning employers and employees apart and gave the opinion that the denotation of the term 'industry' is to be found in the first part relating to employers and the full connotation of the term is intended to include the second part relating to workmen. It was, therefore, concluded:

"If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot define 'industry'..... By the inclusive part of the definition the labour force employed in an industry is made an integral part of the industry for purposes of industrial disputes although industry is ordinarily something which employers create or undertake."

11. These observations need to be somewhat qualified. It is to be noticed that this definition modifies somewhat the definition of 'industry' in Section 4 of the Commonwealth Conciliation and Arbitration Act (1909-1910) (Acts Nos. 13 of 1904 and 7 of 1910) of Australia where the definition reads:

"'industry' means business, trade, manufacture, undertaking, calling, service or employment, on land or water, in which persons are employed for pay, hire, advantage or reward, excepting only persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."

Although the two definitions are worded differently the purport of both is the same. It is not necessary to view our definition in two parts. The definition read as a whole denotes a collective enterprise in which employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocations as detailed in the definition and employ workmen who follow one of the avocations detailed for workmen. The definition no doubt seeks to define 'industry' with reference to employers' occupation but includes the em-

ployees, for without the two there can be no industry. An industry is only to be found when there are employers and employees, the former relying upon the services of the latter to fulfil their own occupations.

12. But every case of employment is not necessarily productive of an industry. Domestic employment, administrative services of public officials, service in aid of occupations of professional men, also disclose relationship of employers and employees but they cannot be regarded as in the course of industry. This follows from the definition of 'workman' in the Act defined in Clause (s) which reads:

"'workman' means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Army Act, 1950 or the Air Force Act, 1950 or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service, or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

The word 'industry' in this definition must take its colour from the definition and discloses that a workman is to be regarded as one employed in an industry if he is following one of the vocations mentioned in conjunction with his employers engaged in the vocations mentioned in relation to the employers.

13. Therefore an industry is to be found when the employers are carrying on any business, trade, undertaking, manufacture or calling of employers. If they are not, there is no industry as such. What is meant by these expressions was discussed in a large number of cases

which have been considered elaborately in the Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554). The conclusion in that case may be stated:

"Primarily, therefore, industrial disputes occur when the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expressions trade, business and manufacture."

The words 'trade', 'business', 'manufacture' and 'calling' were next explained thus:

"The word 'trade' in this context bears the meaning which may be taken from Halsbury's Laws of England, Third Edn. vol. 38 p. 8—

(a) exchange of goods for goods or goods for money;

(b) any business carried on with a view to profit, whether manual, or mercantile, as distinguished from the liberal arts or learned professions and from agriculture; and business means an enterprise which is an occupation as distinguished from pleasure. Manufacture is a kind of productive industry in which the making of articles or material (often on a large scale) is by physical labour or mechanical power. Calling denotes the following of a profession or trade."

14. It may be added here that in National Association of Local Government Officers v. Bolton Corporation, 1943 AC 166 at page 183 et seq Lord Wright observes that 'trade' is a term of the widest scope. This is true. We speak of the occupation of men in buying and selling; barter or commerce as trade. We even speak of work, especially of skilled work as a trade, e. g. the trade of goldsmiths. But the word as used in the statute must be distinguished from professions although even professions have 'trade unions'. The word 'trade' includes persons in a line of business in which persons are employed as workmen. Business too is a word of wide import. In one sense it includes all occupations and professions. But in the collocation of the terms and their definitions these terms have a definite economic content of a particular type and on the authorities of this Court have been uniformly accepted as excluding professions and are only

concerned with the production, distribution and consumption of wealth and the production and availability of material services. Industry has thus been accepted to mean only trade and business, manufacture, or undertaking analogous to trade or business for the production of material goods or wealth and material services.

15. Why professions must be held outside the ambit of industry may be explained. A profession ordinarily is an occupation requiring intellectual skill, often coupled with manual skill. Thus a teacher uses purely intellectual skill while a painter uses both. In any event, they are not engaged in an occupation in which employers and employees co-operate in the production or sale of commodities or arrangement for their production or sale or distribution and their services cannot be described as material services.

16. What is meant by 'material services' needs some explanation too. Material services are not services which depend wholly or largely upon the contribution of professional knowledge, skill or dexterity for the production of a result. Such services being given individually and by individuals are services no doubt but not material services. Even an establishment where many such operate cannot be said to convert their professional services into material services. Material services involve an activity carried on through co-operation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what these men do but upon the productivity of a service organised as an industry and commercially valuable. Thus the services of professional men involving benefit to individuals according to their needs, such as doctors, teachers, lawyers, solicitors etc., are easily distinguishable from an activity such as transport service. The latter is of a commercial character in which something is brought into existence quite apart from the benefit to particular individuals. It is the production of this something which is described as the production of material services.

17. Mr. Ramamurti arguing against the Hospitals drew our attention to Citrine's book 'Trade Union Law' (3rd Edn. p. 609) where the author observes;

"However, whilst the words 'trade' and 'industry' are separately capable of a wide interpretation, when they occur in conjunction the tendency of the courts is to give them a narrow one."

He cites the House of Lords case to which we have referred and criticises the tendency of the courts to narrow the meaning of the expressions 'industry' and 'workman'. He says that this narrow interpretation unnecessarily excludes from workmen teachers employed by local authorities, university employees, nurses and others employed under the National Health Service, the domestic staff of the Houses of Parliament and Civil Servants who are not employed in "trading" or "industrial undertaking". He includes all these in the definitions because a person doing the same type of work for a commercial undertaking is within the definition. According to him any person gainfully employed must be within the definition. On the strength of this definition Mr. Ramamurti also contends that not the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) but the earlier cases of this Court such as University of Delhi v. Ramnath, (1964) 2 SCR 703 = (AIR 1963 SC 1873) and National Union of Commercial Employees v. M. R. Meher, (1962) Supp 3 SCR 157 = (AIR 1962 SC 1080) must be reconsidered and overruled.

18. The reason for these cases, as also the Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554) lies in the kind of establishment with which we are concerned. The Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554) of this Court (followed and applied in Cricket Club of India v. Bombay Labour Union, AIR 1969 SC 276) has held that non-profit making members' clubs are not employed in trade or industry and their employees are not entitled to engage in trade disputes with the clubs. This view finds support from Hotel and Catering Industry Training Board v. Automobile Proprietary Ltd., (1969) 1 WLR 697 HL(E) (Affirming (1968) 1 WLR 1526 and (1968) 3 All ER 399 C. A.). The Solicitors case cited by Mr. Ramamurti was so decided because there the services rendered by the employees were in aid of professional men and not productive of material goods or wealth or material services. The other case of University was also decided, as it was, for the same reason.

19. It, therefore, follows that before an industrial dispute, can be raised be-

tween employers and their employees or between employers and employees or between employees and employees in relation to the employment or non-employment or the terms of employment or with the conditions of labour of any person, there must be first established a relationship of employers and employees associating together, the former following a trade, business, manufacture, undertaking or calling of employers in the production of material goods and material services and the latter following any calling, service, employment, handicraft, or industrial occupation or avocation of workmen in aid of the employers' enterprise. It is not necessary that there must be a profit motive but the enterprise must be analogous to trade or business in a commercial sense.

20. We do not find it necessary to refer to the earlier cases of this Court from which these propositions have been deduced because they are all considered in the Gymkhana Club case, (1968) 1 SCR 742 = (AIR 1968 SC 554). We accept the conclusion in that case that

".....before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking resulting in material goods or material services."

21. We may now consider closely the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) and the reasons for which it was held that the workmen employed in a hospital were entitled to raise an industrial dispute. We may say at once that if a hospital, nursing home or dispensary is run as a business in a commercial way there may be found elements of an industry there. Then the hospital is more than a place where persons can get treated for their ailment. It becomes a business.

22. In the Hospital Mazdoor Sabha case, (1960) 2 SCR 866 = (AIR 1960 SC 610) hospitals run by Government and even by private associations not on commercial lines but on charitable lines or as part of the functions of Government Department of Health, were held included in the definition of industry. The reason given was that the second part of the definition of industry contained an extension of the first part by including other items of industry. As we have pointed out the first and the second parts of the definition are not to be read in

isolation as if they were different industries but only as aspects of the occupation of employers and employees in an industry. They are two counterparts in one industry. The case proceeds on the assumption that there need not be an economic activity since employment of capital and profit motive were considered unessential. It is an erroneous assumption that an economic activity must be related to capital and profit-making alone. An economic activity can exist without the presence of both. Having rejected the true test applied in other cases before, the test applied was 'can such activity be carried on by private individuals or group of individuals?'. Holding that a hospital could be run as a business proposition and for profit, it was held that a hospital run by Government without profit must bear the same character. With respect, we do not consider this to be the right test. That test was employed to distinguish between the administrative functions of Government and local authorities and their functions analogous to business but it cannot be used in this context. When it was emphasised in the same case that the activity must be analogous to business and trade and that it must be productive of goods or their distribution or for producing material services to the community at large or a part of it, there was no room for the other proposition that privately run hospitals may in certain circumstances be regarded as industries. The expression 'satisfying material human needs' was evolved which bore a different meaning. These observations were apparently based on the observations of Isaacs and Rich, JJ. in *Federated Municipal and Shire Council Employees of Australia v. Melbourne Corporation*, 26 CLR 508 but they were:

"Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants and desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the produce or any other terms and conditions of their co-operation.... The question of profit making may be important from an income-tax point of view as in many municipal cases in England; but, from an industrial dispute point of view, it cannot matter whether the expenditure is met by fares from passengers or from rates."

The observations in the Australian case only indicate that in those activities in which government takes to industrial ventures, the notion of profit-making and the absence of capital in the true sense of the word is irrelevant. The passage itself shows that industrial disputes occur in operation in which employers and employees associate to provide what people want and desire in other words where there is production of material goods or material services. In our judgment the Hospital Mazdoor Sabha case (1960) 2 SCR 866= (AIR 1960 SC 610) took an extreme view of the matter which was not justified.

23. It is argued that after the amendment of the Industrial Disputes Act by which 'service in hospitals and dispensaries' is included in public utility services, there is no scope for saying that hospitals are not industries. It is said that Parliament has accepted that the definition is suited to include a hospital. This contention requires close attention in view of the fact that it was noticed in the Hospital Mazdoor Sabha case, (1960) 2 SCR 866= (AIR 1960 SC 610) although that arose before the amendment.

24. A public utility service is defined in the Act by merely naming certain services. It will be noticed that these services are:

- (i) any railway service or any transport service for the carriage of passengers or goods by air;
 - (ii) any section of any industrial establishment on the working of which the safety of the establishment or the workmen employed therein depends;
 - (iii) any postal, telegraph or telephone service;
 - (iv) any industry which supplies power, light or water to the public;
 - (v) any system of public conservancy or sanitation;
- After naming these services the definition adds
- (vi) any industry specified in the First Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the official gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification.

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months, at any one

time if in the opinion of the appropriate Government public emergency or public interest requires such extension.

25. The intention behind this provision is obviously to classify certain services as public utility services with special protection for the continuance of those services. The named services in the definition answer the test of an industry run on commercial lines to produce something which the community can use. These are brought into existence in a commercial way and are analogous to business in which material goods are produced and distributed for consumption.

26. When Parliament added the sixth clause under which other services could be brought within the protection afforded by the Act to public utility services, it did not intend that the entire concept of industry in the Act, could be ignored and anything brought in. Therefore it said that an 'industry' (underlined in original, printed in single quotation marks in this report—Ed.) could be declared to be a public utility service. But what could be so declared had to be an industry in the first place. We are concerned with the addition of Item 9 'service in hospitals and dispensaries'. The heading of the First Schedule speaks again of industries which may be declared to be public utility services. The original entries were five and they read:

1. Transport (other than railways for the carriage of passengers or goods, by land, water or air (now air is omitted))
2. Coal
3. Cotton textiles
4. Food-stuffs
5. Iron and steel.

It is obvious that general headings are given here. Coal is not an industry but certain aspects of dealing with coal is an industry and that is what is intended. That dealing must be in an industry in which there are employers and employees co-operating in the production of material goods or material services. Similarly, cotton textiles or food-stuffs or iron and steel, as the entries stand, are not industries. Therefore the heading of the First Schedule and the words of clause (vi) presuppose the existence of an industry which may be notified as a public utility service, for special protection under the Act.

27. Therefore when the list was expanded in the First Schedule and certain services were mentioned, the intention

could not be otherwise. The list was extended to 10 items by amendment of the Act by Act 36 of 1956 with effect from March 10, 1957. The new items are (a) Banking, (b) Cement, (c) Defence Establishments, (d) Service in hospitals and dispensaries, and (e) Fire Brigade Service. Later by notifications issued under Section 40 of the Act nine more items were added. Section 40 gives to Governments the power to add to the Schedule. They are (a) Indian Government Mints, (b) India Security Press, (c) Copper Mining, (d) Lead Mining, (e) Zinc Mining, (f) Iron ore mining, (g) Service in any oil field, (h) Any service in, or in connection with, the working of any major port or dock and (i) Service in the Uranium Industry. It is easy to see that most of them are items in which an industry proper involving trade, business, manufacture or something analogous to business can be found. It is hardly to be thought that notifications can issue in respect of enterprises which are not industries to start with. It is only industries which may be declared to be public services.

28. Therefore to apply the notification, the condition precedent for the existence of an industry has to be satisfied. If there is an industry which falls within the items named in the First Schedule, then alone can it be notified to be classed as a public utility service. The law does not work the other way round that every activity connected with coal becomes an industry and therefore on notification that activity becomes a public utility service. The same is true of all items including all the services mentioned. They must first be demonstrated to be industries and then the notification will apply to them. To hold otherwise would largely render useless all the definitions in the Act regarding industry, industrial disputes etc., in relation to the scheduled items. Parliament has not attempted to declare that notwithstanding the definitions of 'industry', 'industrial disputes', 'workman' and 'employer', every hospital is to be regarded as an industry. All that has been provided is that an 'industry' may be notified as a public utility service. That is insufficient to convert non-industries under the Act to industries.

29. We now take up the individual cases.

C. A. No. 1705 of 1969.

30. It is obvious that Safdarjung Hospital is not embarked on an economic activity which can be said to be analo-

gous to trade or business. There is no evidence that it is more than a place where persons can get treated. This is a part of the functions of Government and the Hospital is run as a Department of Government. It cannot, therefore, be said to be an industry.

31. In this case the petitioner chose to be a Lower Division Clerk. The amount of security which he had to furnish in the job of a Store-keeper was also refunded to him. He had applied for the post on May 31, 1962. On July 14, 1962 he again drew attention to his application. His application was recommended on August 9, 1962. It was only after November 26, 1962 when the scale of Store-keepers was raised to Rs. 130-300 that he changed his views. On December 12, 1962 he made a representation but in forwarding it the Medical Superintendent said that the incumbents of the posts of Store-keepers could not be given the up-graded scale of Rs. 130-300. In addition there were certain matters pending against him which precluded his appointment in that scale. On August 11, 1966, the Director-General wrote:

"With reference to your letter No. 1-20/62-Estt., dated the 4th January, 1966 and subsequent reminder of even number dated the 24th May, 1966, on the subject noted above, I am directed to say that a reference was made to the Government of India in the Ministry of Health and Family Planning, New Delhi who have stated that it was not intended that the revised scale of Rs. 110-131 (previous scale of Rs. 60-70) should be further revised to Rs. 130-300 as all incumbents of the posts carrying the pay scale of Rs. 110-131 were promoted from Class IV and did not possess the requisite qualifications prescribed for posts carrying pay scale of Rs. 130-300.

In view of the position stated above further action in the matter may kindly be taken in the light of the above remarks and store-keepers concerned informed accordingly."

In view of these facts it is hardly necessary to refer to the reports about the work of Kuldip Singh Sethi and other matters which came in his way of promotion. Both on the question of law decided by us and on the merits of his case, Kuldip Singh Sethi was not entitled to the pay scale of store-keepers and the award of Rs. 914/- in his favour was wrong. The appeal is allowed. The order is set aside but there will be no order about costs.

C. A. No. 1781 of 1969.

32. The Tuberculosis Hospital is not an independent institution. It is a part of the Tuberculosis Association of India. The hospital is wholly charitable and is a research institute. The dominant purpose of the Hospital is research and training, but as research and training cannot be given without beds in a hospital, the hospital is run. Treatment is thus a part of research and training. In these circumstances, the Tuberculosis Hospital cannot be described as an industry. The order of the Additional Industrial Tribunal, Delhi on the preliminary point must be reversed. The reference to the Tribunal under Section 10 (1) (d) of the Industrial Disputes Act was incompetent. The appeal is allowed but we make no order about costs.

C. A. No. 1777 of 1969.

33. The objects of the Kurji Holy Family Hospital are entirely charitable. It carries on work of training, research and treatment. Its income is mostly from donations and distribution of surplus as profit is prohibited. It is, therefore, clear that it is not an industry as laid down in the Act. The reference made by the State Government, Bihar was thus incompetent. The appeal will be allowed. There will be no order about costs, except in the first case (C. A. 1705/69) in which the earlier order of this Court shall be given effect to.

Appeals allowed.

AIR 1970 SUPREME COURT 1417
(V 57 C 301)

(From: Calcutta)

J. C. SHAH AND K. S. HEGDE, JJ.
Corporation of Calcutta, Appellant v.
Life Insurance Corporation of India, Res-
pondent.

Civil Appeal No. 1559 of 1966, D/- 9-4-1970.

(A) Municipalities — Calcutta Municipal Corporation Act (33 of 1951), Section 168 (1) and Proviso — Amount of consolidated rate, how to be fixed — Determination of annual value of premises — Maximum limit is annual standard rent — No order fixing standard rent under Section 9 of West Bengal Premises Rent Control (Temporary Provisions) Act (1950) passed — Maximum limit of annual value is still annual standard rent.

EN/EN/B783/70/CWM/D

In determining the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, the statutory limitation of rent circumscribes the scope of the bargain in the market and in no circumstances the hypothetical rent may exceed the limit. In determining the annual value of the land or building for the purpose of ascertaining the consolidated rate, therefore the standard rent is the maximum amount which can be taken into account. AIR 1962 SC 151, Rel. on.

(Paras 4 and 7)

It cannot be said that the gross rent for which the land or building might reasonably be expected to let is subject to the maximum limit of the annual standard rent, only in those cases in which standard rent under Section 9 of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950 is fixed by order of the Controller, as envisaged by the proviso to Section 168, and that where no such standard rent is fixed by order of the Controller, the assessing authority is in determining the annual value, competent to take into account all relevant circumstances including the rent at which the premises were or could be sublet. Even if there is no order of the Controller fixing standard rent under Section 9 the standard rent stands determined by the definition of that expression in Section 2-(10) (b) of that Act.

(Paras 6 and 8)

(B) Municipalities — Calcutta Municipal Corporation Act (33 of 1951), Section 193 — Apportionment of consolidated rate — Determination of annual value for quantum of consolidation rate — Section not relevant for determining annual value.

Under the Act the quantum of the consolidated rate depends upon the annual value of land or building on the gross rent for which the land or building might reasonably be expected to let, and not the gross rent at which the subordinate interest of a tenant may be expected to sublet. In determining the assessment of annual value, the assessing authority is not concerned with the rent which the tenant may receive from his sub-tenant. It is the gross rent which the owner may realise by letting the land or building under a bargain uninfluenced by extraneous considerations which determines the annual value. Section 193 only provides for apportionment of consolidated rates. It is irrelevant in determining annual value.

(Para 9)

Cases Referred: Chronological Paras
 (1962) AIR 1962 SC 151 (V-49)=
 (1962) 3 SCR 49, Corporation of
 Calcutta v. Smt. Padma Debi
 3, 4, 6, 7

The following Judgment of the Court was delivered by

SHAH, J.—Messrs. A. Firpo Ltd., held as tenants premises No. 11, Government Place East, Calcutta, belonging to the Asiatic Assurance Company Ltd. under a lease dated August 6, 1941, at a monthly rental of Rs. 2,000/-. The rent was increased by mutual agreement with effect from November 1953 to Rs. 2,800/- per month. Messrs. A. Firpo Ltd., had sublet a major part of the premises to five different tenants and the aggregate rent received from the sub-tenants amounted to Rs. 4,520/-.

2. The Corporation of Calcutta assessed the annual value of the premises at Rs. 32,076/- for six years prior to April 1, 1955. With effect from April 1, 1955, the Corporation assessed the annual value of the premises at Rs. 62,761/-. The objection raised by the owner against the determination of annual value was rejected by the Special Officer of the Corporation. In appeal by the Life Insurance Corporation of India (which had statutorily acquired the rights of the owner) the Court of Small Causes assessed Rupees 30,240/- as the annual value. The order was confirmed in appeal to the High Court under Section 183 (3) of the Calcutta Municipal Corporation Act, 1951. With certificate granted by the High Court, this appeal has been preferred.

3. In this appeal the Corporation claims that in determining the annual value of the premises the assessing authority was entitled to take into consideration the rental received by Messrs Firpo Ltd. from its sub-tenants. This Court in Corporation of Calcutta v. Smt. Padma Debi, (1962) 3 SCR 49= (AIR 1962 SC 151) a case arising under the Calcutta Municipal Act, 1923 held that in assessing the annual value under Section 127 (a) of the Calcutta Municipal Act, 1923, the rent which the landlord may realise if the house was let is the basis for fixing the annual value of the building; the criterion being the rent realisable by the landlord and not the value of the holding in the hands of the tenant. The test of reasonableness of the gross annual rent at which the building may at the time of assessment reasonably be expected to let in

Section 127 (a) is the rent which the landlord may realise if the house is let under a bargain between a willing lessor and a willing lessee uninfluenced by extraneous considerations, and in determining the reasonableness of the expectation of the landlord in the matter of rent a law which imposes penal consequences cannot be ignored. The law must be taken as one of the circumstances obtaining in the open market placing an upper limit on the rate of rent for which a building can reasonably be expected to let, and since a statutory limitation of rent circumscribes the scope of the bargain in the market, in no circumstances can the hypothetical rent exceed the limit prescribed by the law.

4. It was therefore clearly laid down by this Court in Smt. Padma Debi's case, (1962) 3 SCR 49= (AIR 1962 SC 151) that in determining the annual value of the land or building for the purpose of ascertaining the consolidated rate, the standard rent is the maximum amount which can be taken into account.

5. In the present case the Court of Small Causes and the High Court have determined the annual value on the footing of the standard rent.

6. Counsel for the Corporation, however, contended that the decision in Smt. Padma Debi's case, (1962) 3 SCR 49= (AIR 1962 SC 151) has no application to this case since that case was decided on the interpretation of Section 127 (a) of the Calcutta Municipal Act, 1923, whereas the present case falls to be determined on the interpretation of Section 168 of the Calcutta Municipal Corporation Act, 1951, of which the scheme is different. Section 168 (1) at the relevant time provided:

"For the purpose of assessment to the consolidated rate the annual value of any land or building shall be deemed to be the gross annual rent at which the land or building might at the time of assessment be reasonably expected to let from year to year, less, x x x

Provided that in respect of any land or building the standard rent of which has been fixed under Section 9 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, the annual value thereof shall not exceed the annual amount of the standard rent so fixed."

Counsel urged that under the proviso, gross rent for which the land or building might reasonably be expected to let is subject to the maximum limit of the annual standard rent, only in those cases in which

standard rent under Section 9 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 is fixed by order of the Controller, and since no such standard rent is fixed by order of the Controller, the proviso to Section 168 does not apply, and the assessing authority was in determining the annual value, competent to take into account all relevant circumstances, including the rent at which the premises were or could be sublet.

7. It is true that the assessment of annual value in *Smt. Padma Debi's case*, (1962) 3 SCR 49= (AIR 1962 SC 151) was for the year 1950-51 and Section 127 (a) of the Calcutta Municipal Act, 1923, was in these terms:

"the annual value of land, and the annual value of any building erected for letting purposes or ordinarily let, shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less, xxx" That section did not contain a proviso in the form of the proviso to Section 168 (1) of the Calcutta Municipal Corporation Act, 1951. But the enactment of the proviso does not alter the law. This Court in *Smt. Padma Debi's case*, (1962) 3 SCR 49= (AIR 1962 SC 151) interpreted the words "gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year" in Section 127 (a), and held that in determining the gross annual rent statutory limitation of rent circumscribes the scope of the bargain in the market and therefore in no circumstances the hypothetical rent may exceed the limit.

8. By the addition of the proviso, in our judgment, the meaning of the expression "gross rent at which the land or building might reasonably be expected to let" is not altered. In the present case, there is no order of the Controller fixing standard rent under Section 9 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, but the 'standard rent' stands determined by the definition of that expression in Section 2 (10) (b) of that Act, which provides (omitting parts not relevant):

"'standard rent' in relation to any premises means—

(a) $x \quad x \quad x \quad x \quad x$
(b) where the rent has been fixed under Section 9, the rent so fixed; or at which it would have been fixed if application were made under the said section."

We are therefore of the view that the High Court was right in assessing the annual value on the basis of the standard rent as statutorily determined. It is common ground that the standard rent of the premises was Rs. 2,800/- per month by virtue of the second part of Section 2 (10) (b).

9. It was then urged that in any event where there are different grades of owners of a building, the assessing authority is bound to take into consideration the value to each grade of owner for the purpose of determining the standard rent. It was submitted that qua their sub-tenants Messrs. A. Firpo Ltd., were the owners of the premises and the rent which they received had also to be taken into account in determining the standard rent. Reliance in that behalf was placed upon the definition of "owner" in Section 5 (53) and Section 193 of the Calcutta Municipal Corporation Act, 1951. Section 5 (53) defines "owner" as including "the person for the time being receiving the rent of any land or building or of any part of any land or building, whether on his own account or as agent or trustee for any person or society or for any religious or charitable purpose, or as a receiver or who would so receive such rent if the land, building or part thereof were let to a tenant". Section 193 provides:

"Where there are gradations of owners of any land or building, the Commissioner may, notwithstanding anything contained in Section 191, apportion the owner's share of the consolidated rate in respect of such land or building among such owners in proportion to the amount of the net rent receivable by each of them and thereupon the owner's share of the consolidated rate shall be paid by such owners accordingly.

Explanation.— $x \quad x \quad x$
But under the Act the quantum of the consolidated rate depends upon the annual value of land or building on the gross rent for which the land or building might reasonably be expected to let, and not the gross rent at which the subordinate interest of a tenant may be expected to sublet. In determining the assessment of annual value, the assessing authority is not concerned with the rent which the tenant may receive from his sub-tenant. It is the gross rent which the owner may realize by letting the land or building under a bargain "uninfluenced by extraneous considerations" which determines the annual value. Section 193 only provides for apportionment of consolidated

rate: it is irrelevant in determining annual value.

10. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1420

(V 57 C 302)

(From: Mysore)

J. C. SHAH AND K. S. HEGDE, JJ.

Shop named Kaloji Talusappa Ganga Vathi, Appellant v. Khyanagouda and others, Respondents.

Civil Appeal No. 1621 of 1966, D/- 9-4-1970.

(A) Debt Laws — Hyderabad Money Lenders Act (5 of 1349 Fasli), Section 9 — Suit for recovery of loans — Plaintiff at the date of transaction carrying on business as a money-lender without a licence — Court is bound to dismiss the suit. (Judgment of High Court of Mysore, Affirmed). (Para 5)

(B) Constitution of India, Article 136 — Appeal with special leave — New point — Question whether restrictions imposed upon money-lenders by Hyderabad Money Lenders Act (5 of 1349 Fasli) are unreasonable — Question requiring fresh pleading on questions of fact — Question cannot be allowed to be raised for first time before Supreme Court. (Para 6)

The following Judgment of the Court was delivered by

SHAH, J.:— Against the decree dismissing his suit for recovery of the amount due under a mortgage and a promissory note executed by the defendants, the plaintiff has appealed to this Court with special leave.

2. The plaintiff carries on the business of a money-lender at Raichur which was formerly in the State of Hyderabad, but which is, since the States Reorganization Act, 1956, within the State of Mysore. The plaintiff instituted a suit in the Court of the District Judge, Raichur, against the defendants for a decree for Rs. 17,790/- claiming that the defendants were indebted to the plaintiff for Rs. 6,000/- and interest under a deed of mortgage executed by them on June 20, 1949; Rs. 3,000/- and interest under a promissory note dated September 22, 1956; and certain sums of money under other transactions.

3. The defendants raised several contentions one of which alone is relevant. They contended that at the date of the transactions the plaintiff had not obtained a licence under the Hyderabad Money Lenders Act 5 of 1349 Fasli, and on that account he was not entitled to sue for the amounts due under the mortgage deed and the promissory note.

4. The Trial Court held that the plaintiff's suit for a decree for the amounts due under the mortgage deed and the promissory note was not maintainable. The decree of the Trial Court was confirmed in appeal to the Mysore High Court. The High Court of Mysore confirmed the decree of the Trial Court.

5. The plaintiff was at the date of the transactions in dispute a money-lender as defined in Section 2 (7) of the Hyderabad Money Lenders Act 5 of 1349 Fasli. The relevant provisions of the Act are as follows:

By Section 2 (7) a "money-lender" means "a person including a pawn-broker, who, within the meaning of this Act, only advances loan in the ordinary course of his business or does so along with other businesses, x x x x". By Section 3, insofar as it is relevant, it is provided:

(1) x x x x x
(2) Every money-lender, in order to get his name registered, shall present an application in writing in the prescribed form to the competent officer and the said officer shall on such application being presented, register the applicant's name and grant a licence in the prescribed form and within prescribed period: x x x x x

(5) (a) No money-lender shall carry on in any district the business of money-lending without obtaining a licence provided for in sub-section (2).

(b) If any person contravenes the provisions of clause (a), he shall be punished with rigorous imprisonment for a term which may extend to six months or with fine or with both. x x x
Section 9 provides, insofar as it is material:

"Notwithstanding anything contained in any law for the time being in force, in every suit relating to a loan—

(1) x x x x x
(2) if it is proved that the plaintiff is a money-lender as defined in sub-section (7) of Section 2, but does not hold a licence granted under Section 3, the Court shall dismiss his suit; x x x x x

The plaintiff had not obtained a licence when he advanced money to the defendants on the transactions of mortgage and promissory note. By virtue of sub-s. (5) (a) of S. 3 the plaintiff was prohibited from carrying on in any district the business of money-lending without obtaining a licence provided for in sub-s. (2). Section 9 (2) expressly provides that a suit filed by a money-lender who did not hold a licence granted under S. 3 shall be dismissed. In the present case the plaintiff did not hold any licence. There is no dispute that the amount advanced under the transactions of the mortgage and the promissory note constituted loans. Since the plaintiff was at the date of transactions carrying on business as a money-lender without a licence, the Court was bound to dismiss his suit for recovery of the amounts advanced in the course of his business as a money-lender.

6. It was urged by an application filed in this Court (C. M. P. No. 1744 of 1970) that the plaintiff should be allowed to raise in this Court a contention that the provisions of S. 9 (2) of the Hyderabad Money Lenders Act 5 of 1349 Fasli were unconstitutional and contravened the fundamental rights guaranteed under Arts. 19 (1) (f) and (g) and 31 of the Constitution. In this case, no question of any right to acquire, hold or dispose of property arises, nor of any claim of deprivation of property. In the circumstances the plaintiff cannot obviously claim the guarantee of Arts. 19 (1) (f) and 31. It is true that the Act places a restriction upon a money-lender in carrying on his business in money-lending. But the question whether the restrictions imposed by the Act are not reasonable was never raised in the Court of First Instance and the High Court, and we would not at this late stage be justified in allowing the plaintiff to raise the question which requires a fresh pleading on questions of fact. In order to curb malpractices of the money-lender in the course of his business and to protect unwary debtors, the Legislature has imposed stringent restrictions upon him in requiring him to obtain a licence, maintain and furnish accounts and carry out other obligations. Practically every State in India has enacted statutes imposing restrictions upon money-lenders. Whether the conditions in the State of Hyderabad when

the Act was enacted were so different that it was not necessary to impose restrictions upon the money-lenders can only be decided on a proper plea and on a full consideration thereof after hearing the State.

7. The appeal fails and is dismissed. The respondents have not filed their statement of case, but they have only appeared before this Court at the time of the hearing of the appeal. In the circumstances, there will be no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1421 (V 57 C 303)

(From: Industrial Tribunal Madras)*

J. M. SHELAT, C. A.

VAIDIALINGAM AND I. D. DUA, JJ.

Remington Rand of India Ltd. Appellant v. The Workmen, Respondents.

Civil Appeal No. 1551 of 1966, D/- 17-10-1969.

(A) Payment of Bonus Act (1965) — No retrospective effect — Bonus for 1963-64 — Act does not apply — Bonus payable for that year will have to be calculated on the basis of FB Formula as approved by Supreme Court. I. D. No. 21 of 1965 D/- 28-2-1966 (Ind. Tri. Mad), Reversed; AIR 1967 SC 691, Foll. (Para 3)

(B) Industrial Disputes Act (1947), Sch 3, Item 5 — Company having all India organization — Scheme for medical benefit for its workmen — Calcutta scheme already extended to areas covered by Bangalore, Hyderabad and Kerala branches as it was fair and reasonable — Held there was no reason why Calcutta scheme should not be extended to Madras region also as there was no substantial difference between those areas and Madras region so far as the question of medical benefit to workmen was concerned — Question of ceiling on burden of medical facilities not considered — But certain diseases of contagious and epidemic nature (such as venereal disease, leprosy, small pox, typhoid or cholera) excepted from that scheme. I. D. No. 21 of 1965 D/- 28-2-1966 (Ind. Tri. Mad). Reversed. (Paras 7 & 8)

(C) Industrial Disputes Act (1947), Sch. 3 Item 5 — Gratuity scheme —

*(I. D. No. 21 of 1965 D/- 28-2-1966 — Ind. Tri. Mad.)

EN/EN/F213/69/VBB/P

Gratuity payable in cases of dismissal for misconduct — Provision for forfeiture if misconduct is gross not unreasonable — Longer period of qualifying period in other cases of misconduct reasonable. I. D. No. 21 of 1965, D/- 28-2-1966 (Ind. Tri. Mad), Reversed.

Once the principle that gratuity is paid to ensure good conduct throughout the period that the workman serves his employer is accepted, some distinction in the matter of the qualifying period between cases of resignation and retirement on the one hand and dismissal for misconduct on the other becomes logically necessary. Such a distinction cannot legitimately be assailed as unreasonable. Similarly, if the object underlying schemes of gratuity is to secure industrial harmony and satisfaction among workmen it is impossible to equate cases of death, physical incapacity, retirement and resignation with cases of termination of service incurred on account of misconduct. Besides, a longer qualifying period in the latter cases would ensure restraint against wilful use of violence and force, neglect, etc.

(Para 18)

Though the employer could not deprive the workman of the gratuity in all cases of misconduct, he could do so where it consisted of acts involving violence against the management or other employees or riotous or disorderly behaviour in or near the place of employment. The gratuity scheme could also give right to the employer to deduct from gratuity such amount of loss as is occasioned by the workman's misconduct.

(Para 16)

The scheme could also provide for 15 years continuous service (longer than usual) as the qualifying period for earning gratuity in cases where the service of the employee has been terminated on account of misconduct other than gross. Case law discussed. I. D. No. 21 of 1965, D/- 28-2-1966 (Ind. Tri. Mad), Reversed.

(Para 19)

Cases Ref: Chronological Paras

(1970) AIR 1970 SC 919 (V 57) =

C. A. Nos. 2168, 2569 of 1966

and 76, 123 and 560 of 1967 D/-

27-9-1968, Delhi Cloth and

General Mills Co. Ltd. v.

Workmen 11, 12, 16, 17, 19

(1968) AIR 1968 SC 224 (V 55) =

1968-1 SCR 164, Remington

Rand of India v. Workmen 14

(1968) 1968-1 Lab LJ 542 =

1967-2 SCWR 373, Remington

Rand of India Ltd. v. Workmen 14, 16

(1968) C. A. Nos. 856, 1475 and

2119 of 1968 D/- 10-12-1968 =

19 Fac LR 46, Remington Rand

of India v. Their Workmen 7

(1967) AIR 1967 SC 1286 (V 54) =

1967-2 SCR 596, Calcutta

Insurance Co. Ltd. v. Their

Workmen 11, 12, 14, 15, 17, 18

(1967) AIR 1967 SC 691 (V 54) =

1967-1 SCR 15, Jalan Trading

Co. v. Mill Mazdoor Union 3

(1966) AIR 1966 SC 305 (V 53) =

(1966) 1 SCR 25, Employees v.

Reserve Bank of India 14

(1965) 1965-2 Lab LJ 139 =

1965-11 Fac LR 4 (SC),

Motipur Zamindari (P) Ltd. v.

Workmen 14, 16

(1964) AIR 1964 SC 864 (V 51) =

1963-2 Lab LJ 403, Wanger and

Co. v. Its Workmen 16

(1962) AIR 1962 SC 673 (V 49) =

1962-2 SCR 711, Garment

Cleaning Works v. Its Workmen

13, 14, 15

(1956) 1956-1 Lab LJ 435 (LATI)

(Mad), Indian Oxygen and

Acetylene Co. Ltd. Employees

Union v. Indian Oxygen and

Acetylene Co. Ltd. 15

H. R. Gokhale, Sr. Advocate

(Mr. D. N. Gupta, Advocate with him)

for Appellant; M. K. Ramamurthi,

Sr. Advocate (Mrs. Shyamla Pappu

and Vineet Kumar, Advocates; with

him), for Respondents.

The Judgment of the Court was

delivered by:

SHELAT, J.: On demands for re-

vision of wage-scales, dearness allow-

ance, medical benefit, bonus for the

year 1963-64, gratuity etc. having been

made by the workmen of the appellant-

company in its Madras and the other

branches in that region and disputes

thereabout having arisen between the

company and its said workmen, the

Government of Madras referred them

by its notification dated April 6, 1965

for adjudication to the Industrial Tri-

bunal, Madras. The Tribunal granted

some and rejected the rest of the de-

mands. Aggrieved by the award the

company filed this appeal under special

leave granted by this Court.

2. Though the award dealt with a

number of demands counsel for the

appellant-company restricted its chal-

lenge against the award on three sub-

jects only. Consequently, we are con-

cerned in this appeal with those three subjects only, namely, bonus for the year 1963-64, medical benefits and revision by the Tribunal of the company's existing gratuity scheme.

3. As regards the bonus, the company had already paid to the workmen bonus at the rate of 4 months' basic pay as against the demand for the maximum bonus calculated in accordance with the Payment of Bonus Act, 1965, and on consolidated as against the basic wages. The Tribunal conceded that demand and granted bonus at 20 per cent of the consolidated wages. In view, however, of this Court's decision in *Jalan Trading Co. v. Mill Mazdoor Union*, 1967-1 SCR 15 = (AIR 1967 SC 691), Mr. Ramamurthi for the workmen conceded that the Act cannot apply in respect of the year in question and that the bonus payable for that year will have to be calculated on the basis of the Full Bench Formula as approved by this Court. The award to that extent therefore, has to be set aside and remanded to the Tribunal for determining the bonus in accordance with the said Formula.

4. On the question of medical facilities, the workmen's demand is contained in paras 27 to 31 of their statement of claim filed before the Tribunal according to which the workmen wanted the company to reimburse all medical expenses incurred by them on production of bills therefor. In paras 27 and 28 of the statement, it was stated that the company had a scheme for medical benefit for its workmen at Calcutta made under the consent award of 1962 and that there was no reason "why this amenity should be refused to the workmen in this region". Para 30 of the statement stated that there was a discussion between the parties regarding this demand when the company agreed to appoint a medical officer for consultation by the workmen and also to meet the cost of medicines upto Rs. 100 for a workman per year. This offer, however, was rejected on three grounds: (1) that the condition as to the ceiling was discriminatory, (2) that the ceiling was too low and (3) that there was no warrant for not extending the benefit to workmen of the branch offices outside Madras.

5. This demand is dealt with by the Tribunal in para 14 of the award. It is clear therefrom that the union's

contention before the Tribunal was that there was no reason why "this amenity of medical facility which the company has granted to its Calcutta workmen should be refused to the workmen of the Madras region". The contention thus clearly was that the company having made a scheme for its Calcutta employees it was discriminatory to refuse such a scheme to its workmen in Madras region. It is equally clear that the offer made by the company and referred to in the statement of claim by the workmen was rejected as it contained a ceiling which was not in its Calcutta scheme, and it was, therefore, that its offer was considered discriminatory. In view of these contentions the Tribunal agreed that a scheme for medical benefit for this region was called for. The Calcutta scheme was not produced before the Tribunal and therefore the Tribunal proceeded to frame its own scheme. The Tribunal rejected the demand for reimbursement of all medical expenses in respect of which bills would be produced as it felt that such a provision would lead to abuses including the obtaining of false bills. Instead, the Tribunal directed that the company should pay the cost of such medicines as are prescribed by the company's doctor, if supported by genuine bills, and should also pay all cost of hospitalisation if and when it was recommended by the company's doctor.

6. Counsel for the company objected to this part of the award on the grounds (1) that the Tribunal was not justified in throwing on the company the entire burden of medical expenses including the cost of hospitalisation even in cases of major diseases which workmen might suffer or contract, (2) that it was no part of the employer's obligation to provide for such expenses and that too to an unlimited degree; and (3) that the award should have provided a ceiling both in respect of the cost of medicines and of hospitalisation. The argument was that the grievance of the workmen was that denial of the medical amenity to them as the one given to its Calcutta workmen was discriminatory, and therefore, if the Tribunal decided to concede the demand, it should have been on the same lines as the Calcutta scheme. Mr. Ramamurthi, on the other hand, contended that (a) it was an accepted principle that though a company may

have an all-India organisation, it was not necessary that it should have uniform conditions of service in all the regions and that, therefore, merely because the company has a medical scheme for its Calcutta office it did not follow that that scheme must also be applied to its workmen in Madras region, and (b) that the scheme framed by the Tribunal was fair and should not be interfered with in order only to bring it in line with that of Calcutta.

7. In a recent decision concerning this very company and its workmen in Bangalore, Hyderabad and Kerala branches Remington Rand of India v. The Workmen, C. A. Nos. 856, 1475 and 2119 of 1968 D/- 10-12-1968 (reported in 19 Fac LR 46 SC) this Court had to consider this very question. The Tribunal in those cases had, as in this case, made schemes which imposed the burden of medical facilities on the company without any ceiling and extended therein such benefit to the family members of the workmen also. In those cases, on our finding the company's Calcutta scheme to be fair and reasonable, we substituted it for the schemes framed by the respective Tribunals. The Calcutta scheme is thus in operation in those areas also. Counsel for the workmen has not shown to us any substantial difference between those areas and the Madras region affecting the question of medical benefit. We, therefore, find no legitimate reason why the Calcutta scheme should not be applied to these workmen. It is true that medical benefit is excepted in that scheme for certain diseases of a contagious and epidemic nature. That presumably was done on the ground that for such diseases the primary duty to give relief is of the State and not of the employer. For the reasons given in that decision, we set aside the directions given by the Tribunal in this behalf and substitute them by the following scheme:

1. When a workman during the course of his duty requires medical attention, and where such attention is given by the company's doctor (i.e. a doctor or doctors nominated by the company including a doctor nominated as a part-time doctor) and medicines are prescribed by him, the cost of such prescription should be borne by the company;

2. In the event of a workman falling sick at his residence and the illness

is other than a venereal disease, leprosy, smallpox, typhoid or cholera, he should be paid the cost of the medicines prescribed;

3. Bills or cash vouchers, pertaining to such prescription should be produced for countersignature of the company's doctor before payment is authorised;

4. Disease of a serious nature requiring hospitalisation will be subject to consideration by the company;

5. At the time of employment the company will be entitled to get the prospective employees examined by the company's doctor and their employment will be subject to being found medically fit;

6. All company employees who are presently employed or those employed in future will be medically examined by the company's doctor once a year or at such other periodical intervals determined by the company but the results of such medical examinations will not be prejudicial to the workmen's employment;

7. In case a workman is found medically unfit to continue in service, the company will decide his case in consultation with the union's secretary; and

8. This scheme will come to an end as and when the Employees' State Insurance Scheme is extended to the employees concerned.

8. The question of laying down any ceiling need not be considered as the company, we are told, is agreeable to extend this scheme in this region.

9. The third item in respect of which the company challenges the award is the revision made by the Tribunal of the existing gratuity scheme. The workmen's demand in this respect was: (1) that the maximum limit of 15 months' salary should be enhanced to 20 months' salary, and (2) that the provisions in the existing scheme that no gratuity would be payable to a workman dismissed on the ground of misconduct should be substituted by a provision that even in such cases gratuity should be payable but the company would be entitled to deduct from such gratuity amount, the amount of financial loss, if any, resulting from such misconduct. The Tribunal's view was that these demands were reasonable and accordingly made modifications in the existing scheme. At first, Mr. Gokhale objected to this part of the award, firstly on the

ground that the Tribunal ought not to have allowed gratuity even in cases of dismissal for misconduct, and secondly, that the qualifying period in the case of termination of service by the company otherwise than for misconduct should be 10 years and not the graded periods from 5 to 15 years as provided in the award. On second thoughts he did not press the second objection, and therefore, nothing need be said about it. He, however, contended that if gratuity even in cases of dismissal for misconduct is to be made payable, a provision should be made that it would be forfeited if the misconduct is a gross one involving violence, riotous behaviour etc. and for the rest of the cases, the qualifying period should be 15 years of continuous service.

10. These objections involve a principle, and therefore, need serious consideration. The principle invoked by Mr. Gokhale is, firstly, that since gratuity is paid as a reward for long and meritorious service it would be inconsistent with that principle to award gratuity in cases of dismissal for misconduct, for, such cases cannot be treated as cases of meritorious service, & secondly, the provisions in such cases for deduction only of financial loss resulting from misconduct committed by the workman is neither proper nor consistent with the principle on which gratuity is made payable by an employer. A workman may be guilty of gross misconduct, such as riotous behaviour or assault on a member of the staff. Such misconduct may not result in any financial loss to the company, and therefore, the workman would be paid full gratuity amount. The contention was that it would be a serious anomaly that while a workman, who has caused some damage to the company's property and is dismissed on the ground that he was guilty of misconduct would have the gratuity amount payable to him reduced to the extent of that damage, another workman, who, for instance, assaults and causes injury, even a serious injury, to another employee would, though liable to be dismissed, be entitled to the full gratuity merely because the misconduct of which he is guilty, though graver in nature, does not result in pecuniary loss to the company.

11. In support of his contention, Mr. Gokhale leaned heavily on two re-

cent decisions of this Court in *Calcutta Insurance Co. Ltd. v. Their Workmen*, 1967-2 SCR 596 = (AIR 1967 SC 1286) and *The Delhi Cloth & General Mills Co. Ltd. v. Workmen*, C. A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 D/-27-9-1968=(reported in AIR 1970 SC 919). Relying on these decisions, he urged that in cases of dismissal for misconduct, the qualifying period should not be as prescribed by the Tribunal but must be 15 years of continuous service. Mr. Ramamurthi, on the other hand, contended that the principle that gratuity is a reward for long and meritorious service and that for a single misconduct after such service, such misconduct should not result in deprivation of gratuity except to the extent of the actual monetary loss caused to the employer has been long accepted in industrial adjudication and should not be abandoned, and that the two decisions relied on by Mr. Gokhale should not be construed as having the cumulative result of enhancing the qualifying period and also depriving gratuity in cases of dismissal for misconduct. The first decision, according to him, lays down an increase in the qualifying period from 10 years, which generally used to be the period for earning gratuity, to 15 years, and the second lays down certain exceptions to the accepted rule that deduction of monetary loss resulting from misconduct was sufficient. He argued that neither of the two decisions lays down that both the consequences must follow where a workman is dismissed for misconduct, even if such misconduct has not resulted in any monetary loss to the employer.

12. In view of these contentions it becomes necessary for us to examine the earlier decisions cited before us before we come to the cases of 1967-2 SCR 596 = (AIR 1967 SC 1286) and C. A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 D/-27-9-1968, (reported in AIR 1970 SC 919).

13. The question as to whether gratuity should be payable even though the concerned workman is dismissed for misconduct appears to have been raised for the first time in *The Garment Cleaning Works v. Its Workmen*, 1962-2 SCR 711 = (AIR 1962 SC 673). The objection there raised related to Cl. 4 of the gratuity scheme framed by the Tribunal which provided that even if a workman was dis-

missed or discharged for misconduct, gratuity would still be payable except that if such a misconduct resulted in financial loss to the works, gratuity should be paid after deducting such loss. The contention urged by counsel, but which failed, was that such a clause was inconsistent with the principle on which gratuity claims were based, namely, that they were in the nature of retiral benefit based on long and meritorious service. Therefore, if a workman was guilty of misconduct and was dismissed or discharged, it would be a blot on his long and meritorious service and in such a case it would not be open to him to claim gratuity. This was a general argument and was repelled as such is clear from what the Court said at p. 715 of the Report (SCR) = (at p. 675 of AIR):

"On principle, if gratuity is earned by an employee for long and meritorious service it is difficult to understand why the benefit thus earned by long and meritorious service should not be available to the employee even though at the end of such service he may have been found guilty of misconduct which entails his dismissal. Gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the service rendered by him to the employer, and when it is once earned it is difficult to understand why it should necessarily be denied to him whatever may be the nature of misconduct for his dismissal — Therefore we do not think that it would be possible to accede to the general argument that in all cases where the service of an employee is terminated for misconduct gratuity should not be paid to him."

The words "why it should necessarily be denied to him whatever may be the nature of misconduct" occurring in the earlier part of the passage and the words "general argument that in all cases where the service of an employee is terminated for misconduct gratuity should not be paid" and the reference by the Court to certain awards made by tribunals where simple misconduct was distinguished from grave misconduct and forfeiture of gratuity was provided for the latter occurring after this passage clearly show, firstly, that the Court was dealing with and repelled the general proposition that without any distinction between simple and gross misconduct

there should be forfeiture in all cases of dismissal for misconduct of whatsoever nature, and secondly, that though the Court approved the scheme which provided that gratuity should be paid after deducting financial loss resulting from the workman's misconduct, the Court did not lay down any principle that gratuity should be paid in cases of grave misconduct involving even violence which though it may not result in financial damage may yet be more serious than the one which results in monetary loss. The decision thus is not an authority for the proposition that even if a workman were guilty of misconduct, such as riotous behaviour or an assault on another employee, industrial adjudication should not countenance a provision for forfeiture of gratuity in such cases merely because it does not result in monetary loss or that such a provision would be inconsistent with the principle that gratuity is not a boon or a gratuitous payment but one which is earned for long and meritorious service.

14. In Motipur Zamindari (P) Ltd. v. Workmen, 1965-2 Lab LJ 139 (SC) the only question considered was whether the award was justified in providing forfeiture of gratuity in a case where the misconduct involved moral turpitude. The Court following *Garment Cleaning Works*, 1962-2 SCR 711 = (AIR 1962 SC 673) directed that instead of forfeiture, the clause should provide deduction of the amount of monetary loss, if any, caused by such misconduct. It is clear that no one canvassed the question as to whether a provision in a gratuity scheme that a workman should forfeit gratuity in the event of his committing misconduct involving violence or riotous behaviour within or around the works premises would be justified or not. Nor was it considered whether it would be anomalous to provide for exaction of compensation from gratuity amount in case of misconduct involving moral turpitude while not making any provision against misconduct, such as the use of violence or force, which though not resulting in monetary loss, yet is unquestionably of a graver nature. The case of *Employees v. Reserve Bank of India*, 1966-1 SCR 25 at p. 58 = (AIR 1966 SC 305 at p. 321) was again a case where there was a general clause in the gratuity scheme providing forfei-

ture in cases of dismissal for misconduct whatsoever and where in view of the decision in *Garment Cleaning Works* 1962-2 SCR 711 = (AIR 1962 SC 673) the Bank conceded to substitute the rule by providing deduction from gratuity the amount of monetary loss occasioned by the misconduct for which dismissal is ordered. Thus, in none of the cases cited before us the question as to what should be the minimum qualifying period in cases of dismissal for misconduct and the question as to whether a provision for forfeiture of gratuity in the event of such dismissal having been ordered for misconduct involving violence were either canvassed or considered. On the other hand, in a recent decision between this very company and its workmen in Bangalore region (*Remington Rand of India Ltd. v. Their Workmen*, 1968-1 Lab LJ 542 (SC)), the gratuity scheme made by the Tribunal provided for a qualifying period in cases of termination of service otherwise than for misconduct, but no qualifying period was provided for cases where termination of service was by way of punishment for misconduct. This Court accepted the objection of the company on the ground of this omission and laid down the qualifying period of 15 years' service in such cases. In this decision the Court followed the earlier decision in *Calcutta Insurance Co.*, 1967-2 SCR 596 = (AIR 1967 SC 1286). In another such case [*Remington Rand of India v. Workmen* 1968-1 SCR 164 at p. 168 = (AIR 1968 SC 224 at p. 227)] where the dispute concerned the workmen of the company in Kerala region 15 years' service was provided as the qualifying period in cases of dismissal for misconduct.

15. In the case of *Calcutta Insurance Co.* 1967-2 SCR 596 = (AIR 1967 SC 1286) on a contention having been raised that the qualifying period for earning gratuity in cases of retirement and resignation should be 15 years' service and that no gratuity should be payable in cases of dismissal for misconduct, the Court examined the earlier decisions commencing from the *Indian Oxygen & Acetylene Co., Ltd.*, 1956-1 Lab LJ 435 (LATI-Mad) to the case of *Garment Cleaning Works* 1962-2 SCR 711 = (AIR 1962 SC 673) and registered its demurrer against the observation made in the latter case that as gratuity was earned by an em-

ployee for long and meritorious service, it should consequently be available to him even though at the end of such service he may have been found guilty of misconduct entailing his dismissal. In so doing the Court at p. 608 (of SCR) = (at p. 1293 of AIR) of the Report remarked:

"In principle, it is difficult to concur in the above opinion. Gratuity cannot be put on the same level as wages. We are inclined to think that it is paid to a workman to ensure good conduct throughout the period he serves the employer. "Long and meritorious service" must mean long and unbroken period of service meritorious to the end. As the period of service must be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct as causes financial loss to his employer, the employer would under the general law have a right of action against the employee for the loss caused and making a provision for withholding payment of gratuity where such loss caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers—a case in which it would be extremely difficult to assess the financial loss to the employer."

Continuity, in other words, must govern both the service and its character of meritoriousness. The Court further observed that a mere provision in a gratuity scheme enabling an employer to deduct from the gratuity amount the actual loss caused as a result of misconduct for which the workman incurs the punishment of dismissal or discharge cannot subvert industrial peace and harmony, firstly, because an employer even without such a provision has under the law the right of action for claiming damages, a right not taken away by industrial law, and secondly, because a misconduct resulting in dismissal may be such as may undermine discipline in the workmen, in which case it would be extremely difficult to assess the financial loss. As regards the qualifying period, the Court laid down 10 years' service in cases of resignation or retirement and "following the principles laid down in

the former decisions of this Court" provided 15 years' service for qualifying for gratuity in cases of dismissal for misconduct.

16. In the case of Delhi Cloth & General Mills Co. Ltd. C. A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 D/- 27-9-1968 = (reported in AIR 1970 SC 919) an objection was raised on behalf of the workmen to Cl. 3 of the gratuity scheme framed by the Tribunal. That clause provided as follows:

"On termination of service on any ground whatsoever except on the ground of misconduct as in Cls. 1 (a) and 1 (b) above."

Cls. 1 (a) and 1 (b) provided for payment of gratuity in the event of the death of an employee while in service or on his being physically and mentally incapacitated for further service and laid down the rates and the qualifying periods as follows:

(a) After 5 years continuous service and less than 10 years' service — 12 days' wages for each completed year of service.

(b) After continuous service of 10 years—15 days' wages for each completed year of service.

The effect of Cl. 3, therefore, was that in case of termination of service an employee would be entitled to get gratuity at the above rates if he had put in service for the aforesaid periods, but would forfeit it if the termination was due to any misconduct committed by him. The objection was that this provision was inconsistent with the decisions so far given by this Court, that according to those decisions the only provision permissible to the Tribunal was to enable the employer to deduct actual monetary loss arising from misconduct, and that therefore, the mere fact that a workman's service was terminated for misconduct was no ground for depriving him altogether of gratuity earned by him as a result of his long and meritorious service until the date when he commits such misconduct. In examining the validity of this contention the Court analysed the previous decisions and pointed out that none of them laid down a general principle that an industrial tribunal cannot justifiably provide that an employer need not be

made to pay gratuity even where the workman had incurred termination of service on account of his having committed misconduct, not merely technical but of a grave character. The Court observed that in some decisions this Court, no doubt, had held that the fact that dismissal of a workman on account of his having committed misconduct need not entail forfeiture and that it would be sufficient to forfeit partially the gratuity payable to him to the extent of monetary loss caused to the employer. But then no decision had laid down as a principle that a provision for such forfeiture cannot be justified, however grave the misconduct may be, provided it had not caused monetary loss. The Court noticed that the trend in the earlier decisions was to deny gratuity in all cases where the workman's service was terminated for misconduct but that in later years in cases such as the Garment Cleaning Works 1962-2 SCR 711 = (AIR 1962 SC 673) "a less rigid approach" was adopted. The Court then observed:

"A bare perusal of the Schedule (Model Standing Orders) shows that the expression "misconduct" covers a large area of human conduct. On the one hand are the habitual late attendance, habitual negligence and neglect of work; on the other hand are riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline, wilful insubordination or disobedience. Misconduct falling under several of these latter heads of misconduct may involve no direct loss or damage to the employer, but would render the functioning of the establishment impossible or extremely hazardous. For instance, assault on the manager of an establishment may not directly involve the employer in any loss or damage, which could be equated in terms of money, but it would render the working of the establishment impossible. One may also envisage several acts of misconduct not directly involving the establishment in any loss, but which are destructive of discipline and cannot be tolerated. In none of the cases cited any detailed examination of what misconduct would or would not involve to the employer loss capable of being compensated in terms of money was made. It was broadly stated in the cases which have come before this

Court that notwithstanding dismissal for misconduct a workman will be entitled to gratuity after deducting the loss occasioned to the employer. If the cases cited do not enunciate any broad principle we think that in the application of those cases as precedents a distinction should be made between technical misconduct which leaves no trail of indiscipline, misconduct resulting in damage to the employer's property, which may be compensated by forfeiture of gratuity or part thereof, and serious misconduct which though not directly causing damage, such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture: the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. The precedents of this Court, e.g., *Wanger & Co. v. Its Workmen* 1963-2 Lab. LJ 403 = (AIR 1964 SC 864) *Remington Rand of India Ltd.'s case* (1968-1 Lab. LJ 542 (SC)) and *Motipur Zamindari (P.) Ltd.'s case* (1965-2 Lab LJ 139 (SC)) do not compel us to hold that no misconduct however grave may be visited with forfeiture of gratuity. In our judgment, the rule set out by this Court in *Wanger & Co.'s case* 1963-2 Lab LJ 403 = (AIR 1964 SC 864) and *Motipur Zamindari (P.) Ltd.'s case* 1965-2 Lab LJ 139 (SC) applies only to those cases where there has been by actions wilful or negligent any loss occasioned to the property of the employer and the misconduct does not involve acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment. In these exceptional cases—the third class of cases—the employer may exercise the right to forfeit gratuity: to hold otherwise would be to put a premium upon conduct destructive of maintenance of discipline.”

In this view, the Court modified cl. 3 of the scheme by adding an explanation, the effect of which was that though the employer could not deprive the workman of the gratuity in all cases of misconduct, he could do so where it consisted of acts involving violence against the management or

other employees or riotous or disorderly behaviour in or near the place of employment and also gave right to the employer to deduct from gratuity such amount of loss as is occasioned by the workman's misconduct. We may mention that the Court did not alter the qualifying period in cases of misconduct since no objection appears to have been raised on that ground.

17. As against the contention that a provision in accordance with these two decisions should be introduced in the scheme under examination, Mr. Ramamurthi submitted that the two decisions should not be construed as if they laid down principles, which should have the cumulative effect, firstly, as to the qualifying period, and secondly, as to deprivation of gratuity in cases specified in the *Delhi Cloth & General Mills case* C. A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 D/- 27-9-1967 = (reported in AIR 1970 SC 919). It is true that this decision does not lay down that the qualifying period in cases of misconduct should be 15 years as was held in *Calcutta Insurance Co.* 1967-2 SCR 596 = (AIR 1967 SC 1286). But, as aforesaid, that was because that question was not raised, while in the *Calcutta Insurance Co.* case 1967-2 SCR 596 = (AIR 1967 SC 1286) it was expressly raised and the Court laid down that in such cases it would be proper to provide 15 years' continuous service as a criterion.

18. Once the principle that gratuity is paid to ensure good conduct throughout the period that the workman serves his employer is accepted as laid down in *Calcutta Insurance Co.*, 1967-2 SCR 596 = (AIR 1967 SC 1286) some distinction in the matter of the qualifying period between cases of resignation and retirement on the one hand and dismissal for misconduct on the other becomes logically necessary. Such a distinction cannot legitimately be assailed as unreasonable. Similarly, if the object underlying schemes of gratuity is to secure industrial harmony and satisfaction among workmen it is impossible to equate cases of death, physical incapacity, retirement and resignation with cases of termination of service incurred on account of misconduct. Besides, a longer qualifying period in the latter cases would ensure restraint against wilful use of violence and force, neglect, etc. No

serious argument was advanced that such a distinction would not be reasonable. The objection was against the insertion of both and not against the merit of such distinction.

19. As regards the clause as to misconduct, it is not possible to disagree with the proposition laid down in the Delhi Cloth & General Mills' Case C. A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 D/- 27-9-1968=(reported in AIR 1970 SC 919) that acts amounting to misconduct as defined in the standing orders, where they are made, or the model standing orders, where they are applicable, differ in degree of gravity, nature and their impact on the discipline and the working of the concern, and that though grave in their nature and results, all of them may not result in loss capable of being calculated in terms of money. Amongst them there would be some which would forthwith disentitle the workman from retaining his employment and justifying his dismissal. For the reasons given in the Delhi Cloth & General Mills' case, C. A. Nos. 2168, 2569 of 1966 and 76, 123 and 560 of 1967 D/- 27-9-1968=(reported in AIR 1970 SC 919) with which we, with respect, concur, we must agree with counsel for the company that it is necessary to modify the scheme and to add in cl. 5 thereof a proviso that in cases where there has been termination of service on account of an employee found guilty of act or acts involving violence against the management or other employees or riotous or disorderly behaviour in or near the company's premises, the company would be entitled to forfeit the gratuity which would otherwise be payable to the concerned workman. Cl. 5 should also be modified so as to introduce therein 15 years continuous service as the qualifying period of earning gratuity in cases where the service of the employee has been terminated on account of misconduct and that such gratuity should be payable at the rate prescribed in cl. 3 (d) of the scheme.

20. The appeal is allowed and the award is set aside to the extent aforesaid. The gratuity scheme and the scheme for medical benefit, as revised by the Tribunal, are modified as stated above. So far as the question of bonus is concerned, that question is remanded to the Tribunal to decide it

in accordance with the observations made hereinabove. The Tribunal will give liberty to the parties to adduce for that purpose such further evidence as they think necessary. There will be no order as to costs.

Appeal allowed.

**AIR 1970 SUPREME COURT 1430
(V 57 C 304)**

(From Madhya Pradesh : AIR 1962
Madh Pra 348)

**S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.**

Choudhary Jawaharlal and others,
Appellants v. The State of Madhya
Pradesh and another, Respondents.

Civil Appeal No. 97 of 1966, D/- 30-
10-1969.

Constitution of India, Art. 226
— Act of State, what constitutes —
Rule of the act of State applies even
to liability incurred in respect of
public property of erstwhile State.

An act of State is an exercise of sovereign power over a territory which was not earlier subject to its sway. When such an event takes place, and the territory is merged, although a sovereign might allow the inhabitants to retain their old laws and customs or undertake to honour the liabilities etc, it could not be itself bound by them until it purported to act within the laws by bringing to an end the defence of 'act of State.' No variation of this rule, even in the case of liability incurred in respect of a public property of the erstwhile State which the successor State has taken over, and retains as part of its public property is justified. AIR 1957 SC 286 & AIR 1959 SC 1383, Rel. on.

(Para 4)

- Cases Referred: Chronological Paras**
(1959) AIR 1959 SC 1383 (V 46)=
(1960) 1 SCR 537, State of
Saurashtra v. Memon Haji
Ismail 2
(1957) AIR 1957 SC 286 (V 44)=
1956 SCR 889, Raja Rajender
Chand v. Sukhi 4
(1924) AIR 1924 PC 216 (V 11)=
51 Ind App 357, Vajesinghji
Joravar Singhji v. Secy. of
State 4

Mr. M. S. Gupta, Advocate, for Appellants; Mr. I. N. Shroff, Advocate, for Respondent. No. 1.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.:—This appeal is by certificate granted by the High Court of Madhya Pradesh under Article 133 (1) (a) of the Constitution of India against its judgment and decree by which it reversed the judgment and decree of the Addl. District Judge, Ambikapur. The High Court held that the claim of the appellant on the promissory note executed by the Maharaja of Surguja—an erstwhile Ruler whose State was merged in Madhya Pradesh—could not be enforced against the 1st Respondent the State of Madhya Pradesh because after the cession of the erstwhile State, the new State had not expressly or impliedly undertaken to meet that liability. In other words, the plea of 'an act of State' raised by the 1st respondent was accepted.

2. The circumstances in which the suit was filed by the appellants and the array of parties may now be stated. Appellants 1, 2, 3 and deceased Hira Lal were brothers and members of a joint Hindu family. Appellant 4 is the wife of Hira Lal, appellants 5 to 7 are his sons and appellant 8 is the grandson. All these appellants along with appellants 1 to 3 constitute a joint Hindu family which was carrying on business of construction of buildings under the name and style of Hira Lal & Bros at Ambikapur in the erstwhile State of Surguja. The allegations in the suit filed by the appellant against the respondent State was that they had constructed buildings of the District Court and the Secretariat at Ambikapur in 1936. The work was completed but in so far as payment was concerned, there was a difference of opinion about the measurements etc. but ultimately it was decided to pay to the appellants Rs. 80,000/- on account of the said construction and accordingly the Maharaja of Surguja, 2nd respondent, executed a promissory note in favour of the appellants on 27-9-1947 for Rs. 80,000/- with interest @ Rs. 3/- per annum. Thereafter the Madhya Pradesh Government took over the administration of the State of Surguja on 1-1-1948 after the merger of the Chattisgarh State and consequently the Court

building as well as Secretariat building were taken possession of by the Government. When the appellants claimed the money from the State of Madhya Pradesh, it neither accepted the claim nor paid them. The appellants after giving a notice under S. 80 of the Code of Civil Procedure filed a suit.

3. On the pleadings, the Trial Court had framed several issues but it is unnecessary to notice them in any great detail except to say that the claim of Rs. 80,000 was held to be valid, that this amount was payable on account of the construction of the buildings known as Court and Secretariat buildings, that the pronote was not without consideration, that the first defendant was the successor in interest of Surguja State, and is liable to pay the claim with interest and that the amount was not due to the plaintiffs on account of the personal obligation and liability of the 2nd respondent. The Court also found against the first respondent on the issue relating to jurisdiction and negated the defence that it is not liable because of an act of State. In so far as the defendant the Maharaja of Surguja was concerned, it held that the suit was not maintainable against him without the consent of the Central Government as required under Section 86 of the Civil Procedure Code and that the liability was not a personal obligation of the Maharaja but an obligation incurred on account of his State. In the result as we said earlier the Court awarded a decree for Rs. 87,200 with full cost against the first defendant and discharged the second defendant. In appeal the High Court while noticing that it is the admitted case of the parties that the District Court and the Secretariat buildings were public property and were in the possession of the first defendant as such and that the liability in respect thereof was incurred by the Maharaja was not merely his personal liability but was a liability incurred on behalf of the State of Surguja, however, reversed the judgment of the Trial Court by holding "that the liability of the State of Surguja under the pronote was at best a contractual liability and this liability could only be enforced against the State of Madhya Pradesh if after the cession of the erstwhile State of Surguja, the new State had expressly or

The Judgment of the Court was delivered by

SHAH, J.: The Government of India invited tenders for "reinforced concrete work relating to the foundation and super-structure of the Fertilizer Factory building at Sindri" in the State of Bihar. The tender submitted by the appellant Company was accepted on November 22, 1947 and a formal contract in that behalf was executed on November 26, 1948. By cl. 12 of the contract, insofar as it is relevant, it was provided:

"The Engineer-in-charge shall have power to make any alterations in, omissions from, additions to, or substitutions for, the original specifications, drawings, designs and instructions, xxx, and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him xxx; and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in that tender for the main work, xxx-And if the altered, additional or substituted work includes any class of work, for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the current schedule of rates of the Hazaribagh P.W.D. district which was in force at the time of the acceptance of the contract minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender, and if the altered, additional or substituted work is not entered in the said schedule of rates, then the contractor shall within seven days of the date of his receipt of the order to carry out the work inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, and if the Engineer-in-charge does not agree to this rate he shall, by notice in writing, be at liberty to cancel his order to carry out such class of work, xxx provided xx that if the contractor shall commence work or incur any expenditure in regard thereto before the rates shall have been determined xxx then xx he shall only be entitled to be paid in respect of the work carried out or expenditure incurred xxx according to such rates as

shall be fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the Circle shall be final."

Clause 25 of the agreement provided, insofar as it is relevant:

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to a Superintending Engineer x x x to be nominated by the Chief Engineer for arbitration in the manner provided by law relating to arbitration x x x x".

2. The Sindri Factory Buildings were to be constructed under the advice and guidance of M/s. Chemical Construction Corporation of New York. That Firm made delay in supplying the drawings and specifications which involved work of a complicated nature not included in the original contract. Time for completion of the work was on that account extended till February 26, 1950.

3. On September 20, 1950 the appellant Company made a demand for payment at an enhanced rate of 42½ per cent over the basic rates stipulated under the original contract. This claim was made on five grounds:

1. That there was a "substantial deviation" in the nature of work of which the detailed work drawings were supplied to the appellant Company after the date of the contract. The work involved was of a complex nature requiring highly skilled labour, and that additional labour and materials not covered by the contract rates were required;

2. That there was "great increase in the price of materials and labour on account of undue prolongation of the period of work";

3. That there was increase in the cost of transportation on account of

rise in the price of petrol and increase in railway freight;

4. That the Government of India entered into other contracts incidental to the construction of the Sindri Factory at substantially higher rates which directly affected the cost of labour and materials of the appellant Company who had to compete with the other contractors;

5. That additional work ordered to be done involved in many instances quantity of work several times the work set out in the contract.

4. By his letter dated September 13, 1950, the Additional Chief Engineer rejected the claim. In September 1954 the disputes relating to the claim for rise in cost of material and labour due to delay in supplying detailed work drawings, the claim arising from rise in price of petrol and for increase in the cost of material and labour due to other contractors working on the site, were referred to arbitration, but not the claims for revision of rates due to complex nature of the work and increase in the quantity of work. The arbitrator rejected the claims of the Company in respect of the matters which were referred.

5. Thereafter the appellant Company filed a suit on August 9, 1956, against the Union of India, for a decree for Rs. 3,62,674/9/6 being the amount claimed at the rate of 42½ per cent above the contract rate, in the alternative, a decree for Rs. 2,44,000 being the amount claimed at the rate of 28.1 per cent above the contract rate as recommended by the Executive Engineer, and in the further alternative, a decree for Rs. 1,36,222 at the rate of 18.17 per cent above the contract rate as certified by the Superintending Engineer. The Union of India contended, inter alia, that the claim was barred by the law of limitation.

6. The Trial Court held that the claim was not barred by the law of limitation and decreed the claim for Rs. 1,36,222 as certified by the Superintending Engineer. Against the decree passed by the Trial Court the appellant Company as well as the Union of India appealed to the High Court.

7. Before the High Court in support of the appeal only the plea of limitation was pressed on behalf of the Union of India. In the view of the High Court the claim was governed either by Art. 56 or by Art. 115 of the

First Schedule to the Limitation Act, 1908, and the suit not having been filed within three years of the date on which the work was done and in any event of the date on which the claim was rejected was barred. The appellant Company has appealed to this Court with certificate.

8. The appellant Company had undertaken under the terms of the contract to do specific construction work at "basic rates". The Engineer-in-charge was by the terms of cl. 12 of the agreement competent to give instructions for work not covered by the terms of the contract, and it was provided that remuneration shall be paid at the rate fixed by the Engineer-in-charge for such additional work, and in case of dispute the decision of the Superintending Engineer shall be final. It is common ground that the claim made by the appellant Company was not covered by the arbitration agreement and on that account it was not referred to the arbitrator. The claim in suit related to the revision of rates due to the complex nature of the work and due to increase in the quantity of work and also grant of contracts to other competing parties at substantially higher rates and other related matters.

9. Article 56 of the First Schedule to the Indian Limitation Act, 1908, prescribes a period of three years for a suit for the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, and the period of limitation commences to run from the date when the work is done. A suit is governed by Art. 56 if it arises out of a contract to pay the price of work done at the request of the defendant. The claim in the present case is for payment at an additional rate over the stipulated rate in view of change in circumstances, and not for price of work done by the appellant Company. It is true that additional work was done at the request of the Engineer-in-charge, but the claim in suit was not for the price of work done but for enhanced rates in view of altered circumstances.

10. Article 115 of the First Schedule to the Limitation Act is a residuary article dealing with the claim for compensation for the breach of any contract, express or implied, not in writing registered and not specially provided for, in the First Schedule.

The period of limitation in such cases is three years and it commences to run when the contract is broken, or where there are successive breaches when the breach in respect of which the suit is instituted occurs, or where the breach is continuing when it ceases. The suit filed by the appellant Company is not a suit for compensation for breach of contract express or implied: it is a suit for enhanced rate because of change of circumstances, and in respect of work not covered by the contract. The additional work directed by the Engineer-in-charge when carried out may be deemed to be done under the terms of the contract; but the claim for enhanced rates does not arise out of the contract; it is in any case not a claim for compensation for breach of contract.

11. The claim is therefore not covered by any specific article under the First Schedule, and must fall within the terms of Art. 120. The Solicitor-General appearing on behalf of the Union of India contended that even if the claim falls within the terms of Art. 120 of the Limitation Act, it was barred, for the appellant Company had in the suit made a claim for work done more than six years before the institution of the suit. Counsel submitted that under Art. 120 the period of limitation commences to run from the date on which the defendant obtains the benefit of the work done by the plaintiff. But under Art. 120 of the Limitation Act the period of six years for suits for which no period of limitation is provided elsewhere in the Schedule commences to run when the right to sue accrues. In our judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted: *Bolo v. Koklan*, 57 Ind App 325 at p. 331 = (AIR 1930 PC 270 at p. 272).

12. The appeals are allowed and the decree passed by the Trial Court is restored with costs in the High Court and in this Court. One hearing fee. The appellant will be entitled to interest on the amount decreed at the rate of 6 per cent per annum from the date of the suit till payment.

Appeal allowed.

AIR 1970 SUPREME COURT 1436 (V 57 C 306)

(From Patna: AIR 1968 Pat 50)

M. HIDAYATULLAH C. J., J. M. SHELAT, V. BHARGAVA, K. S. HEGDE AND A. N. GROVER JJ:

Baijnath Kedia etc., Appellants v. The State of Bihar and others, Respondents; Dhalbham Trades and Industries Ltd. (in C. A. No. 685 of 1967), Intervener.

Civil Appeals Nos. 685 to 688 of 1967 D/- 28-8-1969.

(A) Constitution of India, Sch. 7 List 2 entry 23 — Mines and minerals — Regulation and development — Minor minerals — Declaration by Parliament in statute that Control should vest in Central Government — Effect—State Legislature not competent under Entry 23 to enact legislation after such declaration trenching upon that field.

Entry 54 of the Union List speaks both of Regulation of mines and minerals development and entry 23 of State List is subject to entry 54 of Union List. It is open to Parliament to declare that it is expedient in the public interest that the control should vest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature. AIR 1961 SC 459 and AIR 1964 SC 1284, Rel. on. (Para 14)

(B) Constitution of India, Art. 254 — Mines and minerals — Regulation and control — Minor minerals — Declaration by Parliament in statute under entry 54 of Union list that control should vest in Central Government — State Legislature not competent to enact legislation under entry 23 of State list trenching upon field disclosed in the declaration. (Para 4)

(C) Constitution of India, Sch. 7 List I entry 54 — Mines and minerals — Regulation and development —

Minor minerals — Declaration by Parliament that control should vest in Central Government — State legislature not competent under List 2 entry 23 to enact legislation trenching upon field disclosed in declaration.

(Para 4)

(D) Tenancy Laws — Bihar Land Reforms Act (30 of 1950) (as amended by Bihar Act 4 of 1965) S. 10(2), Second proviso — Enactment of second proviso to S. 10 (2) after Act 67 of 1957 was without jurisdiction—Amendment is ultra vires the Constitution—AIR 1968 Pat 50, Reversed.

Since the Bihar State Legislature amended the Bihar Land Reforms Act by Act 4 of 1965 after the coming into force of Mines and Minerals (Regulation and Development) Act, 67 of 1957, the declaration in the latter Act would carve out a field to the extent provided in that Act and to that extent entry 23 of the State List of the Constitution would stand cut down.

(Para 17)

The pith and substance of the amendment to S. 10 of the Bihar Reforms Act falls within entry 23 of the State List although incidentally touches land and not vice versa. Therefore, this amendment was subject to the overriding power of Parliament as declared in Act 67 of 1957 in S. 15. Entry 18 of the State list, therefore, is of no help.

(Para 19)

By enacting S. 15 of the Act 67 of 1957 the Union has taken all the power to itself and authorised the State Government to make rules for the regulation of leases. By the declaration and the enactment of S. 14 the whole of the field relating to minor minerals came within the jurisdiction of Parliament and no scope was left for the enactment of the second proviso to S. 10(2) in the Bihar Land Reforms Act. The enactment of the proviso, was therefore, without jurisdiction. AIR 1961 SC 459 and AIR 1964 SC 1284, Applied; AIR 1968 Pat 50, Reversed.

(Para 20)

(E) Bihar Minor Mineral Concession Rules (1964), R. 20 (2) (added on 10-12-1964) — Second sub-rule ineffective. AIR 1968 Pat 50, Reversed.

Rule 20, as it stood prior to the addition of the second sub-rule in December 1964, by the Bihar State Government, applied prospectively to all leases which came to be executed after the promulgation of the rules. The

second sub-rule, entitling the recovery of the dead rent, royalty, etc., as in the schedules, made applicable those provisions to all leases subsisting on the date of the promulgation of the rules, including those in existence before Act 67 of 1957.

(Para 21)

The entire legislative field in relation to minor minerals had been withdrawn from the State Legislature by the enactment of the Mines and Minerals (Regulation and Development) Act (67 of 1957). Vested rights could only be taken away by law made by a competent legislature. Mere rule-making power of the State Government was not able to reach them. The authority to do so must, therefore, have emanated from Parliament. As no such Parliamentary Law had been passed the second sub-rule to Rule 20 was ineffective. It could not derive sustenance from the second proviso to S. 10 (2) of the Bihar Land Reforms Act since that proviso was not validly enacted. (see Placitum (D)). AIR 1968 Pat 50, Reversed:

(Para 24)

Cases Ref: Chronological Paras (1964) AIR 1964 SC 1284 (V 51) =

1964-4 SCR 461, State of Orissa v.

M. A. Tulloch and Co. 14, 16

(1961) AIR 1961 SC 459 (V 48) =

1961-2 SCR 537, Hingir Rampur

Coal Co., Ltd. v. State of

Orissa 14, 15, 16

Mr. A. K. Sen, Sr. Advocate (Mr. P. K. Chatterjee, Advocate, with him), for Appellants (in all appeals); Mr. Lal Narain Singha, Sr. Advocate (M/s. Lakshman Saran Sinha and D. Goburdhun, Advocates with him), for Respondents (in C. A. No. 685/67); Mr. B. P. Jha, Advocate, for Respondents (in C. A. No. 686/67); Mr. U. P. Singh, Advocate, for Respondents Nos. 1 to 3 (in C. A. Nos. 687 and 688 of 1967); Miss Krishna Sen, Advocate and M/s. M. M. Kshatriya and G. S. Chatterjee, Advocates of M/s. Kshatriya and Chatterjee, for No. 4 (in C. A. No. 687/67) and Nos. 5 to 8 (in C. A. No. 688/67) for Respondents; Mr. R. C. Prasad Advocate, for Intervener (in C. A. No. 685/67).

The following judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This judgment will also govern the disposal of Civil Appeals 686 (Kanti Prasad Pandey v. State of Bihar and others), 687 (Shri Krishna Chandra Gangopadhyaya v. State of Bihar and others) and 688

(M/s. Pakur Quarries Private Ltd. and Anr. v. State of Bihar and others) of 1967. These four appeals have been brought against a common judgment, November 1, 1966, of the High Court of Patna (reported in AIR 1968 Pat 50) and arise out of four petitions under Art. 226 of the Constitution filed to question the validity of Proviso (2) to S. 10 (2) added by Bihar Land Reforms (Amendment) Act, 1964 (Bihar Act 4 of 1965) and the operation of the second sub-rule of R. 20 added on December 10, 1964 by a notification of the Governor in the Bihar Minor Mineral Concession Rules, 1964. The facts of all the four cases are similar and the same points arise for determination. It is, therefore, sufficient to state the facts in Civil Appeals 685 and 686 as illustrative of the others as well.

2. One Jyoti Prakash Pandey obtained on March 23, 1955 from Babu Bijan Kumar Pandey and Smt. Anila Devi acting for herself and also as legatee under the will of one Baidyanath Pandey, registered leases to quarry stone ballast, boulders and chips from and upon Blocks Nos. 32, 45/1, 45/2 and 43/3 in tauzi No. 1452, khata No. 1 in Mouza Malpahari No. 89 in Pakur Sub Division of Santhal Parganas. The leases were to commence from November 1, 1954 and to end on October 31, 1984, that is to say, they were for a total period of 30 years. Jyoti Prakash Pandey was working under the name and style of 'stone India'. He sold his rights, title and interest by a registered sale-deed on September 9, 1963 to the present appellant. It is admitted that rent under the terms of the original lease was deposited upto September 1965.

3. On the passing of the Bihar Land Reforms Act, 1950 (Act 30 of 1950) the ex-landlords ceased to have any interest from the date of vesting and in their place the State of Bihar became lessor under S. 10 (1) of the Land Reforms Act. The terms of S. 10 were as given below†. After the vest-

ing of the estate of the intermediaries, the State of Bihar as the new lessor recognised the lease for the quarrying of stones for the remaining period and the Deputy Commissioner, Santhal Parganas asked for the rent from the date of vesting to 30 April, 1965 at the rate of Rs. 200 per year as stated in the original lease. This was by a letter issued from his office on February 2, 1963. On December 10, 1964 the appellants received a letter which gives the gist of the facts on which the present controversy starts and the relevant part may be quoted here:

"Government have been pleased to amend S. 10 of Bihar Land Reforms Act, 1950, according to which the terms and conditions in regard to leases for minor minerals stand statutorily substituted by the corresponding terms and conditions by the Bihar Minor

date of vesting, be deemed to have been leased by the State Government to the holder of the said subsisting lease for the remainder of the term of that lease, and such holder shall be entitled to retain possession of the leasehold property.

(2) The terms and conditions of the said lease by the State Government shall mutatis mutandis be the same as the terms and conditions of the subsisting lease referred to in sub-section (1), but with the additional condition that, if in the opinion of the State Government the holder of the lease had not, before the date of the commencement of this Act, done any prospecting or development work, the State Government shall be entitled at any time before the expiry of one year from the said date to determine the lease by giving three months' notice in writing:

Provided that nothing in this sub-section shall be deemed to prevent any modifications being made in the terms and conditions of the said lease in accordance with the provisions of any Central Act for the time being in force regulating the modification of existing mining leases.

(3) The holder of any such lease of mines and minerals as is referred to in sub-section (1) shall not be entitled to claim any damages from the outgoing proprietor or tenure-holder on the ground that the terms of the lease executed by such proprietor or tenure-holder in respect of the said mines and minerals have become incapable of fulfilment by the operation of this Act."

†"10. Subsisting leases of mines and minerals.—(1) Notwithstanding anything contained in this Act, where immediately before the date of vesting of the estate or tenure there is a subsisting lease of mines or minerals comprised in the estate or tenure or any part thereof, the whole or that part of the estate or tenure, comprised in such lease shall, with effect from the

Mineral Concession Rules, 1964. As a result of this, rent and royalty, etc. in respect of minor minerals in the State irrespective of the date on which the lease was granted are to be paid by all categories of leases according to the rates given in the aforesaid Rules with effect from 27-10-64*.

The appellants denied their liability to pay. The Government informed them by letter as follows:

"This is to inform you that the terms and conditions of your mining lease in so far as they are inconsistent with the Bihar Minor Mineral Concession Rules, 1964, framed by the State Government under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, stand substituted by the corresponding terms and conditions prescribed by the Bihar Mineral Concession Rules, 1964, from 27-1-1964. Accordingly, dead rent, royalty and surface rent in addition to the other substitution as per Bihar Mineral Concession Rules, 1964, will be as follows:—

1. Dead rent ... Rs. 50 per acre per annum.
2. Royalty ... @ Rs. 3 per 100 cwt. of stone chips.
... @ Rs. 2 per 100 cft. of stone ballast and boulders.
... @ Rs. 4 per 100 cft. on building stones.
... @ Re. 1 per 100 Nos. of stones "setts".

3. Surface rent @ Rs. 10 per acre per year."

It is this additional demand and the liability to pay, which is the subject of controversy here. The Bihar Government contends that the terms of the original lease have been validly altered by the operation of the second proviso to S. 10 (2) of the Bihar Land Reforms Act added first by Ordinance III of 1964 and later incorporated again by the Bihar Land Reforms (Amendment) Act 1964 (Act 4 of 1965) and the addition of S. 10A to the Act by the same enactments. The material part of the second section of Act 4 of 1965 is quoted below*. Section 10A

*Amendment of section 10 of Bihar Act XXX of 1950 — In section 10 of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950) (hereinafter referred to as the said Act),—

provided for the vesting of the interest of leases of mines or minerals which were subject to such leases and need not be read here. The State Government also relied upon the Bihar Mineral Concession (First Amendment) Rules 1964 by which a second sub-rule was added to Rule 20. The twentieth rule, purporting to be framed under S. 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957) was amended on December 19, 1964 and now reads:

Rule 20. (1) Dead rent, royalty and surface rent. — When a lease is granted or renewed

(a) Dead rent shall be charged at the rates specified in Schedule I.

(b) royalty shall be charged at the rates specified in Schedule II, and

(c) surface rent shall be charged at the rates specified by the Govt. in the Revenue Department from time to time.

(2) On and from the date of commencement of these rules, the provisions of sub-rule (1) shall also apply to leases granted or renewed prior to the date of such commencement and subsisting on such date."

The contention is that the amendment of S. 10 of the Bihar Land Reforms Act is ultra vires the Constitution and that rule 20 (2) does not legally entitle the recovery of the dead rent, royalty etc., as in the Schedules to the Bihar Minor Mineral Concession Rules, 1964.

4. To understand fully the argument on behalf of the appellants a resume of the legislation on the subject of mines and minerals is neces-

(a) in sub-section (2), the following second proviso shall be added, namely:—

"Provided further that the terms and conditions of the said lease in regard to minor minerals as defined in the Mines and Minerals (Regulation and Development) Act, 1957 (Act LXVII of 1957), shall, in so far as they are inconsistent with the rules made by the State Government under section 15 of that Act, stand substituted by the corresponding terms and conditions prescribed by those rules and if further ascertainment and settlement of the terms will become necessary then necessary proceedings for that purpose shall be undertaken by the Collector", and

(b) after sub-s."

sary. Under the Government of India Act 1935, the subject of Mines and Minerals was covered by Entry 36 of the Federal Legislative List I and entry No. 23 of the Provincial Legislative List II of the 7th Schedule. These entries read as follows:

"Entry 36. Regulation of mines and oil-fields and mineral development to which such regulation and development under a Federal control is declared by Federal law to be expedient in the public interest."

"Entry 23. Regulation of mines and oil-fields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control."

When the Indian Independence Act, 1947 was passed the word 'federal' where it occurs for the first time in Entry 36 and in Entry 23 was changed to 'dominion'. The entries are practically repeated in the present Constitution and may be read immediately here:

Entry 54 of List I—Union List — reads:

"Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

Entry 23 of List II—State List—reads:

"Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

The difference between the entries of the Government of India Act, 1935 and the present Constitution lies in the removal of oil-fields from the entries and the declaration now must be by Parliament. Entry 53 in List I deals with oil-fields and mineral resources.

5. In 1948 the Legislative Assembly enacted the Mines and Minerals (Regulation and Development) Act 1948 (Act 53 of 1948). It received the assent of the Governor-General on September 8, 1948. It was an Act to provide for the regulation of mines and oil-fields and for the development of minerals. In S. 2 of that Act is to be found the declaration contemplated by Entries 36 and 23, 7th Schedule of the Government of India Act, 1935. That declaration reads as follows:

"2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation of mines and oil-fields and the development of minerals to the extent herein-after provided."

Section 3 of the Act of 1948 contained definitions. There were definitions of 'mine' and 'minerals'. The former meant an excavation for the purpose of searching for or obtaining minerals and included an oil-well and the latter included natural gas and petroleum. Section 4 provided that no mining lease would be granted after the commencement of that Act otherwise than in accordance with the rules made under that Act and that a mining lease granted contrary to the provisions would be void and of no effect. Section 5 empowered the Central Government, by notification to make rules for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area. In particular the rules could provide for the manner in which, the minerals or areas in respect of which and the persons by whom, applications for mining leases could be made and the fees payable, the terms on which and the conditions subject to which, mining leases might be granted, the areas and the period for which any mining lease might be granted and the maximum and minimum rent payable by a lessee, whether the mine was worked or not. Under S. 6 the Central Government had power to make rules as respect mineral development. Section 7 then provided as follows:

"7. (1) The Central Government may, by notification in the Official Gazette, make rules for the purpose of modifying or altering the terms and conditions of any mining lease granted prior to the commencement of this Act so as to bring such lease into conformity with the rules made under sections 5 and 6:

Provided that any rules so made which provide for the matters mentioned in clause (c) of sub-section (2) shall not come into force until they have been approved, either with or without modifications, by the Central Legislature.

(2) The rules made under sub-section (1) shall provide—

(a) for giving previous notice of the modification or alteration proposed to be made thereunder to the lessee, and

when the lessor is not the Central Government, also to the lessor and for affording them an opportunity of showing cause against the proposal;

(b) for the payment of compensation by the party who would be benefited by the proposed modification or alteration to the party whose rights under the existing lease would thereby be adversely affected; and

(c) for the principles on which, the manner in which and the authority by which the said compensation shall be determined.

Section 8 provided that the Central Government might by notification direct that any power exercisable under that Act might be exercised, subject to such conditions if any, as might be specified by such officer or authority or might be specified in the direction. In furtherance of the powers conferred the Central Government framed the Mineral Concession Rules 1949 and they came into force on the twenty-fifth day of October 1949. These rules for the first time defined minor minerals and after amendments from time to time the term meant:

"3 (ii) 'minor mineral' means building stone, boulder, shingle, gravel, chalcedony, pebbles (used for ball mill purposes only), limeshell, kankar and limestone used for lime burning, murrum, brick-earth (Fuller's earth), Bentonite, ordinary clay, ordinary sand (used for non-industrial purposes), road metal, reh-matti, slate and shale when used for building material."

Rule 4 however provided:

"4. Exemption—These rules shall not apply to minor minerals, the extraction of which shall be regulated by such rules as the Provincial Government may prescribe."

The word "provincial" was later changed to 'State'. Although some of the Provinces (now States) made Minor Mineral Concession Rules, it is admitted that Bihar Government did not frame any such rules.

6. The leases to the appellants' predecessors were granted in 1955 during the subsistence of the Act of 1948 and the Rules of 1949. It is also to be noticed that a fresh declaration was made by Parliament as required by Entry 54 List I—Union List of the 7th Schedule of the Constitution. The existing laws, however, continued. Without a declaration by Parliament the field of legislation might have been open to the

State Legislatures under Entry 23 of List II—State List of the Constitution but no law was made except what was enacted by the Bihar Legislature in the Land Reforms Act about vesting of mines in the State and the emergence of the State as a lessor in place of all original lessors.

7. Further rules were made by the Central Government in 1955 and 1956. In 1955 Minerals Conservation and Development Rules were made which were later replaced in 1958. On September 4, 1956, the Central Government in exercise of the powers conferred by S. 7 of the Act of 1948 made the Mining Leases (Modification of Terms) Rules 1956. Under these rules existing mining leases were to be brought into conformity with the Minerals Conservation and Development Rules. The expression 'existing mining leases' was defined as a mining-lease granted before the 25th day of October 1949 and subsisting at the commencement of those rules but did not include any lease in respect of any minor mineral within the meaning of clause (c) of S. 3 of the Act of 1948.

8. We now come to the year 1957. In that year Parliament enacted the Mines and Minerals (Regulation and Development) Act, 1957 (Act 67 of 1957). It came into force from December 28, 1957. Act 67 of 1957 made amendments in the Act of 1948 so as to make the latter relate to oil-fields only. All references to minerals other than oil were removed, with the result that it became legislation exclusively relating to oil and gas. Since the Act of 1948 was thus altered, Parliament enacted new provisions for minerals in Act 67 of 1957. We are primarily concerned with this Act in these appeals. A glance at some of the provisions of Act 67 of 1957 is necessary.

9. The Act 67 of 1957 came into force on 1st June, 1958 and extended to the whole of India. It contained the following declaration in S. 2.

"It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided."

By definition minerals excluded mineral oil because the Act of 1948 exclusively dealt with oil. 'Minor minerals' were defined to mean building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed

purposes and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral, Act 67 of 1957 contained 33 sections which were separated by general headings showing the topics dealt with. The first group of sections 4—9 contained general restrictions on undertaking prospecting and mining operations. Of this group we may quote here S. 4 which will be considered later:

"4. Prospecting or mining operations to be under licence or lease—

(1) No person shall undertake any prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a prospecting licence or, as the case may be, a mining lease, granted under this Act and the rules made thereunder:

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with the terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement.

(2) No prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder."

Section 5 lays down restrictions on the grant of prospecting licences or mining leases. Section 6 prescribes the maximum area for which a prospecting licence or mining lease may be granted and section 7 the periods for which prospecting licences may be granted or renewed and section 8 the periods for which mining leases may be granted or renewed. Section 9 fixes the royalties in respect of mining leases.

10. Then follows another group of sections 10—12 which lays down the procedure for obtaining prospecting licences or mining leases in respect of land in which the minerals vest in the Government. The next group of sections 13—16 is headed 'Rules for regulating the grant of prospecting licences and mining leases'. Section 13 gives power to the Central Government to make rules in respect of minerals. Section 14 however excludes the application of sections 4—13 to minor minerals. It reads:

"The provisions of sections 4 to 13 (inclusive) shall not apply to prospect-

ing licences and mining leases in respect of minor minerals."

Section 15 gives power to the State Governments to make rules in respect of minor minerals. It reads:

"15 (1) The State Government may, by notification in the official Gazette make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith.

(2) Until rules are made under sub-section (1), any rules made by a State Government regulating the grant of prospecting licences and mining leases in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force."

Section 16 gives power to modify mining leases granted before 25th October, 1949. It reads:

"16 (1) All mining leases granted before the 25th day of October, 1949, shall, as soon as may be after the commencement of this Act, be brought into conformity with the provisions of this Act and the rules made under sections 13 and 18:

Provided that if the Central Government is of opinion that in the interests of minerals development it is expedient so to do, it may, for reasons to be recorded, permit any person to hold one or more such mining leases covering in any one State a total area in excess of that specified in clause (b) of section 6 or for a period exceeding that specified in sub-section (1) of section 8.

(2) The Central Government may, by notification in the official Gazette, make rules for the purpose of giving effect to the provisions of sub-section (1) and in particular such rules shall provide—

(a) for giving previous notice of the modification or alteration proposed to be made in any existing mining lease to the lessee and where the lessor is not the Central Government also to the lessor and for affording him an opportunity of showing cause against the proposal;

(b) for the payment of compensation to the lessee in respect of the reduction of any area covered by the existing mining lease; and

(c) for the principles on which, the manner in which, and the authority by which, the said compensation shall be determined."

Section 17 stands by itself as a group and contains special powers of Central Government to undertake prospecting or mining operations in certain cases. Section 18 deals with mineral development and gives additional rule-making power to the Central Government. Next follow some miscellaneous provisions; of these, only two interest us. Section 19 lays down that prospecting licences or mining leases granted, renewed or acquired in contravention of the provisions of the Act shall be void and of no effect and Section 20 that the provisions apply to prospecting licences or mining leases whether granted before or after the Act. The rest of this Act does not concern this dispute.

11. It may be pointed out here that the rules made under S. 13 do not apply to minor minerals in view of the provisions of S. 14. The State of Bihar had not made any rules till the Bihar Minor Minerals Concession Rules 1964 were made. The modification of the terms of existing mining leases was provided for in S. 16 but that provision applied to mining leases granted before 25th October, 1949. The provisions of Mining Leases (Modification of Terms) Rules 1955 did not apply to minor minerals because the definition of 'existing mining lease' excluded a lease in respect of any minor minerals. The power to modify the existing leases in the case had to be found elsewhere.

12. The argument of the appellants is that apart from the provisions of the 2nd proviso to S. 10 added to the Land Reforms Act 1950 in 1964 by Act IV of 1965 and second sub-rule added to rule 20 of the Bihar Minor Mineral Concession Rules 1964, there is no power to modify the terms. These provisions of law are said to be outside the competence of the State Legislature and the Bihar Government. With regard to the State Legislature it is contended that the scheme of the relevant entries in the Union and State List is that to the extent to which regulation of mines and mineral development is declared by Parliament by law to be expedient in the public interest, the subject of legislation is withdrawn from the jurisdiction of the State Legislature and therefore Act 67 of 1957 leaves no legislative field to the Bihar Legislature to enact Act 4 of 1965 amending

the Land Reforms Act. As regards Rule 20 (2) it is contended that the rule-making power of its own force cannot reach mining leases granted in 1955 and that this could only be done by a competent legislature. These are the two matters which need decision.

13. The main arguments are supplemented by the following contentions. That the Bihar Rules in so far as they make demands of rent and royalty on the existing leases which were executed prior to their coming into force are beyond the power to make rules in respect of minor minerals under S. 15 of Act 67 of 1957, that S. 15 itself is unconstitutional and void because it delegates legislative power to the rule-making authority and it is excessive delegation and that the amendment of Bihar Land Reforms Act is void because it affects the fundamental rights of the appellants guaranteed under Articles 31 and 19 of the Constitution.

14. Although these supplementary arguments were raised it is obvious that they can arise according as the two main arguments are allowed or disallowed. Therefore it is necessary to address ourselves to the first argument that the legislative competence to enact the amendment to S. 10 of the Reforms Act was wanting. As the amendment was made after Act 67 of 1957 we have to consider the position in relation to it. Entry 54 of the Union List speaks both of Regulation of mines and minerals Development and entry 23 is subject to entry 54. It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature. This proposition is also self-evident that no attempt was rightly made to contradict it. There are also two decisions of this Court reported in the *Hingir-Rampur Coal Co. Ltd. v. State of Orissa* 1961-2 SCR

537 = (AIR 1961 SC 459) and State of Orissa v. M. A. Tulloch & Co. 1964-4 SCR 461 = (AIR 1964 SC 1284) in which the matter is discussed. The only dispute, therefore, can be to what extent the declaration by Parliament leaves any scope for legislation by the State Legislature. If the impugned legislation falls within the ambit of such scope it will be valid; if outside it, then it must be declared invalid.

15. The declaration is contained in S. 2 of Act 67 of 1957 and speaks of the taking under the control of the Central Government the regulation of mines and development of minerals to the extent provided in the Act itself. We have thus not to look outside Act 67 of 1957 to determine what is left within the competence of the State Legislature but have to work it out from the terms of that Act. In this connection we may notice what was decided in the two cases of this Court. In the Hingir-Rampur case 1961-2 SCR 537 = (AIR 1961 SC 459) a question had arisen whether the Act of 1948 so completely covered the field of conservation and development of minerals as to leave no room for State Legislation. It was held that the declaration was effective even if the rules contemplated under the Act of 1948 had not been made. However, considering further whether a declaration made by a Dominion Law could be regarded as a declaration by Parliament for the purpose of entry 54, it was held that it could not and there was thus a lacuna which the Adaptation of Laws Order 1950 could not remove. Therefore, it was held that there was room for legislation by the State Legislature.

16. In the M. A. Tulloch case 1964-4 SCR 461 = (AIR 1964 SC 1284) the firm was working a mining lease granted under the Act of 1948. The State Legislature of Orissa then passed the Orissa Mining Areas Development Fund Act 1952, and levied a fee for the development of mining areas within the State. After the provisions came into force a demand was made for payment of fees due from July 1957 to March 1958 and the demand was challenged. The High Court held that after the coming into force of Act 67 of 1957 the Orissa Act must be held to be non-existent. It was held on appeal that since Act 67 of 1957 contained the requisite declaration by Parliament under entry 54 and that

Act covered the same field as the Act of 1948 in regard to mines and mineral development, the ruling in Hingir-Rampur case 1961-2 SCR 537 = (AIR 1961 SC 459) applied and as Sections 13 (1) and (2) of the Act 67 of 1957 were very wide they ruled out legislation by the State Legislature. Where a superior legislature evinced an intention to cover the whole field, the enactments of the other legislature whether passed before or after must be held to be overborne. It was laid down that inconsistency could be proved not by a detailed comparison of the provisions of the conflicting Acts but by the mere existence of two pieces of legislation. As S. 18 (1) covered the entire field, there was no scope for the argument that till rules were framed under that section, room was available.

17. These two cases bind us and apply here. Since the Bihar State Legislature amended the Land Reforms Act after the coming into force of Act 67 of 1957, the declaration in the latter Act would carve out a field to the extent provided in that Act and to that extent entry 23 would stand cut down. To sustain the amendment the State must show that the matter is not covered by the Central Act. The other side must, of course, show that the matter is already covered and there is no room for legislation.

18. We have already analysed Act 67 of 1957. The Act takes over the control of regulation of mines and development of minerals to the Union; of course, to the extent provided. It deals with minor minerals separately from the other minerals. In respect of minor minerals it provides in S. 14 that Ss. 4-13 of the Act do not apply to prospecting licences and mining leases. It goes on to state in S. 15 that the State Government may, by notification in the official Gazette, make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith, and that until rules are made, any rules made by the State Government regulating the grant of prospecting licences and mining leases in respect of minor minerals which were in force immediately before the commencement of the Act would continue in force. It is admitted that no such rules were made by the State Government. It follows that the subject of legislation is cover-

ed in respect of minor minerals by the express words of S. 15 (1). Parliament has undertaken legislation and laid down that regulation of the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith must be by rules made by the State Government. Whether the rules are made or not the topic is covered by Parliamentary legislation and to that extent the powers of State Legislature are wanting. Therefore, there is no room for State legislation.

19. Mr. Lal Narain Sinha argued that the topic of legislation concerns land and therefore falls under entry 18 of the State List and he drew our attention to other provisions on the subject of mines in the Land Reforms Act as originally passed. The abolition of the rights of intermediaries in the mines and vesting these rights as lessors in the State Government was a topic connected with land and land tenures. But after the mining leases stood between the State Government and the lessees, any attempt to regulate those mining leases will fall not in entry 18 but in entry 23 even though the regulation incidentally touches land. The pith and substance of the amendment to S. 10 of the Reforms Act falls within entry 23 although it incidentally touches land and not vice versa. Therefore, this amendment was subject to the overriding power of Parliament as declared in Act 67 of 1957 in S. 15. Entry 18 of the State list, therefore, is of no help.

20. Mr. Lal Narain Sinha next contended that the provisions of Sections 4-14 do not envisage control of the Union which is a condition precedent to the ousting of the jurisdiction under entry 23. Obviously Mr. Lal Narain Sinha reads Union as equivalent to Union Government. This is erroneous. Union consists of its three limbs, namely, Parliament, Union Government and the Union Judiciary. Here the control is being exercised by Parliament, the legislative organ of the Union and that is also controlled by the Union. By giving the power to the State Government to make rules, the control of Union is not negated. In fact, it establishes that the Union is exercising the control. In view of the two rulings of this Court referred to earlier we must hold that by enacting S. 15 of Act 67 of 1957 the Union

has taken all the power to itself and authorised the State Government to make rules for the regulation of leases. By the declaration and the enactment of S. 15 the whole of the field relating to minor minerals came within the jurisdiction of Parliament and no scope was left for the enactment of the second proviso to S. 10 in the Land Reforms Act. The enactment of the Proviso was, therefore, without jurisdiction.

21. This leaves for consideration the second sub-rule added to Rule 20 in December, 1964 by the State Government. It will be noticed that the rule as it stood previously applied prospectively to all leases which came to be executed after the promulgation of the rules. The second sub-rule made applicable those provisions to all leases subsisting on the date of the promulgation of the rules. The short question is whether the rules could operate on leases in existence prior to their enactment without the authority of a competent legislature. Vested rights cannot be taken away except under authority of law and mere rule-making power without the support of a legislative enactment is not capable of achieving such an end. There being two legislatures to consider, namely, Parliament and the State Legislature we have first to decide which legislature would be competent to grant such power.

22. We have already held that the whole of the legislative field was covered by the Parliamentary declaration read with the provisions of Act 67 of 1957, particularly S. 15. We have also held that entry 23 of List II was to that extent cut down by entry 54 of List I. The whole of the topic of minor minerals became a Union subject. The Union Parliament allowed rules to be made but that did not recreate a scope for legislation at the State level. Therefore, if the old leases were to be modified a legislative enactment by Parliament on the lines of S. 16 of Act 67 of 1957 was necessary. The place of such a law could not be taken by legislation by the State Legislature as it purported to do by enacting the second Proviso to S. 10 of the Land Reforms Act. It will further be seen that Parliament in S. 4 of Act 67 of 1957 created an express bar although S. 4 was not applicable to minor minerals. Whether S. 4 was intended to apply to minor minerals

as well or any part of it applies to minor minerals are questions we cannot consider in view of the clear declaration in Section 14 of Act 67 of 1957 that the provisions of Ss. 4-13 (inclusive) do not apply. Therefore, there does not exist any prohibition such as is to be found in Sec. 4 (1), Proviso in respect of minor minerals. Although Section 16 applies to minor minerals it only permits modification of mining leases granted before October 25, 1949. In regard to leases of minor minerals executed between this date and December 1964 when R. 20 (1) was enacted, there is no provision of law which enables the terms of existing leases to be altered. A mere rule is not sufficient.

23. Faced with this difficulty Mr. Lal Narain Sinha attempted to claim power for the second Proviso to S. 10 of the Land Reforms Act from entry 18 of List II, a contention we have rejected. He also attempted to find a field for enactment by the State Legislature for the said proviso. This argument was extremely ingenious and needs separate notice.

24. The contention was that modification of existing leases was a separate topic altogether and was not covered by S. 15 of Act 67 of 1957. Therefore if Parliament had not said anything on the subject the field was open to the State Legislature. The other side pointed to the words 'and for purposes connected therewith' in S. 15 and contended that those words were sufficiently wide to take in modification of leases. Mr. Lal Narain Sinha's argument is unfortunately not tenable in view of the two rulings of this Court. On the basis of those rulings we have held that the entire legislative field in relation to minor minerals had been withdrawn from the State Legislature. We have also held that vested rights could only be taken away by law made by a competent legislature. Mere rule-making power of the State Government was not able to reach them. The authority to do so must, therefore, have emanated from Parliament. The existing provision related to regulation of leases and matters connected therewith to be granted in future and not for alteration of the terms of leases which were in existence before Act 67 of 1957. For that special legislative provision was necessary. As no such parliamentary

law had been passed the second sub-rule to R. 20 was ineffective. It could not derive sustenance from the second Proviso to S. 10 (2) of the Land Reforms Act since that proviso was not validly enacted.

25. In the result, therefore, these appeals must succeed. They are allowed with costs. A mandamus shall issue restraining the State Government from enforcing the provisions of the second Proviso to S. 10 (2) added by Bihar Land Reforms (Amendment) Act 1964 (Bihar Act 4 of 1965) and the second sub-rule of Rule 20 added by a notification on December 10, 1964 to the Bihar Mineral Concession Rules 1964.

Appeals allowed.

**AIR 1970 SUPREME COURT 1446
(V 57 C 307)**

M. HIDAYATULLAH C. J., J. C. SHAH, V. RAMASWAMI, G. K. MITTER AND A. N. GOVER JJ.

The State of Bihar, Petitioner v. The Union of India and another, Respondents.

Civil Misc. Petns. Nos. 512, 513, 574, 575, 578, 579, 581, 582, 583, 584, 587, 588, 605, 606, 609, 610, 1466 and 1467 of 1969; Original Suits Nos. 3 of 1967, 1 and 3 to 9 of 1968, D/- 19-9-1969.

(A) Constitution of India, Art. 131 — Original Jurisdiction of Supreme Court — Article does not contemplate that suit must be filed for complete adjudication of dispute envisaged therein.

Under Art. 131, the Supreme Court is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. Once the Court comes to its conclusion on the cases presented by any disputant and gives its adjudication on the facts or the points of law raised, the function of the Supreme Court under Art. 131 is over. Article 131 does not prescribe that a suit must be filed in the Supreme Court for the complete adjudication of the dispute envisaged therein or the passing of a decree capable of execution in the ordinary way as decrees of other courts are. It is open to an aggrieved party to present a petition to the Supreme Court con-

taining a full statement of the relevant facts and praying for the declaration of its rights as against the other disputants. Once that is done, the function of the Supreme Court under Article 131 is at an end. The framers of the Constitution do not appear to have contemplated the contingency of a party to an adjudication by Supreme Court under Art. 131 not complying with the declaration made. The legal right which is the subject of dispute must arise in the context of the Constitution and the federalism it sets up. However, there can be no doubt that so far as the parties to the dispute are concerned, the framers of the Constitution did intend that they could only be the constituent units of the Union of India and the Government of India itself arrayed on one side or the other either, singly or jointly with another unit or the Government of India.

(Paras 2, 11)

(B) Constitution of India, Art. 131 — Original Jurisdiction of Supreme Court — Article does not contemplate suit in which private person is party, either jointly or alternatively with State or Government.

The specification of the parties in Art. 131 is not of an inclusive kind. The express words of clauses (a), (b) and (c) exclude the idea of a private citizen, a firm or a corporation figuring as a disputant either alone or even along with a State or with the Government of India in the category of a party to the dispute. There is no scope for suggesting that a private citizen, a firm or a corporation can be arrayed as a party by itself on one side and one or more States including the Government of India on the other. Nor is there anything in the article which suggests a claim being made by or preferred against a private party jointly or in the alternative, with a State or the Government of India.

(Para 3)

A dispute in which such a private party is involved must be brought before a court, other than the Supreme Court, having jurisdiction over the matter.

(Para 18)

(C) Constitution of India, Art. 131 — Original Jurisdiction of Supreme Court — Article had a forerunner in Govt. of India Act (1935), S. 204 — Origin of S. 204 traced. (Paras 4, 5)

(D) Constitution of India, Art. 131 — Original Jurisdiction of Supreme

Court — Subject to provisions of the Constitution — Clause (2) of Art. 143 shows that the power of President overrides the proviso to Art. 131.

(Para 15)

(E) Constitution of India, Art. 131 — Original Jurisdiction of Supreme Court — 'State' — Hindustan Steel Ltd. is not.

The expression "the State" has the same meaning in Part IV of the Constitution under Art. 36. The enlarged definition of 'State' given in Parts III and IV of the Constitution would not be attracted to Article 131 of the Constitution and a body like the Hindustan Steel Ltd. cannot be considered to be "a State" for the purpose of Article 131 of the Constitution. AIR 1967 SC 1857, Ref.

(Para 19)

Cases Ref: Chronological Paras

(1967) AIR 1967 SC 1857 (V 54) =

(1967) 3 SCR 377, Rajasthan

State Electricity Board v.

Mohanlal

19

(1951) AIR 1951 SC 253 (V 38) =

1951 SCR 474, State of Seraikella

v. Union of India

13

(1939) AIR 1939 FC 58 (V 26) =

1939 FCR 124, United Provinces

v. Governor General in Council

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Mr. Niren De, Attorney-General for India and Dr. V. A. Sayid Muhammad, Senior Advocate (Mr. B. D. Sharma, Advocate, with them) for Defendant No. 1 (In all Suits).

Mr. D. N. Gupta, Advocate, for Defendant No. 2 (In Suits Nos. 3 to 8 of 1968).

Mr. D. N. Mukherjee, Advocate, for Defendant No. 2 (In Suits Nos. 3 of 1967, 1 and 9 of 1968).

Mr. D. P. Singh, Advocate for Plaintiff (In Suits No. 3 of 1967, 1, 3, 5 and 6 of 1968).

Mr. D. Goburdhun, Advocate for Plaintiff (In Suits Nos. 4 and 7 of 1968).

Mr. U. P. Singh, Advocate for Plaintiff (In Suit No. 8 of 1968).

Mr. R. C. Prasad, Advocate, for Plaintiff (In Suit No. 9 of 1968).

The following Order of the Court was delivered by

MITTER, J.: This group of applications can be divided into two parts. The object of one group is to get the plaints in nine suits filed in this Court rejected while that of the other group is to stay the hearing of the suits. The suits are all of the same pattern in each of which the State of Bihar figu-

res as the plaintiff. The Union of India is the first defendant in all of them while the second defendant in six is Hindusthan Steel Ltd., and in three others the Indian Iron and Steel Company Ltd. The cause of action in all the suits is of the same nature. Briefly stated the plaintiff's case in all the suits is that "due to the negligence or deliberate action of the servants of both defendants there was a short delivery of iron and steel material ordered by the plaintiff to various sites in the State of Bihar in connection with the construction work of the Gandak Project". As the goods were in all cases booked by rail for despatch to the project site, both defendants are sought to be made liable for short delivery, the first defendant as the owner of the railways and the second defendant as the consignor of the goods under contract with the State of Bihar for supply of the material. In each case there is a prayer for a decree for a specific sum of money to be passed either against the first defendant "or alternatively against the second defendant". Normally all suits of this kind are instituted all over India in different courts beginning from the courts of the lowest jurisdiction to the High Courts exercising original jurisdiction. The only distinguishing feature of this series of suits from others of every day occurrence in different courts is that a State is the plaintiff in each case. In all suits of a similar nature which are filed in courts other than this court, a notice under S. 80 of the Code of Civil Procedure is an essential pre-requisite. No such notice has been served in any of these cases. The applications were set down for trial of three issues sought to be raised by way of preliminary issues. They are as follows:

1. Whether the alleged cause or causes of action in this suit are within the scope of Art. 131 of the Constitution?

2. Whether this suit is within the scope of Art. 131 of the Constitution in view of a non-State, viz., defendant No. 2, having been made a party to the suit?

3. Whether the suit is barred by the provisions of S. 80 C. P. C. for want of notice to defendant No. 1?

2. The question before this Court is, whether the dispute in these cases is within the purview of that article

(quoted in the foot-note)*. It must be noted that the article confers jurisdiction on this Court to the exclusion of all other courts in any dispute between the parties mentioned therein. There is however an overriding provision that such jurisdiction is subject to the provisions of the Constitution and our attention was drawn to a few of these provisions where the disputes specified are to be adjudicated upon in entirely different manner. The most important feature of Art. 131 is that it makes no mention of any party other than the Government of India or any one or more of the States who can be arrayed as a disputant. The other distinguishing feature is that the Court is not required to adjudicate upon the disputes in exactly the same way as ordinary courts of law are normally called upon to do for upholding the rights of the parties and enforcement of its orders and decisions. The words in the article "if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends" are words of limitation on the exercise of that jurisdiction. These words indicate that the disputes should be in respect of legal rights and not disputes of a political character. Moreover, this Court is only concerned to give its decision on questions

*Article 131. Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

(a) between the Government and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which having been entered into or executed before the commencement of the Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

of law or of fact on which the existence or extent of a legal right claimed depends. Once the Court comes to its conclusion on the cases presented by any disputants and gives its adjudication on the facts or the points of law raised, the function of this Court under Art. 131 is over. Article 131 does not prescribe that a suit must be filed in the Supreme Court for the complete adjudication of the dispute envisaged therein or the passing of a decree capable of execution in the ordinary way as decrees of other courts are. It is open to an aggrieved party to present a petition to this Court containing a full statement of the relevant facts and praying for the declaration of its rights as against the other disputants. Once that is done, the function of this Court under Art. 131 is at an end. The framers of the Constitution do not appear to have contemplated the contingency of a party to an adjudication by this Court under Art. 131 not complying with the declaration made. Our law is not without instances where a court may be called upon to make an adjudication of the rights of the parties to an agreement or an award simpliciter on the basis of such rights without passing a decree. A case in point is S. 33 of the Indian Arbitration Act. Further, all adjudications by a court of law even under a decree in a suit need not necessarily be capable of enforcement by way of execution. Section 42 of the Specific Relief Act, 1877 now replaced by S. 34 of the new Act enables a person entitled to any legal character or to any right as to any property to institute a suit against any person denying or interested to deny his title to such character or right without asking for any further relief subject to the limitations prescribed by the section. We need not however lay much stress on this aspect of the case as we are only concerned to find out whether the suits can be entertained by this Court.

3. Clauses (a), (b) and (c) of the article specify the parties who can appear as disputants before this Court. Under cl. (a) it is the Government of India and one or more States; under clause (b) it is the Government of India and one or more States on one side and one or more other States on the other, while under clause (c) the parties can be two or more States without the Government of India being involved in the dispute. The specifica-

tion of the parties is not of an inclusive kind. The express words of clauses (a), (b) and (c) exclude the idea of a private citizen, a firm or a corporation figuring as a disputant either alone or even along with a State or with the Government of India in the category of a party to the dispute. There is no scope for suggesting that a private citizen, a firm or a corporation can be arrayed as a party by itself on one side and one or more States including the Government of India on the other. Nor is there anything in the article which suggests a claim being made by or preferred against a private party jointly or in the alternative with a State or the Government of India. The framers of the Constitution appear not to have contemplated the case of a dispute in which a private citizen, a firm or a corporation is in any way involved as a fit subject for adjudication by this Court under its exclusive original jurisdiction conferred by Article 131.

4. Like many of the provisions of our Constitution this article had a forerunner in the Government of India Act, 1935. Section 204 of that Act provided for conferment of original jurisdiction on the Federal Court of India. That section ran as follows:

"(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federal States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to—

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment."

Clause (a) of the proviso to the section defined the categories of disputes which might be raised before the Federal Court while clause (b) permitted the parties to provide for the exclusion of such jurisdiction in the agreement in respect whereof the dispute arose. It will be noted that the scope of the dispute under sub-clause (i) of clause (a) was limited to the interpretation of the Government of India Act or Order in Council or to the extent of legislative or executive authority vested in the Federation while under sub-clause (ii) the dispute had to relate to the administration in a State of a law of the Federal Legislature or otherwise concerned with some matter relating to the legislative competency of the said legislature. Under sub-clause (iii) the dispute could only be one under an agreement made after the establishment of the Federation between the State and the Federation or a Province subject to the condition therein specified. A dispute of the nature which is raised in this series of a case was outside the ken of S. 204 of the Government of India Act.

5. It may not be out of place to trace the origin of S. 204. The proceedings of the Joint Committee on Indian Constitutional Reform. Session 1933-34, Vol. I, Part II, paragraph 309 read as follows:

"A Federal Court is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the Constitution and a tribunal for the determination of disputes between the constituent units of the Federation. The establishment of a Federal Court is part of the White Paper scheme, and we approve generally the proposals

with regard to it. We have, however, certain comments to make upon them, which we set out below."

The report of the Joint Committee on Indian Constitutional Reforms, Session 1933-34, Vol. I, Part I contained two paragraphs bearing on this matter. Paragraph 322 was a reproduction of paragraph 309 quoted above. Paragraph 324 ran as follows:

"324. It is proposed that the Federal Court shall have an original jurisdiction in—

(i) any matter involving the interpretation of the Constitution Act or the determination of any rights or obligations arising thereunder, where the parties to the dispute are (a) the Federation and either a Province or a State, or (b) two Provinces or two States, or a Province and a State;

(ii) any matter involving the interpretation of, or arising under, any agreement entered into after the commencement of the Constitution Act between the Federation and a Federal Unit or between Federal Units, unless the agreement otherwise provides.

This jurisdiction is to be an exclusive one, and in our opinion rightly so, since it would be altogether inappropriate if proceedings could be taken by one Unit of the Federation against another in the Courts of either of them. For that reason we think that, where the parties are Units of the Federation or the Federation itself, the jurisdiction ought to include not only the interpretation of the Constitution Act, but also the interpretation of Federal laws, by which we meant any laws enacted by the Federal Legislature."

6. It is clear from the above that the framers of the Government of India Act 1935, thought that the Federal Court should be the tribunal for the determination of disputes between the constituent units of the Federation and it sought to lay down the exact nature of the dispute which that Court could be called upon to examine and decide.

7. The Constitutional Proposals of the Sapru Committee show that they had the said report and the said proceedings of the Committee in their mind when they advocated the strengthening of the position of the Federal Court in India and widening its jurisdiction both on the original side and the appellate side but maintaining at the same time that it should

"act as an interpreter and guardian of the Constitution, and as a tribunal for the determination of disputes between the constituent units of the Federation."

8. It is also to be noted that under Section 204 of the Government of India Act, 1935 the Federal Court's jurisdiction was limited to the pronouncement of a declaratory judgment.

9. Art. 109 of the Draft Constitution of India prepared by the Constituent assembly was in the same terms as Art. 131 of the Constitution as it came into force in 1950. The proviso to the original article was substituted by the new proviso in the year 1956 as a result of the Seventh Amendment by reason of the abolition of the Part B States and the changes necessitated thereby. Reference was made at the Bar in this connection to the Debates in the Constituent Assembly, Vol. IV, 13th July, 1947 to 21st July, 1947. They however do not throw any additional light.

10. So far as the proceedings of the Joint Committee on Indian Constitutional Reform and the report of the Committee on the same are concerned, they make it clear that the object of conferring exclusive original jurisdiction on the Federal Court was that the disputes of the kinds specified between the Federation and the Provinces as the constituent units of the Federation, should not be left to be decided by courts of law of a particular unit but be adjudicated upon only by the highest tribunal in the land which would be beyond the influence of any one constituent unit.

11. Although Article 131 does not define the scope of the disputes which this Court may be called upon to determine in the same way as Section 204 of the Government of India Act, and we do not find it necessary to do so, this much is certain that the legal right which is the subject of dispute must arise in the context of the constitution and the Federalism it sets up. However, there can be no doubt that so far as the parties to the dispute are concerned, the framers of the Constitution did intend that they could only be the constituent units of the Union of India and the Government of India itself arrayed on one side or the other either singly or jointly with another unit or the Government of India.

12. There is no decision either of the Federal Court of India or of this Court which throws much light on the question before us. Reference was made at the Bar to the case of *United Provinces v. The Governor General in Council*, 1939 FCR 124 = (AIR 1939 FC 58) where the United Provinces filed a suit against the Governor-General in Council for a declaration that certain provisions of the Cantonments Act, 1924, were ultra vires the then Indian Legislature. A claim was also made that all fines imposed and realised by criminal courts for offences committed within the cantonment areas in the United Provinces ought to be credited to the provincial revenues and that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to Cantonment Funds since 1924. The Governor-General in Council contended inter alia that the dispute was not one which was justiciable before the Federal Court. On the question of jurisdiction, Gwyer, C. J. was not inclined to think "that the plaintiffs would in any event have been entitled to the declarations for which they originally asked, in proceedings against the Governor-General in Council". According to the learned Chief Justice "their proper course would have been to take proceedings against a named Cantonment Board, though such proceedings could not have been brought to this Court." He was of the view that it was competent for the court to entertain a suit for a declaration "that S. 106 of the Act of 1924 was ultra vires," and said that as the dispute between the parties depended upon the validity of the assertion of the Province to have the fines under discussion credited to provincial revenues and not to the Cantonment funds the dispute involved a question of the existence of a legal right. According to him the question might have been raised in proceedings to which a Cantonment Board was a party but "it was convenient to all concerned that it should be disposed of in the proceedings before the court."

13. The only other Indian case cited at the Bar in this connection was that of *the State of Seraikella v. Union of India*, 1951 SCR 474 = (AIR 1951 SC 253) where Mahajan, J. expressed the view that S. 80 of the Code of Civil Procedure would not affect suits instituted in the Federal Court under S. 204 of the Government of India Act.

14. Our attention was drawn to some provisions of the American Constitution and of the Constitution Act of Australia and several decisions bearing on the interpretation of provisions which are somewhat similar to Article 131. But as the similarity is only limited, we do not propose to examine either the provisions referred to or the decisions to which our attention was drawn. In interpreting our Constitution we must not be guided by decisions which do not bear upon provisions identical with those in our Constitution.

15. The Constitution makes special provisions for settlement of certain disputes in a manner different from that laid down in Art. 131. For instance, Art. 143 gives an overriding power to the President of India to consult the Supreme Court when he is of the view that the question is of such a nature and of such public importance that it is expedient to do so. Under cl. (1) of that Article the President is empowered to obtain the opinion of the Supreme Court upon any question of law or fact which has arisen or is likely to arise and is of such a nature and of such public importance that the President considers it expedient to obtain such opinion. In such a case the Court after giving such hearing as it thinks fit has to report to the President its opinion thereon. Clause (2) of the article shows that this power of the President overrides the proviso to Art. 131.

16. Article 257 provides for control of the Union over the States in certain cases. Under clause (2) thereof the executive power of the Union also extends to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance. Under clause (4) where such directions are given and "costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such directions had not been given," the Government of India must pay to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

17. Again, when there is a dispute or complaint with regard to the use,

distribution or control of the waters of, or in, any inter-State river or river valley clause (2) of Article 262 gives Parliament the power by law to provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of such dispute or complaint as is referred to in clause (1). Such a law ousts the jurisdiction of the court which would normally be attracted by Article 131. Article 290 contains a provision somewhat similar to Article 257 (4) with regard to certain expenses and pensions and makes the same determinable by an arbitrator to be appointed by the Chief Justice of India.

18. Apart from these special provisions a dispute which falls within the ambit of Article 131 can only be determined in the forum mentioned therein, namely, the Supreme Court of India, provided there has not been impleaded in any said dispute any private party, be it a citizen or a firm or a corporation along with a State either jointly or in the alternative. A dispute in which such a private party is involved must be brought before a court, other than this court, having jurisdiction over the matter.

19. It was argued by counsel on behalf of the State of Bihar that so far as the Hindustan Steel Ltd., is concerned it is 'State' and the suits in which the Government of India along with Hindustan Steel Ltd. have been impleaded are properly filed within Article 131 of the Constitution triable by this Court in its original jurisdiction. Reference was made to the case of Rajasthan State Electricity Board v. Mohan Lal, (1967) 3 SCR 377 = (AIR 1967 SC 1857). There the question arose between certain persons who were permanent employees of the Government of the State of Rajasthan and later placed at the disposal of the State Electricity Board and one of the questions was whether the appellant Board could be held to be 'State' as defined in Article 12. This Court by a majority held that the Board was "other authority" within the meaning of Article 12 and therefore was a 'State' to which appropriate directions could be given under Articles 226 and 227 of the Constitution. It will be noted that under Article 12 all local or other authorities within the territory of India or under the control of the

Government of India are 'States' for purposes of Part III which defines and deals with the Fundamental Rights enshrined in the Constitution. The expression "the State" has the same meaning in Part IV of the Constitution under Article 36. No reason was shown as to why the enlarged definition of 'State' given in Parts III and IV of the Constitution would be attracted to Article 131 of the Constitution and in our opinion a body like the Hindustan Steel Ltd. cannot be considered to be "a State" for the purpose of Article 131 of the Constitution.

20. In the result we hold that the suits do not lie in this Court under Article 131 of the Constitution and issue No. 2 must be answered in the negative. It is not necessary to give any answer to issue No. 1 nor to issue No. 3. On the view we take the plaints must be returned for the purpose of presentation to courts having jurisdiction over the disputes. Let the plaints be returned for presentation to the proper court after endorsing on them the date of presentation of the plaints in this Court and the date on which they were returned. We make no order as to costs of these applications.

Plaints returned.

**AIR 1970 SUPREME COURT 1453
(V 57 C 308)**

M. HIDAYATULLAH C. J., J. C. SHAH, V. RAMASWAMI, G. K. MITTER AND A. N. GROVER JJ.

Harakchand Ratanchand Banthia and others etc., Petitioners v. Union of India and others, Respondents.

Writ Petns. Nos. 282, 407 and 408 of 1968, D/- 30-4-1969.

(A) Constitution of India, Art. 246— Interpretation of legislative lists — General principles.

The entries in the three lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries, the reason being that the allocation of subjects is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories. But some of the entries in the different

lists or in same list may overlap or may appear to be in direct conflict with each other. It is then the duty of court to reconcile the entries and bring about a harmonious construction. An endeavour must be made to solve the conflict by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. It is a well recognised canon of construction that a general power should not be so interpreted as to nullify a particular power conferred by the same instrument. AIR 1939 FC 1 & AIR 1951 SC 69, Rel. on.

(Paras 6, 7)

(B) Constitution of India, Sch. 7 List I entry 52, List 3 entry 33 — Industries — Manufacture of gold ornaments in India falls within connotation of 'industry' — Gold (Control) Act (1968) validly enacted by Parliament.

The manufacture of gold ornaments by goldsmiths in India is a process of systematic production for trade or manufacture and so falls within the connotation of the word 'industry' in the appropriate legislative entries. It follows, therefore, that in enacting the Gold (Control) Act, 1968, Parliament was validly exercising its legislative power in respect of matters covered by Entry 52 of List I and entry 33 of List III.

(Para 7)

(C) Constitution of India, Sch. 7 List 1 entry 52 — Industries — Interpretation — Decisions relating to interpretation of word 'industry' in S. 2 (f), Industrial Disputes Act, 1947, are of no avail.

(Para 8)

(D) Industries (Development and Regulation) Act (65 of 1951) Schedule 1 — Classification of items — Not logical or scientific — Heading "metallurgical industry" does not control scope and meaning of item (1) (B) (2).

(Para 10)

(E) Industries (Development and Regulation) Act (1951) Sch. 1 Item (1) (B) (2) — Manufacture of ornaments falls within item (1) (B) (2) — Gold (Control) Act (1968) is validly enacted by Parliament.

The expression "semi-manufactures or manufactures" of item (1) (B) (2) of the first schedule should be construed in the context and background of the classification in the Brussels Tariff

Nomenclature. It follows that manufacture of gold ornaments falls within the expression "semi-manufactures or manufactures" in item (1) (B) (2) of the first schedule and Parliament is, therefore, competent to legislate in regard to the subject matter of the Gold Control Act. (Para 11)

(F) Industries (Development and Regulation) Act (65 of 1951), S. 2 — "Scheduled industry" in S. 2 not synonymous with "industrial undertaking".

There is a distinction made between "scheduled industries" and "industrial undertakings" throughout the Act and separate provision has been made for registration of industrial undertakings, for licensing of new industrial undertakings and for the direct management of industrial undertakings by the Central Government in certain cases. Provisions have also been made for regulation of scheduled industries, procedure for grant of licences, power to cause investigation to be made etc. It cannot, therefore, be contended that the expressions 'industrial undertaking' and 'scheduled industry' are used synonymously in the Act or that the expression "scheduled industry" in S. 2 of the Act should be construed as a scheduled industry carried on in the manner of an industrial undertaking. (Para 12)

(G) Constitution of India, Art. 19 — Reasonableness of restrictions — Test.

No abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. AIR 1952 SC 196 (200), Rel. on. (Paras 15, 16)

(H) Gold (Control) Act (1968) — Constitutional validity — Ss. 5 (2) (b), 27 (2) (d), 27 (6), 32, 46, 88, and 100 are constitutionally invalid, S. 5 (2) (b) as suffering from excessive delegation of legislative powers, the rest as unreasonable restrictions on right to carry on trade or business—But those provisions are not inextricably bound up with the rest and the remaining Act survives. (Para 17)

(I) Gold (Control) Act (1968), Ss. 27, 39 — Provisions with regard to licensing of dealers and certification of gold-

smiths, not discriminatory and do not violate Art. 14 of the Constitution — Classification of licensed dealers and certified goldsmiths made by the Act is reasonable. (Para 23)

(J) Constitution of India, Art. 14 — Equality before law — Test of validity.

When a law is challenged as violative of Art. 14 it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act the Court has to apply a dual test in examining its validity (i) whether the classification is rational & based upon an intelligible differentia which distinguished persons or things that are grouped together from others that are left out of the group, and (ii) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object. (Para 23)

(K) Constitution of India, Part 3 (General) — Interpretation of Statutes — Doctrine of severability — Some sections of impugned Act struck down as unconstitutional — What is left survives if invalid provisions do not affect validity of Act as a whole — Real test is whether what remains of the statute is so inextricably bound up with the invalid part that what remains cannot independently survive or whether on a fair review of the whole matter it can be assumed that the legislature would have enacted at all that which survives without enacting the part that is ultra vires. (Para 24)

(L) Penal Code (1860), Chap. VI (Gen.) — Vicarious liability of dealer in criminal law — Extension beyond reasonable limits — Provision is void under Art. 19 of the Constitution.

The maxim 'qui facit per alium, facit per se' (he who acts through another acts through himself) is not generally applicable in criminal law. The principle of vicarious liability is made applicable in certain exceptional cases. Section 88 of the Gold (Control) Act (1968) imposes vicarious liability on the dealer and makes him responsible for the contravention of any provision of the Act or rule or order by any person employed by him in the course of such employment. The rational basis in law for the imposition of vicarious liability is that the person made responsible may prevent com-

mission of the crime and may help to bring the actual offender to book. In one sense the dealer is punished for the sins committed by his employee. It may perhaps be said, if the dealer had been more alert to see that the law was observed, the sin might not have been committed. But the section 88 of the Gold (Control) Act 1968 goes further and makes the dealer liable for any past contravention perpetrated by the employee. It is evident that the dealer cannot reasonably be made liable for any past misconduct of his employee though the dealer can be made liable for any act done by this employee in the course of the employment and whom he can reasonably be expected to influence or control. In section 88 it has been extended beyond reasonable limits and the provision is invalid under Art. 19 of the Constitution. (Para 21)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1080 (V 49)=
1962 Supp (3) SCR 157, National Union of Commercial Employees v. M. R. Mehar 8
(1956) AIR 1956 SC 676 (V 43)=
1956 SCR 393, Tika Ramji v. State of U. P. 7
(1953) AIR 1953 SC 58 (V 40)=
1953 SCR 302, D. N. Banerjee v. P. R. Mukherjee 8
(1952) AIR 1952 SC 196 (V 39)=
1952 SCR 597, State of Madras v. V. G. Row 15
(1951) AIR 1951 SC 69 (V 38)=
1951 SCR 51, State of Bombay v. Narottamdas Jethabhai 6
(1939) AIR 1939 FC 1 (V 26) =
1939 FCR 18, In re, Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act 1938 6

M/s. C. K. Daphtary and B. R. L. Iyengar, Sr. Advocates, (Mr. R. N. Banerjee, Advocate, and M/s Ravinder Narain, J. B. Dadachanji and O. C. Mathur Advocates of M/s J. B. Dadachanji and Co. with them) In W. P. No. 407 of 1968; Mr. N. A. Palkhiwala, Sr. Advocate, (Mr. R. N. Banerjee, Advocate, and M/s Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co. with him) In W. P. No. 408 of 1968; and Mr. A. K. Sen, Sr. Advocate (M/s. J. C. Bhatt, and R. N. Banerjee, Advocates, and M/s Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s J. B.

Dadachanji and Co. with him) In W. P. No. 282 of 1968, for Petitioners; Mr. M. C. Setalvad, Senior Advocate (M/s J. M. Mukhi, A Sreedharan Nambiar and R. N. Sachthey, Advocates with him) for Respondents (in all Petitions).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: — In these petitions which have been filed under Art. 32 of the Constitution a common question is presented for determination, namely, whether the Gold (Control) Act, 1968 (Act No. 45 of 1968) is constitutionally valid.

2. The Gold (Control) Act, (hereinafter called the impugned Act) was passed by Parliament and received assent of the President on September 1, 1968. The impugned Act begins with the following preamble, namely, "an Act to provide in the economic and financial interests of the community, for the control of the production, manufacture, supply, distribution, use and possession of, and business in, gold, ornaments and articles of gold and for matters connected therewith or incidental thereto". Section 2 contains a number of definitions. Section 2(b) defines an "article" to mean anything (other than ornament), in a finished form, made of, manufactured from or containing, gold, and including (i) any gold coin, (ii) broken pieces of an article, but not including primary gold. Clause (d) defines a "certified goldsmith" to mean a self-employed goldsmith who holds a valid certificate, referred to in S. 30. Clause (h) defines a dealer as follows:

"dealer" means any person who carries on, directly or otherwise, the business of making, manufacturing, preparing, repairing, polishing, buying, selling, supplying, distributing, melting, processing or converting gold, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration

Clause (i) states:

"declaration" means a declaration which is required by this Act or was required by Rule 126-I of the Defence of India Rules, 1962, or the Gold (Control) Ordinance, 1968, to be made with regard to the ownership, possession, custody or control of gold;"

Clause (j) defines 'gold' to mean gold, including its alloy (whether virgin, melted or re-melted, wrought or unwrought), in any shape or form, of a

purity of not less than nine carats and including primary gold, article and ornament.

Clause (p) reads as follows:

"ornament" means a thing, in a finished form, meant for personal adornment or for the adornment of any idol, deity or any other object of religious worship, made of, or manufactured from, gold, whether or not set with stones or gems (real or artificial), or with pearls (real, cultured or imitation) or with all or any of them, and includes parts, pendants or broken pieces of ornament.

Explanation.—For the purposes of this Act, nothing made of gold, which resembles an ornament, shall be deemed to be an ornament unless the thing (having regard to its purity, size, weight, description or workmanship) is such as is commonly used as ornament in any State or Union territory;"

Clause (r) states:

"primary gold" means gold in any unfinished or semi-finished form and includes ingots, bars, blocks, slabs, billets, shots, pellets, rods, sheets, foils and wires;"

Clause (u) defines a "standard gold bar" as primary gold of such fineness, dimensions, weight and description and containing such particulars as may be prescribed.

3. Section 4 deals with the appointment and functions of the Administrator and Gold Control Officers and reads as follows:

"(1) The Central Government shall, by notification, appoint an Administrator for carrying out the purposes of this Act.

(2) The Central Government may, by notification, appoint as many persons as it thinks fit to be Gold Control Officers for the purpose of enforcing the provisions of this Act.

(3) The Administrator shall discharge his functions subject to the general control and directions of the Central Government.

(4) The Administrator may authorise such person as he thinks fit to also exercise all or any of the powers exercisable by him under this Act other than the powers under sub-section (6) of this section or under clause (a) of sub-section (1) of Section 80 or under Section 81, and different persons may be authorised to exercise different powers.

(5) Subject to any general or special direction given or condition imposed by the Administrator, any person authorised by the Administrator to exercise any powers may exercise those powers in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by way of authorisation.

(6) The Administrator may also—

(a) perform all or any of the functions or, and

(b) exercise all or any of the powers conferred by this Act or any rule or order made thereunder on,

any officer lower in rank than himself.

(7) A Gold Control Officer shall, subject to such limitations, restrictions and conditions as the Central Government may think fit to impose, exercise such powers and discharge such functions as are specified or conferred, as the case may be, by or under this Act."

Section 5 confers power on the Administrator to issue directions and orders.

"(1) The Administrator may, if he thinks fit, make orders, not inconsistent with the provisions of this Act, for carrying out the provisions of this Act.

(2) The Administrator may, so far as it appears to him to be necessary or expedient for carrying out the provisions of this Act, by order—

(a) regulate, after consultation with the Reserve Bank of India, the price at which any gold may be bought or sold, and

(b) regulate by licences, permits or otherwise, the manufacture, distribution, transport, acquisition, possession, transfer, disposal, use or consumption of gold."

4. Chapter III contains a number of restrictions relating to the manufacture, acquisition, possession, or delivery of gold. Section 16 provides for declarations as to articles and ornaments. Chapter VII relates to dealers. Section 27 of this chapter as regards licensing of dealers may be quoted:

"(1) Save as otherwise provided in this Act, no person shall commence, or carry on, business as a dealer unless he holds a valid licence issued in this behalf by the Administrator.

(2) A licence issued under this section,—

(a) shall be in such form as may be prescribed,

(b) shall be valid for such period as may be specified therein,

(c) may be renewed, from time to time, and

(d) may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers.

(5) A person who intends to commence, after the commencement of this Act, business as a dealer, shall make an application (in such form and on payment of such fees, not exceeding one hundred rupees, as may be prescribed) for the issue of a licence.

(6) On receipt of an application for the issue or renewal of a licence under this section, the Administrator may, after making such inquiry, if any, as he may consider necessary, by order in writing, either issue or renew the licence, or reject the application for the same:

Provided that no licence shall be issued or renewed under this section unless the Administrator, having regard to the following matters, is satisfied that the licence should be issued or renewed, namely:—

(a) the number of dealers existing in the region in which the applicant intends to carry on business as a dealer,

(b) the anticipated demand, as estimated by him, for ornaments in that region,

(c) the turnover of the applicant, if he had been carrying on business as a dealer prior to the commencement of Part XIIA of the Defence of India Rules, 1962, during the two years immediately preceding such commencement, or, in the case of an application for the renewal of a licence, the date of the application for such renewal.

(d) the previous experience, if any, of the applicant with regard to the making, manufacturing, preparing, repairing or polishing of, or dealing in, ornaments,

(e) the suitability of the applicant,

(f) the suitability of the premises where the applicant intends to carry on business as a dealer,

(g) the public interests, and

(h) such other matters as may be prescribed,

Chapter VIII deals with certified goldsmiths. Section 39 of this Chapter provides:

"(1) Save as otherwise provided in this Act, no person shall commence, or carry on, business as a goldsmith after the commencement of this Act, unless he holds a valid certificate recognising him as a goldsmith.

(2) The certificate referred to in sub-section (1)—

(a) shall be in such form as may be prescribed,

(b) shall be valid until the death of the holder, or the cancellation thereof, whichever is earlier, and

(c) may contain such conditions, limitations and restrictions, as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of certified goldsmiths.

(3) Every certificate granted to a person under Part XIIA of the Defence of India Rules, 1962, or under the Gold (Control) Ordinance, 1968, recognizing him as a goldsmith, shall, if in force immediately before the commencement of this Act, continue to be in force until the death of the holder, or the cancellation, thereof whichever is earlier.

(5) Every application for the grant of a certificate referred to in sub-section (1) shall be made in such form, in such manner and on payment of such fee, not exceeding ten rupees, as may be prescribed.

(8) A certified goldsmith may engage not more than one hired labourer to assist him in his work as a goldsmith but such hired labourer shall not make, manufacture, prepare, repair or process any article or ornament."

Chapter X deals with cancellation and suspension of licences and certificates. Chapter XII contains provisions relating to entry, search, seizure and arrest. The other material chapters are Chapter XIII dealing with confiscation and penalties. Chapter XIV providing for adjudication, appeal and revision and Chapter XV relating to offences and their trial. Chapter XVI contains certain miscellaneous provisions. Section 100 of this chapter enacts:

"Every licensed dealer or refiner or certified goldsmith shall, before accepting, buying or otherwise receiving any gold from any person, take all reasonable steps to satisfy himself as to the identity of such person and if, after an inquiry made by an officer autho-

rised in this behalf by the Administrator, it is found that such person is not either readily traceable or is a fictitious person, it shall be presumed, unless such dealer or refiner or certified goldsmith, as the case may be, establishes that he had taken all reasonable steps to satisfy himself as to the identity of such person, that such gold was bought, acquired, accepted or received by such licensed dealer or refiner or certified goldsmith, as the case may be, in contravention of the provisions of this Act."

5. The first question to be considered is whether the impugned Act is within the legislative competence of Parliament under Entry 52 of List I, and Entry 33 of List III of the Seventh Schedule. It was argued on behalf of the petitioners that the legislation fell within the exclusive competence of the State Legislatures under Entry 27 of List II. It was said that the goldsmiths' work was a handicraft requiring application of skill and the art of making gold ornaments was not an industry within the meaning of Entry 52 of List I, or Entry 33 of List III of the Seventh Schedule. The opposite viewpoint was presented by Mr. Setalvad who argued that the legislative entries must be construed in a large and liberal sense and that the goldsmith's craft was an industry within the meaning of Entry 24 of List II, Entry 33 of List III and Entry 52 of List I and Parliament is competent to legislate in regard to the manufacture of gold ornaments. The relevant entries in the Lists of the Seventh Schedule of the Constitution are List I, Entry 52—Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest; List II, Entry 24: Industries subject to the provisions of Entries 7 and 52 of List I; List II, Entry 27: production, supply and distribution of goods subject to the provisions of Entry 33 of List III. List III, Entry 33 reads as follows:

"Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oil-seeds and oils,

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute."

6. Before construing these entries it is useful to notice some of the well settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction. In *re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, 1939 FCR 18= (AIR 1939 FC 1), Sir Maurice Gwyer proceeded to state:

"Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship." (p. 44)

The Federal Court in that case held that the entry "taxes on the sale of goods" was not covered by the entry "duties of excise" and in coming to that conclusion the learned Chief Justice observed:

"Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with sound principles of

construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning." (pp. 49-50)

The rule of construction adopted by that decision for the purpose of harmonizing the two apparently conflicting entries in the two Lists would equally apply to an apparent conflict between two entries in the same List. Patanjali Sastri J. (as he then was) held in *State of Bombay v. Narothamdas Jethabhai*, 1951 SCR 51 = (AIR 1951 SC 69) that the words "administration of justice" and "constitution and organization of all courts" in Entry I of List II of the Seventh Schedule to the Government of India Act, 1935 must be understood in a restricted sense excluding from their scope "jurisdiction and powers of courts" specifically dealt with in item 2 of List II. In the words of the learned Judge, if such a construction was given "the wider construction of entry 1 would deprive entry 2 of all its content and reduce it to useless lumber."

7. The question to be considered is what is the meaning of the word "industry" in Entry 52 of List I, Entry 24 of List II and Entry 33 of List III. Whatever may be its connotation it must bear the same meaning in all these entries which are so interconnected that conflicting or different meanings given to them would snap the connection. In the Shorter Oxford English Dictionary the word "industry" is defined as "a particular branch of productive labour; a trade or manufacture." According to Webster's Third New International Dictionary (1961 edn.) the word "industry" means "(a) systematic labour especially for the creation of value; (b) a department or branch of a craft, art, business or manufacture, a division of productive

and profit making labour especially one that employs a large personnel and capital especially in manufacturing; (c) a group of productive or profit making enterprises or organisations that have a similar technological structure of production and that produce or supply technically substitutable goods, services or sources of income". It was said that if the word "industries" is construed in this wide sense, Entry 27 of List II will lose all meaning and content. It is not possible to accept this contention for, Entry 27 is a general Entry and it is a well-recognised canon of construction that a general power should not be so interpreted as to nullify a particular power conferred by the same instrument. In *Tika Ramji v. State of Uttar Pradesh*, 1956 SCR 393 = (AIR 1956 SC 676) the expression "industry" was defined to mean the process of manufacture or production and did not include raw materials used in the industry or the distribution of the products of the industry. It was contended that the word "industry" was a word of wide import and should be construed as including not only the process of manufacture or production but also activities antecedent thereto such as acquisition of raw materials and subsequent thereto such as disposal of the finished products of that industry. But this contention was not accepted. It was contended by Mr. Daphary that if the process of production was to constitute "industry" a process of machinery or mechanical contrivance was essential. But we see no reason why such a limitation should be imposed on the meaning of the word "industry" in the legislative lists. Similarly it was argued by Mr. Palkhivala that the manufacture of gold ornaments was not an industry because it required application of individual art and craftsmanship and aesthetic skill. But mere use of skill or art is not a decisive factor and will not take the manufacture of gold ornaments out of the ambit of the relevant legislative entries. It is well settled that the entries in the three lists are only legislative heads or fields of legislation and they demarcate the area over which the appropriate legislature can operate. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of subjects to the lists is not by way of scientific or logical definition but is a mere enumeration of broad

and comprehensive categories. It is not however, necessary for the purpose of this case to attempt to define the expression "industry" precisely or to state exhaustively all its different aspects. But we are satisfied in the present case that the manufacture of gold ornaments by goldsmiths in India is a "process of systematic production" for trade or manufacture and so falls within the connotation of the word "industry" in the appropriate legislative entries. It follows, therefore, that in enacting the impugned Act Parliament was validly exercising its legislative power in respect of matters covered by Entry 52 of List I and Entry 33 of List III.

8. It was contended by Mr. Ashoke Sen that the manufacture of gold ornaments cannot be said to constitute an industry unless there was co-operation of labour and capital and there was relationship of employer and employee. It was said that ornament making activity was largely carried on by self-employed goldsmiths individually and there was no participation by labour and capital in the said activity. Reference was made to the decision of this Court in *Banerji v. Mukherjee*, 1953 SCR 302 = (AIR 1953 SC 58) in which it was pointed out that the word "industry" in Section 2 (i) of the Industrial Disputes Act, 1947 should be construed as an activity systematically or habitually undertaken for production and distribution of goods or for rendering material services to the community at large and that such an activity generally involved co-operation of the employer and the employees and its object was satisfaction of human needs. The same view was taken in the *National Union of Commercial Employees v. M. R. Meher*, 1962 Supp (3) SCR 157 = (AIR 1962 SC 1080) in which it was pointed out that the distinguishing feature of an industry was that for production of goods or for the rendering of service, co-operation between capital and labour or between the employer and his employee must be direct. But these decisions are of no avail to the petitioners because they were concerned with the interpretation of the word "industry" in S. 2(i) of the Industrial Disputes Act, 1947 which reads as follows:

"industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling,

service, employment, handicraft or industrial occupation or avocation of workmen;"

In interpreting the word "industry" in that section the Court thought it necessary to limit the scope of the section having regard to the aim, object and scope of the whole Act. The history of the legislation made it manifest that the Industrial Disputes Act was introduced as an important step in achieving social justice. The Act seeks to ameliorate the service conditions of the workers, to provide a machinery for resolving their conflicts and to encourage their co-operative effort in the service of the community. It was in this context that the expression "industry" was interpreted in *Banerjee's case*, 1953 SCR 302 = (AIR 1953 SC 58) (supra) and *Meher's case*, 1962 Supp (3) SCR 157 = (AIR 1962 SC 1080) (supra). It was an interpretation adopted by this Court *secundum subjectae materies*. But what we are concerned in the present case is the interpretation of the word "industry" in the legislative lists which constitute part of the Seventh Schedule of the Constitution. It is manifest that the decisions referred to above have no bearing on the question debated in the present case.

9. It was argued by Mr. Palkhivala that even on the assumption that making of gold articles and ornaments was an industry within the meaning of the legislative entries the control of the said industry was not declared by Parliament to be expedient in the public interest and, therefore, Parliament was not competent to legislate upon the subject matter of the impugned Act. To appreciate this argument it is necessary to notice briefly the provisions of the Industries (Development and Regulation) Act, 1951 (Act 65 of 1951) which was enacted by Parliament to provide for the development and regulation of certain industries. Under S. 2 of this Act it is declared that it is expedient in the public interest that the Union should take under its control the industries specified in the first schedule. Section 3(1) of the 1951 Act defines a "scheduled industry" to mean "any of the industries specified in the first schedule". The relevant portion of the first schedule is reproduced below:

"1. METALLURGICAL INDUSTRIES:
A. Ferrous
(1) Iron and steel (metal)

- (2) Ferro-alloys.
- (3) Iron and steel castings and forgings.
- (4) Iron and steel structurals.
- (5) Iron and steel pipes.
- (6) Special steels.
- (7) Other products of iron and steel.
- B. Non-ferrous
 - (1) Precious metals, including gold and silver, and their alloys.
 - (1A) Other non-ferrous metals and their alloys.
 - (2) Semi-manufactures and manufactures."

10. The question presented for determination is whether the manufacture of gold ornaments falls within item 2 "semi-manufactures or manufactures" under the sub-heading B "non-ferrous" of the heading "metallurgical industries." It was argued that item 2 of sub-heading B cannot be read in isolation but it must be construed in the context of the heading "metallurgical industries" which was the controlling factor in the interpretation of the item 2 under the sub-heading. To put it differently the argument was that the heading "metallurgical industries" was the key to the interpretation of the item "semi-manufactures or manufactures". It was said that the expression "metallurgical industries" has a definite technical meaning namely an industry engaged in the actual extraction of metal from ores and the processing, manufacturing and converting the base metal into various forms shapes and classes so as to make them available in a utilisable form for the purpose of various other industries viz: machine building industries, electrical industries, ship building industries, railways etc. In support of this proposition reference was made to the affidavits of Dr. G. S. Tendolkar, Head of the Department of Metallurgy, Indian Institute of Technology Powai and of Dr. V. A. Altekar, Head of the Chemical Technology Dept. University of Bombay and also to certain standard text books on metallurgy. On behalf of the respondents reference was made to the affidavit of Mr. Dayal, Industrial Adviser to the Government of India wherein he states that in the process of manufacture of gold ornaments the goldsmith has to "melt gold (pure virgin metal, old ornaments or scrap); make an alloy of the required specifications; cast it into desired shapes; convert the

alloy into semis like rods, strips, wires, etc., and fabricate it into the required design, finished articles including ornaments." These involve metallurgical operations like melting, refining making of alloys, casting, annealing, rolling, forging, pressing, punching, soldering, pressing, die cutting, etc. and a goldsmith therefore is employed in the metallurgical industry. It is not necessary for us to express any concluded opinion in this case on the question whether the manufacture of gold ornaments involves any metallurgical process. Even on the assumption that the petitioners are right in saying that the manufacture of gold ornaments is not a metallurgical industry in the technical sense we consider that the heading "metallurgical industry" in the schedule does not control the scope and meaning of the Entry 1-B(2) ("semi-manufactures or manufactures"). The headings of the schedule do not follow any logical or scientific pattern but are put in merely as devices for convenient grouping of the industries. For example, there is no warrant for excluding electricity meters used in homes from item 15(1) or for excluding weighing machines used at airports or railway stations or ports from Item 15(3). There are other examples which show that the heading does not control the meaning of the industry. Thus "lubricating oils and the like" in the item at 2(2) are clearly not "fuels" which is the heading under which they are found. Again, fire fighting equipment and appliances such as fire extinguishers used in homes or in offices or in cinema halls or as accessories to motor cars would clearly be included in the industry item 8-B (14). Similarly matches (item 36(3)) is not controlled by the heading "timber products" nor is there any warrant for holding that arms and ammunition, item 37, is controlled by the heading "defence industries". As we have already said that there is no scientific or logical scheme in the classification of first schedule of Act 65 of 1951 but it is a mere enumeration and grouping of various items. We are unable to accept the argument of petitioners that the heading metallurgical industries should be construed as having a controlling effect on the meaning of item B(2) "semi-manufactures or manufactures".

11. We proceed to consider the next question arising in this case as

to whether the manufacture of ornaments falls within item 1-B(2) "semi-manufactures and manufactures" of the first schedule. It was said that the expression "semi-manufactures or manufactures" in regard to gold means the precious metal in various stage of preparation before its production in a pure state. It was argued that "semi-manufactures" would mean gold in the form of ingots, wire, strips, sheets and "manufactures" would mean gold bricks or standard gold bars, gold castings and so on. We are unable to accede to this argument. If the meaning contended for by the petitioners is correct item 1-B(1) and (2) of the first schedule would convey the same meaning. In other words entry No. 1-B(2) would be superfluous and we cannot attribute tautology to Parliament which cannot be supposed to have used words without meaning. We are, on the contrary of opinion that the expression "semi-manufactures or manufactures" should be construed in the light of the Brussels Tariff Nomenclature. Section XIV deals with "precious metals and articles thereof". Sub-Chapter II of Chapter 71 in this section specifically deals with precious metal in unwrought and unworked form and semi-manufactures thereof and sub-Chapter III deals with manufactures of precious metals. Headings 71.07 and 71.08 in this Sub-Chapter set out unwrought or semi-manufactured gold while headings 71.12 to 71.14 in Sub-Chapter III set out finished articles of jewellery, goldsmiths' wares and other articles of precious metals. The explanatory notes to Brussels Tariff Nomenclature shows (Vol. II. p. 633) that "precious metals in unwrought or semi-manufactured form but which have not reached the stage of articles" are included under Headings 71.05 to 71.10. So far as silver is concerned "unwrought and semi-manufactures" are set out at page 641 and they include forms like bars, rods, sections, wire, plates, sheets and strips, tubes, pipes, hollow bars, foils, powder etc. The enumeration of finished articles of gold, that is to say, manufactures of gold is given at page 640. The enumeration includes articles and ornaments, for example, jewellery and parts thereof, small objects of personal adornment such as rings, bracelets, necklaces and articles of personal use such as cigarette cases, snuff boxes, powder boxes, lipstick holders etc. (pp. 641-646

of Explanatory notes). In our opinion the expression "semi-manufactures or manufactures" of the first schedule should be construed in the context and background of the classification in the Brussels Tariff Nomenclature. It follows that manufacture of gold ornaments falls within the expression "semi-manufactures or manufactures" in item 1-B (2) of the first schedule and Parliament is, therefore, competent to legislate in regard to the subject matter of the impugned Act.

12. It was also contended that the provisions of Act 65 of 1951 clearly indicate that what Parliament intended to control under Entry 52 of Union List was not the manufacture of gold ornaments but industrial undertakings as contemplated by S. 2(d) of that Act. It was contended by Mr. Daphtary that the expression "scheduled industry" in S. 2(a) of the Act was synonymous with an industrial undertaking under S. 2(d) and a declaration under S. 2 of the Act would therefore apply to industries carried on in the factories as defined in the Act. It was argued that the Act was intended to apply to industrial undertakings carried on in factories and not to individual craftsmanship of goldsmiths. S. 2(d) of the Act, defines an industrial undertaking to mean: "any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government". Section 2(i) defines a "scheduled industry" as meaning any of the industries defined in the first schedule. Chapter III of the Act provides measures for the regulation of scheduled industries. Chapter III-A relates to direct management and control of industrial undertakings in certain cases. In our opinion Act 65 of 1951 performs two distinct and independent functions, namely, (1) a declaration under S. 2 that it is expedient in the public interest that the Union should take under its control the industries specified in the first schedule and (2) the setting of a machinery for imposing controls on industrial undertakings. There is a distinction made between "scheduled industries" and "industrial undertakings" throughout the Act and separate provision has been made for registration of industrial undertakings, for licensing of new industrial undertakings and for the direct management of industrial undertakings by the Central Govern-

ment in certain cases. Provisions have also been made for regulation of scheduled industries, procedure for grant of licences, power to cause investigation to be made etc. We are, therefore, unable to accept the contention of Mr. Daphtary that the expressions "industrial undertaking" and "scheduled industry" are used synonymously in the Act or the expression "scheduled industry" in S. 2 of the Act should be construed as a "scheduled industry" carried on in the manner of an "industrial undertaking".

13. Having dealt with and negatived the attack upon the validity of the entire Act we shall now proceed to deal with certain sections of the Act, the validity of which was also questioned. It was argued that the restrictions imposed by Ss. 4(4), 4(5), 5(1), 5(2), 27(2) (d), 27(6), 16(7), 32 read with 46, 88 and 100 were unreasonable and not in public interest and so are violative of Art. 19(1) (f) and (g) of the Constitution. It was also said that the sections were also violative of Art. 14 of the Constitution because of the conferment of unchanneled, uncontrolled and arbitrary power in the Administrator and other authorities constituted under the impugned Act.

14. Before examining this argument it is necessary to set out the circumstances and the social and economic background in which the impugned legislation was passed. It is stated in the counter-affidavit that the impugned Act was passed in order to bring about reduction in the quantity of smuggled gold by rendering smuggling more dangerous and the disposal of smuggled gold in the domestic market more difficult. Even though import of gold had been banned considerable quantities of contraband gold find their way into this country through illegal channels. The Customs Department is in itself not in a position to effectively combat smuggling over the long borders and the coast lines and, therefore, the anti-smuggling measures have to be supplemented by a detailed system of control over internal transactions so as to make the circulation of smuggled gold more difficult, if not impossible. The loss of foreign exchange caused by smuggling of gold was estimated at nearly Rs. 100 crores per year in the post-devaluation period; and Government felt that it was very necessary to reduce the internal de-

mand for gold and erect barriers to the circulation of smuggled gold within the country. The submission of Mr. Setalvad was that the reasonableness of the impugned provisions of the Act had to be judged in the light of the widespread smuggling of gold which, if not checked, was calculated to destroy the national economy and hamper the country's economic stability and progress. Reference was made in this connection to the report of the Taxation Enquiry Commission which pointed out that the factual position in regard to the existence of widespread smuggling:

"Smuggling now constitutes not only a loophole for escaping duties but also a threat to the effective fulfilment of the objectives of foreign trade control. The existence of foreign pockets in the country accentuates the danger. The extent of the leakage of revenue that takes place through this process cannot be estimated even roughly, but, we understand, it is not unlikely that it is substantial. Apart from its deleterious effect on legitimate trade, it also entails the outlay of an appreciable amount of public funds on patrol vessels along the sea coasts and permanent works along the land border, and watch and ward staff on a generous scale. It is, therefore, necessary, in our opinion, that stringent measures both legal and administrative should be adopted with a view to minimising the scope of this evil." (p. 320)

15. It is in this context that the test for ascertaining the reasonableness of the restriction of the rights in Art. 19 is of great importance. There are several decisions of this Court in which the relevant criteria have been laid down. It is, however, sufficient to refer to a passage in the judgment of Patanjali Sastri C. J. in *State of Madras v. V. G. Row*, 1952 SCR 597 at p. 607 = (AIR 1952 SC 196 at p. 200):

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time,

should all enter into the judicial verdict."

16. It is necessary to emphasise that the principle which underlies the structure of the rights guaranteed under Art. 19 of the Constitution is the principle of balancing of the need for individual liberty with the need for social control in order that the freedoms guaranteed to the individual subserve the larger public interests. It would follow that the reasonableness of the restrictions imposed under the impugned Act would have to be judged by the magnitude of the evil which it is the purpose of the restraints to curb or eliminate.

17. Section 4 (4) of the Act empowers the Administrator to authorise such person as he thinks fit to also exercise all or any powers exercised by him under the Act (with certain exceptions) and different persons may be authorised to exercise different powers. Section 4 (5) states that "any person authorised by the Administrator to exercise any powers may exercise those powers in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by way of authorisation." After having heard the argument of Mr. Daphtary we are not satisfied that the delegation of power conferred by Ss. 4 (4) and 4 (5) goes beyond the permissible constitutional limits. Delegation by the Administrator is necessary for the volume of work entrusted to him is great and he cannot be expected to do the bulk of it himself. Absence of such power might seriously impair administrative efficiency. Section 4 (4) contemplates that the Administrator may authorise such person as he thinks fit to also exercise all or any of the powers exercisable by him under the Act other than the powers specified in that section. It must be assumed that the Administrator will delegate his authority only to competent and responsible persons in pursuance of the power conferred upon him by S. 4 (4) of the Act. It was then said that the provisions of S. 5 (1) conferred wide and uncontrolled power without any guidelines and was capable of being used with arbitrary discrimination. But S. 5 (1) requires that the Administrator should have regard to the policy of the Act in making his orders. His orders should be made within the framework of the Act and should not

be inconsistent with the provisions of the Act. As regards S. 5 (2) (a) the argument was that unguided power was conferred upon the Administrator or his delegate to regulate or fix the price at which any gold whether it be primary gold, article or ornament should be sold. As the power to fix the price may also be exercised not only in respect of primary gold but also in respect of articles and ornaments the business of the petitioners and similarly other persons will be adversely affected. But the section provides the safeguard that the regulation of the price should be made by the Administrator after consultation with the Reserve Bank of India. It was argued that the phrase "so far as it appears to him to be necessary or expedient for carrying out the provisions of this Act" was a subjective formula and action of the Administrator in making the orders under S. 5 (2) (a) may be arbitrary and unreasonable. But in our opinion the formula is not subjective and does not constitute the Administrator the sole judge as to what is in fact necessary or expedient for the purposes of the Act. On the contrary we hold that in the context of the scheme and object of the legislation as a whole the expression cannot be construed in a subjective sense and the opinion of the Administrator as to the necessity or expediency of making the order must be reached objectively after having regard to the relevant considerations and must be reasonably tenable in a court of law. It must be assumed that the Administrator will generally address himself to the circumstances of the situation before him and not try to promote purposes alien to the object of the Act. As regards S. 5 (2) (b) the contention of the petitioners was that substantive provisions have been made in the Act for the grant of licence for manufacture, acquisition, possession and disposal and consumption of gold. Reference was made in this connection to S. 8 (6) of the Act which confers power on the Administrator to authorise any person or class of persons to buy or otherwise acquire, accept or otherwise receive or sell, deliver, transfer or otherwise dispose of any primary gold or article. Section 11 (1) contains a prohibition in regard to making, manufacturing etc., preparing or processing of any primary gold or ornament or article un-

less there is authorisation by the Administrator. Section 29 empowers the Administrator to authorise a dealer in any exceptional case to make, manufacture or prepare a 'primary gold or article.' Section 34 (2) prohibits sale, delivery, transfer or disposal (1) of primary gold to any person other than a licensed dealer or refiner or certified goldsmith and (2) of any article to any person other than a licensed dealer or refiner. But Section 34 (3) provides that notwithstanding anything contained in sub-s. (2) a licensed dealer may sell or deliver primary gold or article to any person in pursuance of an authorisation made by the Administrator or on production by that person of a permit granted by the Administrator in this behalf. Again, section 114 (1) confers powers on the Central Government to make rules by notification for carrying out the purposes of the Act. Section 114 (2) (d) states:

"(2) In particular, and without prejudice to the foregoing power, such rules may provide for all or any of the following matters, namely:—

** **

(d) conditions, limitations and restrictions subject to which —

(i) a dealer may sell, deliver, transfer or otherwise dispose of any gold on the hypothecation, pledge, mortgage or charge of which he had advanced any loan;

(ii) a refiner may refine gold;

(iii) a licensed refiner may buy, acquire, accept or receive, gold, or melt, assay, refine, extract or alloy gold or subject it to any other process, or sell, deliver, transfer or otherwise dispose of any gold;

(iv) a licensed dealer may buy, acquire, accept or receive or sell, deliver, transfer or dispose of gold."

It is manifest upon a review of all these provisions that the power conferred upon the Administrator under S. 5 (2) (b) is legislative in character and extremely wide. A parallel power of subordinate legislation is conferred to the Central Government under Section 114 (1) and (2) of the Act. But S. 114 (3) however makes it incumbent upon the Central Government to place the rules before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions. It is clear that the substantive provisions of the Act name-

ly Sections 8, 11, 21, 31 (3), 34 (3) confer powers on the Administrator similar to those contemplated by Section 5 (2) (b) of the Act. In these circumstances we are of opinion that the power of regulation granted to the Administrator under S. 5 (2) (b) of the Act suffers from excessive delegation of legislative power and must be held to be constitutionally invalid.

18. We now come to S. 27 of the Act which relates to licensing of dealers. It was stated on behalf of the petitioners that the conditions imposed by sub-s. (6) of S. 27 for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well founded and must be accepted as correct. Section 27 (6) (a) states that in the matter of issue or renewal of licences the Administrator shall have regard to "the number of dealers existing in the region in which the applicant intends to carry on business as a dealer". But the word "region" is nowhere defined in the Act. Similarly S. 27 (6) (b) requires the Administrator to have regard to "the anticipated demand, as estimated by him, for ornaments in that region". The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expressions "suitability of the applicant" in S. 27 (6) (e) and "public interest" in S. 27 (6) (g) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (a), (b), (e) and (g) of S. 27 (6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of S. 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be un-

reasonable. In our opinion clauses (a), (b), (e) and (g) are inextricably bound up with the other clauses of S. 27 (6) and form part of single scheme. The result is that clauses (a), (b), (c), (e) and (g) are not severable and the entire Section 27 (6) of the Act must be held invalid. Section 27 (2) (d) of the Act states that a valid licence issued by the Administrator "may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers." On the face of it, this sub-section confers such wide and vague power upon the Administrator that it is difficult to limit its scope. In our opinion Section 27 (2) (d) of the Act must be struck down as an unreasonable restriction on the fundamental right of the petitioners to carry on business. It appears, however, to us that if Section 27 (2) (d) and Section 27 (6) of the Act are invalid the licensing scheme contemplated by the rest Section 27 of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power under S. 114 of the Act.

19. We now proceed to deal with Ss. 32 and 46 of the Act which are also challenged. Section 32 states:

"Save as otherwise provided in this Act, no licensed dealer shall either own or have at any time in his possession, custody or control primary gold in any form except in the form of standard gold bars:

Provided that such dealer may, unless the Central Government (having regard to the needs of the trade, volume of business and public interest) otherwise directs, own or keep in his possession, custody or control not more than—

(a) four hundred grammes, if he does not employ any artisan,

(b) five hundred grammes, if he employs not more than ten artisans,

(c) one thousand grammes, if he employs more than ten but not more than twenty artisans,

(d) two thousand grammes, if he employs more than twenty artisans,

of primary gold in any form other than in the form of standard gold bars."

Section 46 enacts:

"The total quantity of primary gold in the possession, custody or control, whether individually or collectively, of the artisans employed by a licensed dealer shall not, at any time, exceed the limits specified in section 32."

20. Section 32 of the Act authorises a licensed dealer to keep any quantity of standard gold bars and provides a limit upon his holding of primary gold depending on the number of artisans he employs. The definition of the term "standard gold bar" under S. 2 (u) does not contemplate the standard gold bar being cut into pieces. A standard gold bar being of a prescribed weight and purity cannot in many cases be handed over to a certified goldsmith without cutting the same. If a dealer, therefore, has to give a cut piece of standard gold bar to a certain goldsmith the remaining portion of the standard gold bar will be treated as primary gold in his hands. Hence the limits prescribed under Ss. 32 and 46 of the Act are rendered meaningless in view of the statutory definition of the term "standard gold bar" as it stands at present. We are of opinion that Ss. 32 and 46 constitute an unreasonable restriction on the right of the petitioners to carry on trade or business and must be held to be invalid.

21. Section 88 of the Act has also been challenged. Section 88 reads thus:

"(1) A dealer or refiner who knows or has reason to believe that any provision of this Act or any rule or order made thereunder has been, or is being, contravened, by any person employed by him in the course of such employment, shall be deemed to have abetted an offence against this Act.

(2) Whoever abets, or is deemed under sub-section (1) to have abetted, an offence against this Act, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

This section extends the scope of the vicarious liability of the dealer and makes him responsible for the contravention of any provision of the Act or rule or order by any person employed by him in the course of such employment. The rational basis in law for the imposition of vicarious liability is that the person made respon-

sible may prevent commission of the crime and may help to bring the actual offender to book. In one sense the dealer is punished for the sins committed by his employee. It may perhaps be said if the dealer had been more alert to see that the law was observed the sin might not have been committed. But the section goes further and makes the dealer liable for any past contravention perpetrated by the employee. It is evident that the dealer cannot reasonably be made liable for any past misconduct of his employee though the dealer can be made liable for any act done by his employee in the course of the employment and whom he can reasonably be expected to influence or control. The maxim *qui facit per alium facit per se* (he who acts through another acts through himself) is not generally applicable in criminal law. But in S. 88 it has been extended beyond reasonable limits. We are, therefore, of opinion that S. 88 imposes an unreasonable restriction on the fundamental right of the petitioners and is unconstitutional.

22. We shall now proceed to deal with S. 100 of the Act which also has been challenged. This section imposes a statutory obligation upon a dealer to take all reasonable steps to satisfy himself as to the identity of persons from whom any gold is bought. The section does not specify the nature of steps which a dealer should take for satisfying himself as to the identity of the person from whom any gold is bought. The statutory obligation imposed by the section is uncertain and incapable of proper compliance. It must be held that the section imposes an impossible burden upon the dealers and constitutes an unreasonable restriction.

23. We proceed to consider next the question arising in this case whether the provisions with regard to licensing of dealers and certification of goldsmiths are discriminatory and violate the guarantee of equal protection under Art. 14 of the Constitution. Reference was made to Ss. 27 and 39 of the impugned Act and it was argued that the provisions with regard to licensing of dealers were more harsh than in the case of registered goldsmiths. But in our opinion licensed dealers and certified goldsmiths form separate classes and the classification made by the impugned Act is a rea-

sonable classification. A licensed dealer is essentially a trader who does the business of buying and selling ornaments while a certified goldsmith is a craftsman who does the actual manufacture of ornaments and does not trade in ornaments. A licensed dealer can make or manufacture ornaments from his own gold but a certified goldsmith can make or manufacture new ornaments for his customers only from their gold. A licensed dealer can sell ornaments to the public and can keep ready stock of such ornaments for the purpose of sale while a certified goldsmith is not permitted to do the business of selling ornaments. A licensed dealer may have in his possession primary gold in the form of standard gold bars without any limit and melted gold in the form other than the standard bars in quantities ranging from 400 to 2,000 grammes. A certified goldsmith cannot have in his possession more than 300 grammes of primary gold. A licensed dealer can employ as many persons as he likes as his artisans but a certified goldsmith cannot employ more than one hired labourer to assist him in his work as goldsmith and even this hired labourer cannot make, manufacture, prepare or process any ornament. When a law is challenged as violative of Art. 14 of the Constitution it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act the Court has to apply a dual test in examining its validity (1) whether the classification is rational and based upon an intelligible differentia which distinguishes persons or things that are grouped together from others that are left out of the group and (2) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object. In the present case both the tests are satisfied and we hold that Ss. 27 and 39 of the impugned Act do not violate the guarantee under Art. 14 of the Constitution.

24. The only other point that remains to be decided is whether as a result of some of the sections of the impugned Act being struck down, what is left of the impugned Act should survive or whether the whole of the impugned Act should be declared invalid. We are of opinion that the provisions which are declared invalid

that by the aforesaid rejections the plaintiffs had suffered an injury for which defendants Nos. 1 to 6 were jointly and severally liable and the plaintiffs were entitled to recover damages from the defendants.

3. The plaint was filed on January 21, 1955. Before any written statement was submitted, on February 13, 1955, the sixth defendant S. Rabadi, entered into a compromise with the plaintiffs. The terms of the compromise were:

"1. I, Shavak Dorabjee Rabadi, defendant No. 6 have considered the subject matter of the suit and am sincerely sorry and apologise to the plaintiffs unconditionally for whatever I have done. I realise that I was in error and was misguided.

2. The plaintiffs above named accept the apology tendered by Shri Shavak Dorabjee Rabadi defendant No. 6 and the suit against him may be disposed of treating the aforesaid apology and its acceptance by the plaintiffs as a settlement of the dispute between the plaintiffs and the defendant No. 6.

3. The plaintiffs do not claim any costs against the defendant No. 6 and defendant No. 6 will bear his own costs.

It is therefore prayed that the claim against defendant No. 6 may be disposed of in terms of the above settlement."

A decree was passed in terms of this compromise against defendant No. 6.

4. On May 14, 1955, the other defendants filed a written statement and inter alia alleged:

"That the release of defendant No. 6 Sri S. Rabadi, an alleged joint tortfeasor and the compromise entered into behind the back of the answering defendants with him in full settlement of their suit for damages, appears to be collusive and dishonest and the release by the plaintiffs of defendant No. 6 from his joint liability as a tortfeasor has in law extinguished the plaintiffs' rights to sue the other remaining defendants and claim damage from them."

It was further alleged that "the four plaintiffs could not be legally allowed to totalise the sum of their individual damage, alleged to have been suffered, and thereby procure the trial of the suit in the court of higher jurisdiction," and that the suit had been purposely overvalued.

5. In a statement dated March 17, 1956, the plaintiffs clarified that the "damages are being claimed by the plaintiffs in respect of all the facts mentioned in the plaint and particularly as a result of the facts that have been mentioned in paragraphs 17 and 19 of the plaint", and further "that on account of all the facts complained of each plaintiff is entitled to claim Rs. 10,100 as damages but the plaintiffs have claimed only Rs. 10,100 and have given up rest of the claim."

6. Two of the issues framed by the Civil Judge, may be set out:

"Issue No. 5. What is effect of the compromise between plaintiffs and defendant No. 6, as against rights of the other defendants? Is the suit not maintainable against other defendants? Issue No. 11. Is the court-fee paid by the plaintiffs insufficient?

By order dated September 18, 1956, the Civil Judge held that the court-fee paid by the plaintiffs was insufficient and that there was a deficiency of Rs. 905/12/- in the court-fee which the plaintiffs had to make good. The plaintiffs were given 15 days' time to make good the deficiency. Instead of paying the money the plaintiffs applied under O. VI R. 17, Civil P. C., for amendment of the plaint. The plaintiffs stated in this application that they would in consideration of the order of the Court split the amount of Rs. 10100/- into two portions claiming Rs. 5050/- each in respect of the two separate incidents dated July 3, 1955, and May 5, 1955, respectively. The defendants filed an application contending that as the plaintiffs had failed to make good the deficiency in the court-fee within the time given, the plaint should be rejected in view of the provisions of the O. VII R. 11 C. P. C. and S. 6 U. P. Court-Fees Act. By order dated November 28, 1956, the Civil Judge allowed the plaintiffs' application for amendment on payment of Rs. 30 as costs, and also rejected the defendants' application. Against this order the defendants filed a revision.

7. Dhavan, J., first dealt with the point whether the plaintiff could renounce a part of the claim instead of making good the deficiency in court-fee. He came to the conclusion that the suit contained four causes of action, and that the plaintiffs had to pay court-fee on four separate causes of action of the value of Rs. 2525 each. As the

learned counsel for the plaintiffs had given an undertaking to make good any deficiency in court-fee. Dhavan, J., directed the plaintiffs to pay court-fee on the four separate causes of action valued at Rs. 2525 each. He also directed an amendment to be made in the plaint.

8. The learned Judge felt that it would be in the interest of justice that the question covered by issue No. 5 being one of law should be decided by him in the revision. It appears that the counsel for both parties conceded that the Court had power to decide the issue as the entire record was there, although the learned counsel for the plaintiffs felt that the decision should be left to the Trial Court.

9. The learned counsel for the appellants contends before us that the High Court had no jurisdiction to decide issue No. 5 in a revision. He says that the subject-matter of the revision was the order of the Civil Judge dated November 28, 1956, and the High Court could not decide any other point and convert itself into an original court. The learned counsel for the respondents tried to justify the decision regarding jurisdiction of the High Court under S. 24, C. P. C. This section, inter alia, provides that the High Court may withdraw any suit, appeal or other proceeding pending in any court subordinate to it and try and dispose of the same. We are unable to appreciate how the order of the learned Judge can be justified under S. 24. He has not purported to withdraw any suit and try the same. What he has done is to try an issue arising in a suit in a revision arising out of an interlocutory order. It seems to us that the High Court, even if the parties conceded, had no power to decide the issue. But if we set aside the order of the High Court and remit the case to the Civil Judge to try it according to law, the Civil Judge would feel handicapped in deciding the case properly because he will feel bound to follow the opinion given by the learned Judge on issue No. 5. Under the circumstances we heard arguments on the issue.

10. Dhavan J., following the English Common Law, held that decree against Rabadi was complete accord and satisfaction and the cause of action against all the defendants being one and indivisible, the decree operated as a bar against further proceedings against the remaining joint wrong-doers.

11. Winfield on Tort (8th edn.) p. 661 states the English Law thus:

"The liability of joint tort-feasors is joint and several, each may be sued alone or jointly with some or all the others in one action; each is liable for the whole damage, and judgment obtained against all of them jointly may be executed in full against any one of them. At common law, final judgment obtained against one joint tort-feasor released all the others, even though it was wholly unsatisfied. This was established in *Brinsmead v. Harrison*, 1872 LR 7 CP 547 and the reason put by Blackburn J., was, *Interest reipublicae ut sit finis litium*. Kelly C. B. urged that if the rule were otherwise, then in a second action the second jury might assess an amount different from that in the first action and the plaintiff would not know for which sum he should levy execution. The rule was abolished by the Law Reform (Married Women and Tort-feasors) Act, 1935.

... .. It has long been settled that the release of one joint tort-feasor releases all the others, because the cause of action is one and indivisible. This rule has not been affected by the Act of 1935. It applies to a release under seal and to a release by way of accord and satisfaction, and probably to nothing else. A mere covenant or agreement not to sue, as distinguished from an actual release, does not destroy the cause of action, but merely prevents it from being enforced against the particular tort-feasor with whom it is made."

That was not the law in England in the beginning. The history of the law on this point is set out in William's 'Joint Torts and Contributory Negligence' (p. 35 footnote) as follows:

"In *Y. B. (1305) 33-35 E. 1, R. S. 7*, it was apparently held that in trespass against four, a verdict against two did not of itself prevent continuance against the other two. The verdict may not, however, have been embodied in a judgment. The former rule appears more clearly from *Y. B. (1342) 16 E. 3, 1 R. S. 171*, where judgment against one did not bar the action against the others. That the parties were joint tort-feasors appears plainly from the note from the record, *ibid*, 175 n. 7. See also *Y. BB. (1370) P. 44 E. 3, 7b, pl. 4; (1412/13) H. 14 H. 4. 22b, pl. 27*; in the latter it is said that in

trespass against two, if one be condemned and the plaintiff has execution against him with satisfaction, he shall be barred against the others—thus implying that the mere judgment would not bar. Cp. *Hickman v. Machin* (1605) 1 Ro. Ab. 896 (F) 4. 7, from which case, however (sub. nom. *Hickman v. Payns*.) a different inference is drawn in *Broome v. Wooton* (1605) Yelv. 67 = 80 E. R. 47. The first discussion of the question in the Year Books is in Y. B. (1441) M. 20 H. 6, 11a, pl. 24, where X had first sued A, B, and C in trespass and obtained judgment against A, who alone appeared to the writ; later X, not having levied execution under this judgment, sued B. Paston and Fulthorpe expressed opinions that he was not barred by the first judgment, but Newton C. J. thought that he was. In Y. B. (1495) M. 11 H. 7, 5b, pl. 23 (Bro. Trespass 428) it was said that one can release one joint tort-feasor after judgment against another without affecting that other, such a release would have been unnecessary if the judgment had discharged all other joint tort-feasors. Cp. Y. BB (1474) T. 14 E. 4. 6a, pl. 2; (1475) T. 15 E. 4. 26b, pl. 3. The rule was not settled in 1584, for it was then made a question whether even satisfaction following on judgment would discharge the others (above 19 n. 2); and see *Cocke v. Jen- nor* (n. d.) Hob. 66, 80 E. R. 214, where it was said that if joint tort-feasors be sued in several actions, satisfaction by one would discharge the others; it was not said that judgment against one would discharge."

The Common law rule was first established by the case of *Broome* (*Brown*) v. *Wooton*, (1605) 80 ER 47 and the only reason given was that transit in rem judicatum.

12. In *Goldrei Foucard and Sons v. Sinclair and Russian Chamber of Commerce* in London, (1913) 1 KB 180, at p. 192 Sargant, J. regarded the rule in *Brinsmead v. Harrison*, 1872-LR 7 CP 547 highly technical.

13. The rule was changed in England by legislation, vide *The Law Reform (Married Women and Tort-feasors) Act*, Pt. II (25 and 26 Geo. 5, c. 30). Section 6(1)(a) and (b) of that Act read as follows:

"Where damage is suffered by any person as a result of a tort (whether a crime or not)—

(a) judgment recovered against any tort-feasor liable in respect of that

damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgment given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action."

The provision has been adopted in other parts of the Commonwealth.

14. Recently in *Egger v. Viscount Chelmsford*, (1965) 1 QB 248 at p. 264. Lord Denning M. R., observed:

"I cannot help thinking that the root of all the trouble is the tacit assumption that if one of the persons concerned in a joint publication is a tort-feasor, then all are joint tort-feasors. They must therefore stand or fall together. So much so that the defence of one is the defence of all; and the malice of one is the malice of all. I think this assumption rests on a fallacy. In point of law, no tort-feasors can truly be described solely as joint tort-feasors. They are always several tort-feasors as well. In any joint tort, the party injured has his choice of whom to sue. He can sue all of them together or any one or more of them separately. This has been the law for centuries. It is well stated in Serjeant Williams' celebrated notes to Saunders' Report (1845 ed.) of *Cabell v. Vaughan* (1669) 1 Saund. 291 (f-g). "If several persons jointly commit a tort, the plaintiff has his election to sue all or any number of the parties; because a tort is in its nature the separate act of each individual". Therein lies the gist of the matter. Even in a joint tort, the tort is the separate act of each individual. Each is severally answerable for it; and, being severally answerable, each is severally entitled to his own defence. If he is himself innocent of malice, he

is entitled to the benefit of it. He is not to be dragged down with the guilty. No one is by our English law to be pronounced a wrongdoer, or be made liable to be made to pay damages for a wrong, unless he himself has done wrong; or his agent or servant has done wrong and he is vicariously responsible for it. Save in the case where the principle respondeat superior applies, the law does not impute wrong doing to a man who is in fact innocent."

15. Gatley on 'Libel and Slander' (Sixth Edition), in a footnote at p. 367, remarks regarding the approach of Lord Denning in, (1965) 1 QB 248.

"His approach is also not easy to reconcile with the law on the release of joint tort-feasors".

In the United States of America, in an early decision, *Lovejoy v. Murray*, (1865-67) 18 L. Ed 129 the United States Supreme Court refused to follow the English Common Law. Miller, J. speaking on behalf of the Court, observed, after referring to (1605) 80 ER 47 and other cases:

"The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of transit in rem judicatum, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment.

This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Kilenborough, in *Drake v. Mitchell*, (1803) 3 East, 251 at p. 285, "A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.

This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of personal property. Prior to *Brown v. Wootton*, (1605) Cro. Jac. 73, the English doctrine seems to have been the other way, as shown by Kent, in his Commentaries, 2 Kent. Com. 388, referring to *Shepherd's Touchstone*, Title, Gift; and to *Jenkins*, p. 109, case 88.

.....

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt, at this day, to define it solely on the ground of transit in rem judicatum. For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

.....

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment."

In India the English Law has been generally followed. The learned counsel for the appellant relies on *Ram Kumar Singh v. Ali Husain*, (1909) ILR 31 All 173 at p. 175. The facts in that case in brief were as follows. The plaintiff sued several defendants jointly to recover damages (Rs. 325) in respect of an alleged assault committed on him by the defendants but entered into a compromise with one defendant and accepted Rs. 25 representing his proportionate share of damages. The High Court held:

"The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of from liability. In the case of (1872) LR 7 CP 547 one of the tort-feasors was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit and had agreed to pay a sum of money in satisfaction of his liability."

This case was followed in *Har Krishna Lal v. Haji Quarban Ali*, ILR 17 Luck 284 = (AIR 1942 Oudh. 73). But in these cases the decree was not passed first against the tort-feasor admitting liability.

16. The learned counsel for the respondent relies on *Makhanlal Lolaram v. Panchamal Sheoprasad*, AIR 1934 Nag 226 at p. 227. It was held in that case that "an accord and satisfaction in favour of one joint tort-feasor operates in favour of them all." Vivian Bose, A. J. C., observed:

"An accord and satisfaction in favour of one joint tort-feasor operates in favour of them all; 9 QB 819, 11A and E 453 and 6 Bing (N. C.) 52, *Odgers on Libel and Slander*, Edn. 6, p. 521, *Ratanlal on Torts*, Edn. 10, p. 71. The basis of these decisions is that where the injury is one and indivisible it can give rise to but one cause of action. Consequently if satisfaction is accepted as full and complete and against one person it operates with respect to the entire cause of action."

In *Shiva Sagar Lal v. Mata Din*, AIR 1949 All 105 the facts as stated in the headnote, in brief, were:

"Plaintiff filed a suit to recover damages for malicious prosecution against five defendants of whom defendant 1 was a minor. It was alleged that the other defendants had instigated defendant 1 to make a complaint against the plaintiff. Subsequently, the plaintiff filed an application that there had been a settlement between him and defendant 1 and he had consequently released him. The application was allowed and defendant 1 was discharged."

Following *Duck v. Mayeu*, (1892) 2 QB 511 it was held that the discharge of defendant 1 amounted merely to a covenant not to sue him and not to a release of all the joint tort-feasors. The English Courts adopted this line of reasoning in order to soften the rigour of the common law, but in the present case it cannot be said that the compromise amounted to a covenant not to sue, as a decree was passed.

17. It seems to us, however, that the rule of common law prior to *Brown v. Wootton* and the rule adopted by the United States Supreme Court is more in consonance with equity, justice and good conscience. In other words, the plaintiff must have received full satisfaction or which the law must consider as such from a tort-feasor before the other joint tort-feasors can rely on accord and satisfaction. This rule would recognise that the liability of tort-feasors is joint and several.

18. What is full satisfaction will depend on the facts and circumstances of the case. For example, the acceptance of Rs. 25 in the case of (1909) ILR 31 All 173 would not be a case of full satisfaction.

19. In this case an apology was received from the defendant Rabadi and accepted and embodied in a decree.

This cannot be treated to be a full satisfaction for the tort alleged to have been committed by the appellants-defendants. But this must be treated as an election on the part of the plaintiff to pursue his several remedy against the defendant Rabadi.

20. The learned counsel for the appellants urges that if a decree is passed against them for damages, the defendant Rabadi, who compromised, would be liable to contribute in accordance with the rule laid down in *Dharni Dher v. Chandra Shekhar*, ILR (1951) 1 All 759 = (AIR 1951 All 774) (FB) in which it was held that the rule in *Merryweather v. Nixon*, (1799) 8 T. R. 186 did not apply in India. It is not necessary to decide whether the Full Bench decision of the Allahabad High Court lays down the law correctly, because even if it is assumed that this is the law in India it would not affect the rights of the plaintiffs.

21. In the result the appeal is allowed, the judgment and decree of the High Court set aside and the case remitted to the Trial Court. He shall dispose of the suit in accordance with this judgment and law. No order as to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 1475 (V 57 C 310)

(From: Gujarat)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Vasudev Dhanjibhai Modi, Appellant
v. Rajabhai Abdul Rehman and others,
Respondents.

Civil Appeal No. 406 of 1967, D/- 18-3-1970.

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), S. 6 — Suit for possession of land used for agricultural purposes — Court exercising power under Act has no jurisdiction to entertain suit — Crucial date for determining whether land is used for agricultural purposes is date on which right conferred by Act is sought to be exercised. AIR 1966 SC 806, Relied on.

(Para 4)

(Spl. Civil Appln. No. 371 of 1965,
D/- 10-9-1966 — Guj.)

DN/EN/B510/70/KSB/D

(B) Civil P. C. (1908), S. 38 — Court executing decree — Decree binding — Cannot go behind decree even if it is erroneous in law or on facts.

(Para 6)

(C) Civil P. C. (1908), S. 47 — Question relating to execution — Objection to validity of decree — If and when can be entertained — Decree of Small Cause Court — Objection to its jurisdiction cannot be raised for first time in execution if question depends on investigation of facts — Spl. Civil Appln. No. 371 of 1965 D/- 10-9-1966 (Guj.), Reversed.

When the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. But where the objection as to jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

(Para 7)

Where a decree for ejectment of a lessee is passed by a Court of Small Causes without any objection to its jurisdiction and the question of jurisdiction of that Court to entertain the suit depends upon interpretation of the terms of agreement of lease and the user to which the land was put at the date of grant of lease, these questions cannot be permitted to be raised in an execution proceeding so as to displace the jurisdiction of the Court which passed it. AIR 1933 PC 61, Dist.; Spl. Civil Appln. No. 371 of 1965, D/- 10-9-1966 (Guj.), Reversed.

(Para 8)

Cases Ref: Chronological Paras
(1966) AIR 1966 SC 806 (V 53) =

(1962) 3 SCR 98, Mst. Subhadra

v. Narsaji Chenaji Marwadi 4

(1933) AIR 1933 PC 61 (V 20) =

60 Ind App 71, Jnanendra

Mohan Bhaduri v. Rabindra

Nath Chakravarti 7

I. N. Shroff Advocate, for Appellant; M/s. R. Gopalkrishnan and J. M. Thacker, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

SHAH, J.: Vasudev Dhanjibhai Modi is the owner of Plot No. 15/3 of Jamal-

pur Town Planning Scheme, Ahmedabad. Since 1948 Rajabhai Munshi was a tenant of the land at an annual rental of Rs. 411. Alleging that Munshi committed default in payment of rent, Modi instituted a suit in the Court of Small Causes, Ahmedabad, for an order in ejectment and for payment of rent in arrears. Munshi deposited in Court an amount which he claimed satisfied the liability to pay the rent in arrears. The Court of first instance dismissed the suit. In appeal to the District Court at Ahmedabad the order of the Court of First Instance was reversed and a decree in ejectment was passed in favour of Modi. The order was confirmed in a revision application filed before the High Court of Bombay. A petition for special leave to appeal against that order was granted by this Court but was later vacated when it was found that Munshi had made false statements in his petition.

2. In the meanwhile Modi applied for execution of the decree in ejectment against Munshi. Munshi raised the contention that the Court of Small Causes had no jurisdiction to entertain the suit and its decree was on that account a nullity. According to Munshi the suit premises were not governed by the Bombay Rents, Hotel and Lodging House Rates (Control) Act 57 of 1947, and that in any event Parts II and III of that Act did not apply to open land and on that account the decree of the High Court confirming the decree of the District Court was without jurisdiction. The Court executing the decree rejected the contention. An appeal against that order to a Bench of the Court of Small Causes was also unsuccessful.

3. But in a petition under Art. 227 of the Constitution moved by Munshi the High Court of Gujarat (that High Court having, by virtue of the provisions of the Bombay Reorganization Act, 1960, acquired jurisdiction to deal with and dispose of the case) reversed the order of the Court of Small Causes and ordered that the petition for execution be dismissed. With special leave Modi has appealed to this Court.

4. The expression "premises" in S. 5(8) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act 57 of 1947 does not include premises used for agricultural purposes. By S. 6 of

that Act the provisions of Part II which relate to conditions in which orders in ejectment may be made against tenants and other related matters apply to premises let for education, business, trade or storage. It is plain that the Court exercising power under the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, has no jurisdiction to entertain a suit for possession of land used for agricultural purposes. Again in ascertaining whether the land demised is used for agricultural purposes, the crucial date is the date on which the right conferred by the Act is sought to be exercised; *Mst. Subhadra v. Narsaji Chenaji Marwadi*, AIR 1966 SC 806.

5. In this case the suit for ejectment against Munshi was instituted by Modi in the Court of Small Causes. No objection was raised that the Court had no jurisdiction to entertain the suit. The objection was not raised even in appeal, nor before the High Court. The Trial Court dismissed the suit on merits: the decree was reversed by the District Court and that decree was confirmed by the High Court. The objection was raised for the first time when the decree was sought to be executed.

6. A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the

trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In *Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarti*, 60 Ind App 71 = (AIR 1933 PC 61) the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction.

8. In the present case the question whether the Court of Small Causes had jurisdiction to entertain the suit against Munshi depended upon the interpretation of the terms of the agreement of lease, and the user to which the land was put at the date of the grant of the lease. These questions cannot be permitted to be raised in an execution proceeding so as to displace the jurisdiction of the Court which passed the decree. If the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under S. 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the Court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding.

9. The High Court was of the view that where there is lack of inherent jurisdiction in the Court which passed the decree, the executing Court must refuse to execute it on the ground that the decree is a nullity. But, in our judgment, for the purpose of determining whether the Court which passed the decree had jurisdiction to try the suit, it is necessary to determine facts on the decision of which the question depends, and the objection does not appear on the face of the record, the executing Court cannot enter upon an enquiry into those facts. In the view of the High Court since the land leased was at the date of the lease used for

agricultural purposes and that it so appeared on investigation of the terms of the lease and other relevant evidence, it was open to the Court to hold that the decree was without jurisdiction and on that account a nullity. The view taken by the High Court, in our judgment, cannot be sustained.

10. The appeal is allowed and the order passed by the High Court is set aside. The order of the Court of Small Causes is restored. The respondent Munshi will pay the costs of the appellant throughout.

Appeal allowed.

AIR 1970 SUPREME COURT 1477 (V 57 C 311)

(From: Madhya Pradesh)

T. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

D. P. Mishra, Appellant v. Kamal Narayan Sharma and another, Respondents.

Civil Appeal No. 1738 of 1969, D/- 13-3-1970.

(A) Representation of the People Act (1951), S. 116A — Appeal to High Court from order of Election Tribunal — Period of thirty days' limitation prescribed by S. 116A (3) is a special period of limitation different from one provided under Art. 116, Limitation Act within meaning of S. 29(2) of that Act attracting provisions of Ss. 4 and 12 thereof — Period of limitation after taking into account time requisite for obtaining certified copy of order of Tribunal expiring during summer recess — Appeal filed on first day of reopening of High Court is within time. AIR 1964 SC 1099, Rel. on.

(Paras 4, 5, 7)

(B) Limitation Act (1963) S. 4 — Expiry of period prescribed by special law when Court is closed — Appeal under S. 116A, Representation of the People Act can be filed on reopening day under S. 4 read with S. 29.

(Para 4)

(C) Limitation Act (1963), S. 29(2) — Special law — Period of limitation for appeal prescribed by S. 116A, Representation of the People Act, 1951 is one prescribed by special law within meaning of S. 29(2). (Para 4)

(D) Limitation Act (1963), S. 12 — Exclusion of time in legal proceedings

DN/DN/B417/70/KSB/M

— Time requisite for obtaining copy — Can be excluded in computing limitation prescribed by S. 116A, Representation of the People Act, 1951.

(Para 5)

(E) Representation of the People Act (1951), S. 123 — Corrupt practice — Proof by evidence beyond reasonable doubt — Benefit of doubt when can be given — (Evidence Act (1872), S. 3 — Proved — Election petition).

In an election petition a corrupt practice may be proved only by evidence beyond reasonable doubt. But in giving benefit of doubt the Court in reaching a judicial conclusion may not vacillate. When the High Court had pointed out that there was strong and clear evidence justifying the conclusion that the respondent had consented to those publications, there was no scope for the High Court to give him "the benefit of doubt."

(Para 15)

(F) Representation of the People Act (1951), S. 90 (5) — Amendment of particulars of corrupt practice alleged in petition — Power of tribunal.

Under S. 90 (5) the Tribunal has no power to allow any amendment of the petition so as to supply or introduce particulars of a corrupt practice not alleged in the petition. But the particulars of the corrupt practice alleged in the petition may in appropriate cases be permitted to be introduced by amendment.

(Para 17)

(G) Representation of the People Act (1951), S. 116A — Powers of High Court — Application for amendment of petition filed before Tribunal during trial of election petition — Tribunal wrongly rejecting it — High Court can allow amendment and evidence to be recorded even after a long period.

(Para 18)

(H) Representation of the People Act (1951), S. 77—Account of election expenditure.

Section 77 enjoins election candidate to keep correct account of all expenditure incurred in connection with his election within period specified therein. Congress candidate required by rules of Congress Committee to deposit Rs. 500/- along with his application for Congress ticket. Deposit made prior to date of notification for election. Amount deposited must be deemed to have been appropriated when his candidature was approved by Committee after date of notification

— Hence amount must be deemed to have been incurred within period specified in S. 77 and was liable to be included in election expenditure.

(Para 29)

(I) Representation of the People Act (1951), S. 123 (6) — Candidate incurring expenditure exceeding amount permissible under S. 77 — Candidate is guilty of corrupt practice under Section 123 (6) which renders his election void under S. 100 (1) (b).

(Para 35)

(J) Representation of the People Act (1951), S. 99 — Proceeding under for naming a person as being guilty of corrupt practice — Duty of court or Tribunal — Person found to be guilty must be named — No discretion is left in the matter provided the person concerned is noticed and heard.

(Para 37)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1099 (V 51)=

(1964) 6 SCR 129, Vidyacharan

Shukla v. Khubchand Baghel 6

The following Judgment of the Court was delivered by

SHAH, J.:— At an election held in June 1963 for electing a member from the Kasdol Constituency in the State of Madhya Pradesh, D. P. Mishra who stood as a candidate on "the Congress ticket" was declared elected. The rival candidate, Kamal Narayan Sharma filed a petition for setting aside the election of Mishra on the grounds that the latter was guilty of corrupt practices in that he offered to bribe Sharma, by offering through his agent Dr. Ausaf Hussain to pay him a sum of Rupees 50,000/- as inducement for withdrawing from the contest and thereby committed a corrupt practice defined in S. 123 (1) of the Representation of the People Act, 1951; that Mishra published on April 12, 1963, April 26, 1963 and May 4, 1963 in a Hindi newspaper "Mahakoshal" edited, published and printed by Shyamacharan Shukla (who was engaged as an authorised agent by Mishra to conduct election campaign on his behalf) statements of facts which were false and which they believed to be false or did not believe to be true, in relation to personal character and conduct of Sharma and in relation to his candidature, such statements being reasonably calculated to prejudice the prospects of Sharma's election and thereby committed corrupt practice defined in S. 123 (4) of the Representation of the People Act,

1951; that Mishra through his agents and workers hired or procured on payment or otherwise motor-vehicles and bullock-carts for conveying electors to the polling stations in the constituency and thereby committed a corrupt practice defined in section 123 (5) of the Representation of the People Act, 1951; and that he incurred and authorised, in contravention of S. 77 of the Representation of the People Act, 1951, expenditure in excess of the amount prescribed, and thereby committed a corrupt practice as defined in S. 123 (6) of the Representation of the People Act, 1951. Mishra denied the allegations in support of the plea of corrupt practices alleged to be committed by him. The Election Tribunal substantially negatived the allegations of corrupt practices and by order dated December 28, 1966 dismissed the petition.

2. In appeal under S. 116A of the Representation of the People Act, 1951, against the order passed by the Tribunal, the High Court of Madhya Pradesh set aside the order and declared that the election of Mishra was void under S. 100 (1) (b) of the Representation of the People Act, 1951, for, it was proved that Mishra had incurred or authorised expenditure of an amount of Rs. 7,249-72 which was in excess of the permissible limit, and the expenditure being in contravention of S. 77 of the Act, Mishra was guilty of a corrupt practice within the meaning of S. 123 (6) of the Act. Against the order passed by the High Court, this appeal has been preferred with special leave.

3. Counsel for Mishra contended that (1) the appeal to the High Court was barred by the law of limitation and accordingly the High Court had no power to entertain and decide the appeal; (2) the High Court was not justified in allowing the particulars of the corrupt practices set up in the petition to be modified and to allow the petition to be amended at the stage of the hearing of the appeal and in recording evidence in support of the fresh corrupt practices so set up; and (3) that the evidence does not justify the finding that any corrupt practice was committed by Mishra as found by the High Court.

4. The judgment of the Election Tribunal was delivered on December 28, 1966. A certified copy of the judg-

ment of the Tribunal was supplied to the appellant Sharma on April 27, 1967. The High Court was closed for the summer recess between May 7, 1967 and June 30, 1967 and the memorandum of appeal was lodged in the office of the Registrar of the High Court on July 1, 1967. Section 116A of the Representation of the People Act, as it then stood, provided, insofar as it is relevant:

"(1) An appeal shall lie from every order made by a Tribunal under section 98 or section 99 to the High Court of the State in which the Tribunal is situated.

(2) The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, and follow the same procedure, with respect to an appeal under this Chapter as if the appeal were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction:

"Provided that where the High Court consists of more than two judges every appeal under this Chapter shall be heard by a bench of not less than two judges.

(3) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the Tribunal under S. 98 or S. 99:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

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The right to appeal against the order of a Tribunal is conferred by S. 116A of the Representation of the People Act, 1951. The Act provides a special period of limitation different from the period of limitation prescribed by Art. 116 of the Limitation Act, 1963, for an appeal to the High Court under the Code of Civil Procedure from any decree or order. But the expression "under the Code of Civil Procedure" in Art. 116 of the Limitation Act means an appeal governed by the Code of Civil Procedure, and by virtue of S. 116A (2) the procedure with respect to an appeal from an order of the Tribunal. By virtue of Section 29 (2) of the Limitation Act, Ss. 4 and 12 thereof apply and if the appeal is filed on the date on which the Court re-opens after the recess it will be regarded as within

time if the period of limitation, after taking into account the time requisite for obtaining a certified copy, had expired during the course of the recess.

5. Section 29 of the Limitation Act, 1963, by sub-section (2) provides:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

Computing the time taken for supplying the certified copies, the period of limitation expired during the summer recess, and the memorandum of appeal was lodged in Court on July 1, 1967. There is no provision in the Representation of the People Act, 1951, which excludes the application of S. 4 of the Limitation Act.

6. In *Vidyacharan Shukla v. Khubchand Baghel* 1964-6 SCR 129 = (AIR 1964 SC 1099) this Court held that the exclusion of time provided by S. 12 of the Limitation Act, 1908, is permissible in computing the period of limitation for filing an appeal in the High Court under the Representation of the People Act, 1951. The Court in that case was interpreting S. 29 (2) of the Limitation Act, 1908. The Court held that in the absence of any express provision to the contrary in the special statute, the provisions of the Indian Limitation Act, 1908, contained in section 4 and Ss. 9 to 18 and 22 shall apply to the extent to which they were not expressly excluded by any special or local law.

7. The appeal filed by Sharma must in law be deemed to be filed within the period of limitation prescribed by S. 116A (3) of the Representation of the People Act, 1951.

8. We are also unable to agree with the learned counsel for Mishra that the High Court erred in allowing the amendment of the petition. In paragraph 7 of the petition as originally filed before the Tribunal it was averred:

"(a) The respondent (1) — (D. P. Mishra) — incurred and authorised expenditure in contravention of S. 77 of the Representation of the People Act, 1951, and thereby committed the corrupt practice as defined under section 123 (6) of the Representation of the People Act, 1951.

(b) (i). The respondent (1) — (D. P. Mishra) — in his election expenses has given a return of expenses totalling up to about Rs. 6,300/-. He has deliberately not shown many items of expenditure incurred or authorised by him in connection with his election which if included would make the total expenditure much beyond the permissible limits."

In clauses (b) (ii), (b) (iii), (b) (iv), (b) (v), (b) (vi), (b) (vii), (b) (viii), (b) (ix), (c) (i), (c) (ii), (c) (iii), (c) (iv) & (c) (v) of paragraph 7 were set out various items of expenditure which, it was claimed, were incurred or authorised by Mishra in connection with his election.

9. The petition was allowed to be amended by order of the High Court on May 4, 1968, and certain particulars of expenditure incurred by Mishra were incorporated in the petition. The circumstances in which the High Court permitted the amendment, are these: On November 30, 1965, one Bhaskar Kathote was examined before the Tribunal as a witness for Sharma and from the statements made by him it appeared that Mishra had spent a large amount of money for purchasing cloth for banners used for the purpose of elections, and that amount was not disclosed in the statement of expenditure. An application to amend the petition was made on December 1, 1965 before the Tribunal. The Tribunal rejected the application on the ground that it "was very much belated".

10. On December 6, 1965, Sharma submitted another application, before the Tribunal for amendment of the petition alleging, inter alia, that on March 25, 1963, Mishra had paid into the office of the Madhya Pradesh Congress Committee Rs. 700/- in connection with his election, by paying Rs. 200/- as application fee and deposit amount of Rs. 500/-, and this item of expenditure was liable to be included in the return of election expenses filed by Mishra with the Returning Officer under S. 78 of the Representation of the People Act, 1951, and if that item be included the total expenditure

incurred by Mishra exceeded the maximum amount of expenditure permitted for an Assembly Constituency in Madhya Pradesh under R. 90 (2) of the Conduct of Election Rules, 1961, resulting in contravention of sub-s. (3) of S. 77 of the Representation of the People Act, 1951, and a corrupt practice falling within the terms of S. 123 (6) of the Act. The Tribunal rejected that application. In the view of the Tribunal the allegations made in the application if introduced would amount to adding fresh instances of corrupt practices falling within S. 123 (6) of the Representation of the People Act, and that in any event the application for amendment was "not only very much belated but the circumstances in which it was made led to an inference that it was also mala fide."

11. In appeal before the High Court Sharma by his application dated April 28, 1968, repeated his request for leave to amend the petition in the manner set out in his application dated December 1, 1965 and December 6, 1965. The High Court granted the application observing that the application for amendment was merely intended to amplify the particulars of the corrupt practices which had already been made in the election petition and that items (d) to (i) were not new items of expenditure, but they were sought to be added to show that Mishra had incurred and authorised expenditure in excess of the permissible limit of Rs. 7,000/-. In the view of the High Court since the material was already on the record it would be unjust to ignore it on the ground of omission of the details in the petition, and that delay by itself was no ground for refusing leave to supply particulars.

12. Additional issues were then raised, and statements of Ramnarayana Purohit and Mishra were thereafter recorded. The High Court held on a review of the evidence that an attempt was made but without the consent of Mishra to bribe Sharma by offering him Rs. 50,000/- in consideration for his withdrawal from the contest; that it was proved that Shyamacharan Shukla, Parmanand Patel, Laxmishankar Bhatt, Basant Kumar Tiwari, Chakrapani Shukla, Wasudeo Chandrakar, Bhaskar Singh, Rohini Kumar Bajpai, Jaideo Satapati and N. N. Seel were the agents of Mishra; that it was proved that electors were conveyed to some of the polling stations in motor-

vehicles but it was not proved that any vehicle was hired or procured for this purpose with Mishra's consent; that it was proved that Mahakoshal, a Hindi Daily, published from Raipur, and Shyamacharan Shukla who was the proprietor, publisher, printer and keeper of the Press, were the agents of Mishra within the meaning of S. 123 of the Act; that it was proved that three statements (Annexures I, II and III) were published in the Mahakoshal issues of April 12, April 26 and May 4, 1963, in relation to the personal character and conduct of Sharma, that all the three statements were false, and that Mishra did not believe any of them to be true and those statements were reasonably calculated to prejudice the election prospects of Sharma, but in the view of the High Court Mishra had incurred or authorised expenditure within the meaning of S. 77 of the Act which totalled Rs. 7,249-72, and since the amount exceeded the permissible limit, he was guilty of corrupt practice under S. 123 (6) of the Act. The High Court, however, declined to issue a notice to Shyamacharan Shukla under S. 99 of the Act calling upon him to show cause why he should not be named for committing corrupt practices as defined in S. 123 (4) of the Act. Against the order passed by the High Court this appeal has been filed with special leave.

13. The arguments in this appeal are primarily restricted to the corrupt practice which the High Court found Mishra had committed under Section 123(6) of the Representation of the People Act by incurring expenditure in excess of the permissible limit of Rs. 7,000 for the Assembly Constituency.

14. We deem it necessary to observe that in the course of their judgment the learned Judges of the High Court recorded their conclusion that acts which would amount to corrupt practices, if done with the consent of Mishra would have disqualified him, were in fact committed, but it was not proved that those acts were done with the consent of Mishra. In respect of the corrupt practice under section 123 (4), the High Court first held that Mishra had consented to the publication of the statements in the three annexures; and then proceeded somewhat inconsistently to "give the benefit of doubt" to Mishra. In the

course of the judgment, the High Court observed:

"The statements, annexures I, II and III appeared in the Mahakoshal. Shyamacharan Shukla was its editor. As will be seen the Mahakoshal and Shysmacharan Shukla were both agents of the respondent within the meaning of the election law."

Thereafter in paragraph 83 of the judgment the High Court proceeded to observe that direct evidence of consent can rarely be expected and in the absence of direct evidence, the question of consent has to be determined on circumstantial evidence, each case being decided on its own facts. The Court then proceeded to set out the considerations which would guide the Court in dealing with the question whether the false statements published in the newspaper supporting the candidature of the publishing candidate was with his consent and recapitulated the evidence in support of the case in relation to the three false statements — Annexures I, II & III. After referring to the admission made by Mishra that Shyamacharan Shukla had worked for him, and the evidence that Shyamacharan Shukla was personally associated with Mishra in his campaign and had extensively toured with Mishra, the High Court recorded its finding in paragraph 96:

"In ultimate analysis, the question of consent is one of fact and it is to be decided in each case on its facts and circumstances. Circumstances in their entirety have to be kept in view. It is the overall picture of the case which presents itself, and not isolated facts, which will guide the Court to reach the conclusion. In the present case, the cumulative effect of the respondent's closeness with the Mahakoshal and personal association with Shyamacharan Shukla for days together and the setting in which the false statements were published one after another, and the respondent not contradicting nor dissociating himself from them would have persuaded us to hold that these false statements (Annexures I, II and III) were published with the consent of the respondent."

The High Court then observed that Shyamacharan Shukla may have in his own enthusiasm published those false statements and therefore they gave the "benefit of doubt" to Mishra, with "much hesitation".

15. We are unable to endorse the method adopted by the High Court. If we had disagreed with the view of the High Court on the finding relating to the perpetrating corrupt practice by Mishra falling under S. 123 (6) of the Representation of the People Act, 1951, it would have been necessary for us to consider this question more fully. In an election petition a corrupt practice may be proved only by evidence beyond reasonable doubt. But in giving benefit of doubt the Court in reaching a judicial conclusion may not vacillate. The High Court has pointed out that there was strong and clear evidence justifying the conclusion that Mishra had consented to those publications, in our judgment, there was no scope for the High Court to give Mishra "the benefit of doubt".

16. We may now consider the questions whether the High Court was right in allowing the amendment of the petition, and whether the evidence establishes that corrupt practice within the meaning of S. 123 (6) read with S. 77 of the Act was committed by Mishra. In our judgment, the High Court was clearly right in granting the amendment. In paragraph 7 cls. (a) and (b) (i) of the election petition as originally filed Sharma averred that Mishra had incurred and authorised expenditure exceeding the permissible limit of Rs. 7,000/- fixed under the rules framed under the Representation of the People Act, 1951. Mishra in his statement of election expenses had disclosed that he had spent Rupees 6,324-14. By setting out details or particulars of expenditure incurred which obviously could not be within the knowledge of the election petitioner, no new plea of corrupt practice can be said to have been incorporated. These are particulars of the election expenses. By seeking to amend the petition Sharma was not adding new grounds of corrupt practice not disclosed in the petition he was only furnishing particulars of the corrupt practice committed already set out in paragraph 7 (a) and 7 (b) (i) of the petition.

17. Section 83 (1) (b) of the Representation of the People Act, 1951, as it stood in 1963, provided:

"(1) An election petition —

x x x

(b) shall set forth full particulars of any corrupt practice that the petitioner

alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice:

By S. 90 (5) it was provided:

"The Tribunal may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

The words of cl. (5) of S. 90 are clear. The Tribunal had no power to allow any amendment of the petition so as to supply or introduce particulars of a corrupt practice not alleged in the petition. But the particulars of the corrupt practice alleged in the petition may in appropriate cases be permitted to be introduced by amendment. In the present case particulars of the corrupt practice set out in paragraph 7 cls. (a) and (b) (i) previously alleged in the petition were introduced, and not particulars of a corrupt practice not previously alleged in the petition. Sharma obviously could not have knowledge or information about the matters which from their very nature were within the special knowledge of Mishra. As soon as he came to learn about the commission of corrupt practice he applied to the Tribunal for leave to amend the petition. The Tribunal rejected the first application for amendment on the ground that there was delay in filing the application, and the second application on the ground that it was delayed and was also mala fide. We do not think the Tribunal was right in holding that there was any undue delay which would justify rejection of the application for amendment, and there are no circumstances from which it may be inferred that the application dated December 6, 1965 was mala fide. We hold that the High Court was right in allowing the amendments to be made.

18. Mr. Sen appearing on behalf of Mishra contended that in allowing an application for amendment five years after the date on which the original petition was filed and allowing evi-

dence to be recorded, the High Court has gravely erred. But Sharma did make an application for amendment during the trial of proceeding before the Tribunal. The Tribunal was, in our judgment, in grave error in rejecting the application. It was not the fault of Sharma that evidence could not be recorded at an earlier stage, and the oral evidence as was recorded on behalf of Sharma was only formal, only explanations of the evidence already on the record.

19. The evidence relating to the incurring or authorising of expenditure in respect of the items held proved by the High Court falls under two heads: Rs. 700/- paid to the Madhya Pradesh Congress Committee, Bhopal, on March 25, 1963, for standing on the Congress ticket; and Rs. 510-25 on April 13, 1963, spent for purchasing cloth for preparing banners.

20. Section 77 of the Act, as it then stood, provided:

"(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed."

Section 78 of the Act provided:

"Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate or, if there are more than one returned candidate at the election and the dates of their elections are different, the later of those two dates, lodge with the returning officer an account of his election expenses which shall be a true copy of the account kept by him or by his election agent under section 77."

Section 100 (1) (b) provided:

"Subject to the provisions of subsection (2), if the Tribunal is of opinion—

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent;

the Tribunal shall declare the election of the returned candidate to be void." Under cl. (6) of S. 123 the incurring or authorizing of expenditure in contravention of S. 77 was a corrupt practice.

21. Rule 131 framed under the Representation of the People Act, 1951, then in force, provided:

"(1) The account of election expenses to be kept by a candidate or his election agent under section 77 shall contain the following particulars in respect of each item of expenditure from day to day, namely:

(a) the date on which the expenditure was incurred or authorised;

(b) the nature of the expenditure (as for example travelling, postage or printing and the like);

(c) the amount of the expenditure—

(i) the amount paid;

(ii) the amount outstanding;

(d) the date of payment;

(e) the name and address of the payee;

(f) the serial number of vouchers, in case of amount paid;

(g) the serial number of bills, if any, in case of amount outstanding;

(h) the name and address of the persons to whom the amount outstanding is payable.

(2) A voucher shall be obtained for every item of expenditure unless from the nature of the case, such as postage, travel by rail and the like, it is not practicable to obtain a voucher.

(3) All vouchers shall be lodged along with the account of election expenses, arranged according to the date of payment and serially numbered by the candidate or his election agent and such serial numbers shall be entered in the account under item (f) of sub-rule (1).

(4) xx xx "

Mishra did not produce any account required to be maintained under S. 77 of the Act; he merely relied upon the statement headed "Account of election expenses—Election to Legislative Assembly Constituency, Kasdol" filed under S. 78 of the Act. This statement showed in respect of different items the date of incurring expenditure, nature of expenditure, paid, amount outstanding, date of vouchers, name and address of payee if paid, serial number of voucher, serial number of bill, and name and address of person to whom outstanding. The

Act requires the candidate at an election to keep a correct account of all expenditure. Section 78 enjoins a duty upon the candidate to file a true copy of the account kept by him.

22. It appears from Ext. A-1, Receipt No. 113, issued by the Madhya Pradesh Congress Committee, Bhopal that on March 25, 1963, Mishra paid Rs. 700/- to the Madhya Pradesh Congress Committee, Bhopal. The Permanent Secretary of the Congress Committee acknowledged receipt of the amount of Rs. 700/- from Mishra in connection with the bye-election to the State Legislative Assembly from Kasdol Constituency. Out of that amount, Rs. 200 were appropriated as application fee, and Rs. 500 for deposit. This amount was however not included in the statement filed under Section 78 of the Act.

23. Mr. Sen appearing contended that the payment was not liable to be disclosed in the statement of account filed under S. 78 of the Act because it was made by one Parmanand Patel without the knowledge and consent of Mishra, and that in any event the amount was not paid within the period prescribed by S. 77 of the Representation of the People Act, 1951. Counsel also contended that out of the amount deposited, Rs. 500/- being "refundable" to the person depositing it, it was never treated as appropriated by the Madhya Pradesh Congress Committee.

24. Exhibit A-2 are the Rules of the Madhya Pradesh Congress Committee, which have a bearing on the contentions raised by counsel. The Rules prescribe the procedure for selection of Congress candidates approved by the Working Committee. Rule 8 deals with the observance of discipline and under the head "Application or Declaration of Consent", it is provided, insofar as it is material:

"1. A person may offer himself as a candidate for election to the Parliament or the State Legislature by filling up the prescribed Application Form or his name may be proposed by some one else but in all cases, each name shall have to be recommended by five members of the concerned D.C.C. xx xx

The person concerned shall have to declare that he agrees to stand and shall have to fill up the Consent Form.

2. Along with the application, the intending candidate shall contribute Rs. 200/- only. x x x

This amount will not be refunded.

5. In addition to the application money, each person concerned shall have to deposit Rs. 500/- in the case of State Legislature x x

7. Deposits, in all cases, will be earmarked for the constituencies of the persons concerned. In case he is not selected, the deposit will be refunded."

Appended to these Rules is an application form or declaration of consent.

25. Rs. 700/- were paid into the office of the Congress Committee on March 25, 1963. Notice of election was published on March 27, 1963. The High Court has held that Rs. 200/- out of Rs. 700/- being application money must be deemed to have been expended on March 25, 1963, and cannot be regarded as expenditure within the period prescribed by S. 77. The High Court further held that the amount of Rs. 500/- which was made as deposit was treated on April 1, 1963, as the money belonging to the Madhya Pradesh Congress Committee over which the person depositing had no interest.

26. In Receipt No. 113 dated March 25, 1963, it is stated that the amount was received from Mishra through Ram Krishna Shrivastava. Mishra in his evidence admitted that he knew the procedure for applying for the Congress ticket, but he claimed that he had not approached the District Congress Committee to get the Congress ticket, since he was "absolutely certain" that the High Command of the Congress wanted him and would give him a ticket; that on March 30 or 31, 1963, he was called by the Congress President and was told that he had been granted a Congress ticket by the Parliamentary Board to contest the bye-election from Kasdol Constituency; and that thereafter he declared himself to be a candidate. He denied that he had authorised Parmanand Patel to pay into the office of the Congress Committee Rs. 700 as application fee and deposit money. He also denied that he had any information regarding payment of the amount. According to Mishra, it was for the first time in November or December 1965 that he came to learn on enquiry from Parmanand Patel that the latter had deposited the money with the Congress Committee.

27. Mishra however failed to produce his books of account. He stated that one Laxmishankar was in charge

of the election office at Kasdol and that Laxmishankar maintained the accounts of his election expenses. He further stated that whenever he gave money to Laxmishankar he had entered the money in his accounts. Even these accounts have not been produced on the pretext that Laxmishankar had only given him the vouchers and the accounts were contained only in loose "sheets of paper under different heads". Even those sheets of paper were not produced. The Rules of the Congress Committee required that a candidate desiring to stand for election to the State Assembly on the Congress ticket shall pay an application fee of Rs. 200/- and deposit of Rupees 500/-. Mishra was aware of those Rules, but he says that the local Ad hoc Committee was inimical to him and that he was at the relevant time in Delhi and it was the Congress President who informed him that his candidature was accepted by the Parliamentary Board and that he was permitted to contest the bye-election from Kasdol Constituency. However, Ramanarayan Purohit says that the Ad hoc Committee which was in charge of the election affairs in Madhya Pradesh considered the names of Mishra and one Kanhaiyalal for the Congress ticket in the bye-election and after taking votes it was found that Mishra received nine votes and Kanhaiyalal received eleven votes, and thereafter the Ad hoc Committee sent both the names to the Central Parliamentary Board with the recommendation that the candidature of Kanhaiyalal be approved. This meeting, it was said, was held on March 26, 1963. Ramanarayan Purohit has stated that Ramkrishna Shrivastava at the time of paying the amount of Rs. 700/- did not hand over any application of Mishra. We are unable to accept that an application as required by the Rules was not submitted, and still the name of Mishra was considered by the Congress Committee. If the amount of Rs. 700/- was only tendered without an application, Ramanarayan would have enquired why the application was not submitted. The counter-foil of the receipt maintained in the Madhya Pradesh Congress Committee for Rupees 700/- showed that the amount was received from Mishra, that in all the books of account maintained in the Madhya Pradesh Congress Committee the amount was also entered as paid

by Mishra and the bare denial of Mishra that he had not paid Rs. 700/- cannot be accepted as correct. The application has apparently been withheld. The application could be denied, but not the receipt of money, for they had gone into the accounts.

28. Even assuming that there was no application, if it be believed that Rs. 700/- were paid by Mishra it could only be subject to the terms and conditions of the rules of the Congress Committee. It is pertinent to note that Mishra has admitted that the Ad hoc Congress Committee was against his candidature, and he came to know of it and thereafter he was informed by the Congress President that the Parliamentary Board had accepted his candidature. If his candidature was considered by the Ad hoc Congress Committee, he must have been put to an enquiry as to how the Congress Committee could consider his name without any application and without any deposit as required by the Rules. Mishra was a member of the Congress Party for a long time; he was once a Chief Minister and leader of the Congress party in the Assembly. He was familiar with the rules of the Congress Committee as he had "secured the Congress ticket" on several previous occasions. It was the case of Mishra that the amount had been paid by Parmanand Patel. Parmanand Patel was actively working for Mishra during the course of the election. Mishra had informed the High Court that he desired to examine Parmanand Patel, but he ultimately did not examine him. We agree with the High Court that even if the Ad hoc Congress Committee was not favourable to the candidature of Mishra it was unlikely that he would anticipate the decision and would be imprudent enough not even to comply with the requirement relating to the deposit of Rs. 700/- with the Madhya Pradesh Congress Committee and thereby "give a handle to the Ad hoc Committee not to consider his name". It is reasonable to infer on the circumstances that Mishra tried to secure the recommendation of the Ad hoc Congress Committee and for that purpose he deposited the money required by the Rules, notwithstanding any apprehension he may have felt that the Congress Committee may decide against him, and when he found that the local Committee decided against him, he approach-

ed the Parliamentary Board and secured their approval to his candidature. We are therefore of the view, having regard to all the circumstances, that the amount of Rs. 700 was deposited by Mishra through his agent on March 25, 1963, and his denial that the amount was deposited by him is untrue.

29. Under S. 77 of the Representation of the People Act, 1951, a separate and correct account of all expenditure in connection with the election incurred or authorised by a candidate or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof has to be kept by the candidate. The date of notification for calling the election was March 27, 1963 and the amount of Rs. 700 was paid on March 25, 1963. Relying upon this circumstance that the amount of Rs. 700 even if it be deemed to have been paid by Mishra, it was contended, that the expenditure did not fall within the period prescribed by S. 77 of the Act and was on that account not liable to be included in the statement of expenditure incurred in connection with the election. But Rs. 500 out of Rs. 700 were intended to be for deposit they could, under the relevant rules, be allocated only after the candidate was approved. The meeting of the Ad hoc Congress Committee was held on March 26, 1963, and Mishra's name was turned down. The Parliamentary Board, however, approved his candidature on March 30 or 31, 1963. It was only after the ticket was given to Mishra that the amount of Rs. 500 may be deemed to be appropriated under the rules. If his candidature was not approved the amount of Rs. 500 was under the rules liable to be refunded; if the candidature was approved it was not liable to be refunded, and it would be used for the constituency. The amount of Rs. 500 deposited by Mishra must, therefore, be deemed to have been appropriated on April 1, 1963, by the Madhya Pradesh Congress Committee and was incurred within the period prescribed by S. 77 of the Act.

30. It was urged however, that granting that under the Rules the amount of Rs. 500 paid under Receipt No. 113 dated March 25, 1963, was not refundable, it was still treated at all material times by the Congress Com-

mittee as refundable. Reliance in this connection was placed upon Ext. A-9 which catalogued the amounts received from different candidates and included the name of Mishra from whom an amount of Rs. 500 was received as deposit. Reliance was also placed upon Exts. A-6 and 7 the balance-sheet of the Madhya Pradesh Congress Committee, Bhopal, dated December 27, 1963. Under the head "Liabilities" in the balance-sheet an amount of Rupees 25,075 is shown as election deposit from candidates it was urged that the amount of Rs. 500 which was included in the total amount of Rs. 25,075 was treated even in December 1963 as lying in deposit and not appropriated to the account of the Madhya Pradesh Congress Committee. This argument cannot be accepted. Exhibit A-9 on which reliance was placed is merely a list of the amounts received. The balance-sheet was tendered in evidence, but the auditors were not examined. Again a balance-sheet is only a statement of the sources from which the money has been received. No rational explanation has been even furnished why the Committee did not appropriate the amount to the Congress Committee funds. In our judgment, the High Court was right in holding that the amount of Rs. 500 paid by Mishra was expenditure incurred on April 1, 1963, and was liable to be included in the statement of expenditure incurred for the purpose of the election.

51. The other item relates to Rs. 510-25 for purchasing cloth for use in preparing banners for election propaganda. In the return of election expenses under the entry dated April 27, 1963, an amount of Rs. 370 is shown as paid to Bhartiya Chitra Mandir for painting charges, being Voucher No. 39. An amount of Rs. 200 was also shown as paid on April 18, 1963, to the same firm under Voucher No. 28 as advance against painting charges. Voucher No. 28 dated April 18, 1963, expressly recites that the amount was received from B. K. Tiwari. Reading Voucher Nos. 28 and 39 and the entries made in the return of election expenses together it appears that it was the claim of Mishra that Rs. 430 were spent for cloth and painting charges at the rate of Rs. 5 for ninety-six banners. Bhaskar Kathote of the Bhartiya Chitra Mandir was examined as a witness on behalf of Sharma. He said that he had charged Rs. 5 per

banner for painting only, and cloth was supplied to him by Mishra. The witness said that he was paid Rs. 200 as advance on April 18, 1963, when the order was placed with him and the balance of Rs. 370 was paid to him on April 27, 1963 by Basant Kumar Tiwari. He also stated that he had handed over the receipt for that amount to Basant Kumar Tiwari, and also the voucher for Rs. 370. According to this witness the banners supplied were of three sizes — (i) 18' x 3'; (ii) 12' x 2 1/4'; and (iii) 9' x 2 1/4'. Of these 40 banners were of type (i); 20 banners of type (ii) and 42 banners of type (iii), and that he was supplied 375 yards of cloth for the banners. The witness produced for scrutiny before the Tribunal his cash book and the ledger for the year 1963-64 and he pointed out the entries from April 18, 1963 to April 27, 1963 which showed that only 9 yards of cloth was purchased by him for Rs. 12-37 on April 18, 1963. In Voucher No. 39 the entries are as follows:

"96 cloth banners painting including cost of cloth @ 5.00 each.		480-00
10 Boards of 6' x 4'		
each @ 6.00		60-00
Stitching charges		20-00
Framing charges		10-00
		570-00
Advance	...	200-00
		370-00
Balance	...	370-00

Bhaskar Kathote explained that he was asked to give a voucher containing the words "including cost of cloth", even though the cloth was supplied to him by Mishra. This statement is supported by a carbon copy of the bill dated April 27, 1963 Ext. P-160. This carbon copy is in a bound book, leaves of which bear numbers in serial order and dates in chronological sequence. The book is, in our judgment, a reliable piece of evidence. In Bill No. 3006 dated April 27, 1963 cloth is not mentioned. In that Bill Bhaskar Kathote only charged for painting. The witness has deposed that the carbon copy of Bill No. 3006 is in his handwriting and is signed by him. The entries in the bill show that 96 banners @ Rs. 5 each and 10 boards @ Rs. 6 each, stitching charges Rs. 20 and framing charges Rs. 10, total Rs. 570, less Rs. 200 balance Rs. 370. On the left-hand margin at the top the words "including

ferent rate is fixed under S. 9. Section 17 lays down that such portion of rent as exceeds the standard rent determined according to the provisions of the Act shall be irrecoverable from the month of the tenancy next after the month in which the Act comes into force whether the rent was fixed by agreement or by proceedings under the Act of 1948. It further provides that where standard rent has been fixed under the provisions of the Act of 1948 whether by the Controller or on appeal from his order the Controller shall, on application made to him, re-fix the standard rent according to the provisions of the Act.

7. On an examination of the above provisions of the general scheme of the Act the appeal court may be right in saying that it was not necessary for a tenant to go to the Controller for fixation of standard rent in order to claim relief under Section 3 of the Act. If it could be shown that the rate at which the rent was being sought to be collected was in excess of the standard rent determined in accordance with Schedule A the Court trying the suit for recovery of arrears of rent could give relief to the tenant. But he could get such relief only in respect of the rent which had remained unpaid at the date of the suit. It is, however, unnecessary, to express any final opinion on this point.

8. Now in the present case the entire claim of the appellant for adjustment of the excess rent that had been paid was based on the provisions of the Act which made any amount in excess of the standard rent irrecoverable. The determination of the standard rent had also to be made in accordance with relevant provisions of the Act. It is not possible to see how the appellant could rely on certain provisions of the Act and seek to ignore S. 7 which lays down the procedure for claiming the refund or adjustment of any sum which by the provisions of the Act is irrecoverable. The limitation for filing an application in that behalf has been laid down in clear terms in S. 7, namely, a period of six months from the date of payment or deposit of the excess amount. It is indisputable that if the limitation provided in S. 7 is to govern the present case the appellant could not claim any relief by way of adjustment of the excess amount which had been paid upto the date of the suit.

9. A faint suggestion has been made on behalf of the appellant that it was not debarred under the general law from claiming a set off in respect of the amounts which had been paid in excess and which were irrecoverable. Such a contention cannot be entertained because no proper foundation was laid for it at prior stages nor does it have any merit by reason of the express provisions of S. 7 of the Act. It is not open to the appellant to rely on certain provisions of a special enactment and ignore the others which are contained in it. If the right and the remedy have been provided in the same statute one cannot be disassociated from the other.

10. As regards the applicability of section 72 of the Contract Act we are unable to comprehend how its provisions can be of any avail to the appellant particularly in view of the finding given on appreciation of the relevant material by the appeal court that no mistake had been proved to have been made by the appellant in the matter of payment of the excess rent.

11. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1492
(V 57 C 313)
(From: Patna)

A. N. RAY AND I. D. DUA, JJ.

Sheo Mahadeo Singh, Appellant v. The State of Bihar, Respondent.

Criminal Appeal No. 88 of 1967, D/-6-3-1970.

Penal Code (1860), S. 149 — Every member of unlawful assembly guilty of offence committed in prosecution of common object — Section creates specific offence — Common object and not common intention essential — Evidence showing that common object of all members of assembly was that murder was likely to be committed in prosecution of common object, namely, to commit murder, assault, mischief and criminal trespass — All accused held guilty under S. 302 read with S. 149. (Paras 8, 9, 10)

The following judgment of the Court was delivered by

RAY, J.: This is an appeal by special leave against the judgment of the High Court at Patna dated 28 Febru-

DN/DN/B186/70/DHZ/A

ary, 1967 allowing the appeal in part by acquitting Ram Rattan Singh, Sheo Pujan Singh and Ram Nagina Singh and acquitting the remaining accused of the charge under section 447 of the Indian Penal Code and dismissing the appeal by upholding the conviction of those remaining accused under sections 302/149 of the Indian Penal Code and of the appellant and accused Manogi Singh under section 324 of the Indian Penal Code and altering the sentence of death imposed on Rajballam into one of rigorous imprisonment for life.

2. The appellant and seven others are all Gwalas by caste and residents of village Rayapur situated at a distance of 5 miles from Maner Police-station in the District of Patna where the occurrence took place. The 8 accused belonged to three different families. The accused Sheo Pujan Singh and Rajballam are sons of the accused Manogi Singh. The appellant Sheo Mahadeo Singh and accused Ram Nagina are the sons of accused Ram Charan. The accused Ram Rattan is the son of accused Ram Lakhan.

3. The prosecution case in short is that at about 7 A. M. on 23 October, 1965 the accused Rajballam and seven others including the appellant attacked Ram Prasad and other members of the prosecution party. Sarjug and Suraj Mahto the two brothers were sitting near their tubewell towards the south of the village Bayapur when accused Ram Lakhan armed with garasa and the other accused armed with bhalas came suddenly in a mob and began to demolish the stairs attached to the tubewell. On protest by these two brothers under orders of assault given by the accused Ram Charan, the accused Manogi and the appellant gave bhala blows on the person of Sarjug Prasad. On alarm raised by Sarjug and Suraj Mahto, their other brothers Lakshman and Ram Prasad, the deceased, arrived there and protested against the action of the accused. Then the accused Rajballam gave a bhala blow at the throat of Ram Prasad who died at the spot. Ram Lakhan gave garasa blow on the head of Bharat. The remaining accused are also alleged to have continued wielding their bhalas and Ramcharan's bhala struck the right hand of Bharat. Several persons of the village came as a result of hue and cry. The accused fled away.

4. The motive for the occurrence alleged by the prosecution was that the accused were envious of Sarjug Prasad and others of his family having constructed tube-well 5-6 months before the occurrence and at the time of the occurrence the accused came armed with the object of forcibly removing the tube-well and on protest being made against their action, they committed the assault and the murder.

5. The accused pleaded innocence. Some of them pleaded alibi as well. The plea of alibi was rejected by the trial Court and was not pressed in the High Court. The defence was that there was some quarrel on the date of occurrence much before 7 A. M. between accused Manogi on one side and Sarjug and others of family on the other and further that the brothers of the deceased Ram Prasad assaulted accused Manogi. It was further alleged that the villagers could not tolerate the high handed act of Ram Prasad and his brothers in assaulting Manogi; they came to the Gairmazarua land where the accused Manogi was assaulted by Ram Prasad and there was a free fight between the villagers on one side and Ram Prasad and other members of the family on the other in which Ram Prasad was killed.

6. The High Court rejected the defence version. On a review of the entire evidence the High Court came to the conclusion that there was sufficient evidence to prove that Rajballam was responsible for the murder of Ram Prasad. The High Court further held that the charge under section 324 against the three accused and the appellant and the charge under S. 426 against all the accused other than Ram Rattan, Ram Nagina and Sheo Pujan and the charge under sections 302/149 of the Indian Penal Code against all the persons other than Ram Rattan, Ram Nagina and Sheo Pujan were proved.

7. At the hearing of this appeal the only contention which was advanced was that the death caused by Rajballam was an individual act and the appellant could not be convicted of the charge of the common object to commit murder, assaults, mischief and criminal trespass.

8. The essence of section 149 of the Indian Penal Code is that an accused person whose case falls within the terms of the section cannot put for-

ward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly. It is an offence committed by a member of an unlawful assembly in prosecution of the common object of that assembly and it is an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

9. Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or more persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is on common object. There is no question of common intention in section 149. The act must be one which upon the evidence appears to have been done with a view to accomplishing the common object attributed to the members of the unlawful assembly. Thus every person who is engaged in prosecuting the same object, although he had no intention to commit the offence, will be guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting in the circumstances mentioned in the section. It is in this sense that common object is to be understood.

10. In the present case the facts and the circumstances show that the assault and the demolition of the stairs of the well took place in the same transaction because the members of the unlawful assembly attacked Ram Prasad and his people and injured some of them simultaneously or in quick succession. Sarjug Mahto and Suraj Mahto both said that at the instigation of accused Ram Charan accused Manogi gave a bhala blow near the left elbow of Sarjug Mahto. Sarjug also said that accused Sheo Pujan gave him a bhala blow below the elbow of the left hand and the appellant gave him a bhala blow on the finger of right hand. According to Suraj Mahto the appellant struck Sarjug Mahto on the finger of his right hand. Suraj and Sarjug then raised an alarm. On hearing the alarm Ram Prasad, Bharat and Lakhan came. Ram Prasad protested to the accused against the attack on Sarjug Mahto. At the instigation of accused Ram Charan accused Rajballam struck Ram Prasad with a bhala. Ram Prasad fell down and died there. Ram Lakhan then

struck Bharat with a garasa. Ram Charan struck him on the head with a bhala. The assailants then fled away. The evidence proves that the common object of all the members of the assembly was that murder was likely to be committed in prosecution of a common object, namely, to commit murder, assault, mischief and criminal trespass. All the members of the assembly were armed with weapons, they knew that murder was to be committed in prosecution of that object. It cannot, therefore, be said that the appellant is not guilty of the charge under sections 302/149 of the Indian Penal Code.

11. In the result, the appeal fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT-1494
(V 57 C 314)

(From : Madhya Pradesh)

M. HIDAYATULLAH, C. J., J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.

V. P. Gindroniya, Appellants v. State of Madhya Pradesh and another, Respondents.

Civil Appeal No. 990 of 1967, D/- 29-1-1970.

(A) Constitution of India, Art. 311—Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960) — Suspension — Distinction between suspending contract of service and suspending employee from performing his duties pointed out—Decision of M. P. High Court Reversed.

The power to suspend, in the sense of a right to forbid a employee to work, is not an implied term in an ordinary contract between master and servant, such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. The distinction between suspending the contract of a service of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the em-

ployer merely issues a direction to him that he should not do the service required of him during a particular period. As the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960) do not provide for suspension during pendency of an enquiry the order of suspension by the Government pending enquiry against him cannot amount to an order suspending the contract of service. AIR 1959 SC 1342 & AIR 1961 SC 276 & AIR 1964 SC 787 & AIR 1968 SC 800, Rel. on: Decision of M. P. High Court reversed.

(Paras 8, 9)

(B) Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960), R. 12— Notice — Notice under Cl. (a) can be given either by Government or its temporary servant — Notice by servant stating that he has terminated his services with Government and also intimating that any amount payable by him to Government may be forfeited from the amount due to him from the Government — Notice complies with R. 12— Servant is not in service of Government from date on which Government received notice and it is not open to Government to take disciplinary proceedings against him after receipt of such notice — Decision of M. P. High Court reversed. (Paras 15, 17)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 214 (V 57)=

Civil Appeal No. 1217 of 1966

D/- 6-10-1969, State of Punjab v. Khemi Ram 9, 10

(1968) AIR 1968 SC 800 (V 55)=

1968-2 SCR 577, Balwantray Ratilal Patel v. State of Maharashtra 8

(1966) AIR 1966 SC 447 (V 53)=

1966-1 SCR 771, State of W. B. v. Nipendranath Bagchi 9, 10

(1964) AIR 1964 SC 787 (V 51)=

1964-5 SCR 431, R. P. Kapur v. Union of India 8

(1961) AIR 1961 SC 276 (V 48)=

1961-1 SCR 750, T. Cajee v. U. Jormanik Siem 8

(1959) AIR 1959 SC 1342 (V 46)=

1960-1 SCR 476, Management of Imperial Hotel, New Delhi v. Hotel Workers' Union 7

The following judgment of the Court was delivered by

HEGDE, J.: The appellant was a probationary Naib Tehsildar. He had

been appointed temporarily. While he was working at Bilaigarh in 1961, the Commissioner of Raipur Division directed an enquiry against him on as many as 13 charges. By his order dated August 3, 1961, the Commissioner placed him under suspension pending enquiry. Sometime later, the State Government taking the view that the enquiry ordered by the Commissioner may not be legal, revoked his orders viz., the order directing a departmental enquiry against the appellant as well as the order placing him under suspension. But on the same day, it ordered a departmental enquiry against him and at the same time it placed him under suspension pending that enquiry. In this connection a show cause notice was issued to the appellant on August 1, 1964. But even before that show cause notice was issued, on June 6, 1964, the appellant gave a notice to the Government terminating his services. After the issue of the aforementioned show cause notice, he moved the High Court of Madhya Pradesh to quash the orders passed by the State Government on the ground that as he was no more in the service of the Government, the Government cannot take any departmental action against him.

2. The State Government resisted that application on two grounds viz., (1) the order of the State Government suspending the appellant during the pendency of the departmental enquiry amounted to a suspension of the contract of service and hence the appellant could not have unilaterally terminated his services and (2) the notice given by him on June 6, 1964 was invalid as it did not conform to the rules.

3. The High Court accepted the aforesaid contentions of the State Government and dismissed the writ petition. Hence this appeal by special leave.

4. Mr. Sanghi, learned Counsel for the appellant pressed for our acceptance the two contentions advanced on behalf of the appellant before the High Court. He urged that the view taken by the High Court both as to the effect of the order of suspension made on May 7, 1964 as well as to the validity of the notice issued by the appellant on June 6, 1964 are erroneous in law. According to him the impugned order of suspension merely forbade the appellant from rendering

service and it did not amount to a suspension of the contract of service. As regards the notice issued by the appellant he urged that it was in accordance with rule 12 of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960 (in short 'Rules').

5. The parties are agreed that the appellant was a temporary public servant at the relevant time. His service was neither made permanent nor quasi-permanent. It is also admitted that the conditions of his service are exclusively governed by the 'Rules'. Therefore to find out the true effect of the order of suspension made on May 7, 1964, we must look to those 'Rules'.

6. Three kinds of suspension are known to law. A public servant may be suspended as a mode of punishment or he may be suspended during the pendency of an enquiry against him if the order appointing him or statutory provisions governing his service provide for such suspensions. Lastly he may merely be forbidden from discharging his duties during the pendency of an enquiry against him which act is also called suspension. The right to suspend as a measure of punishment as well as the right to suspend the contract of service during the pendency of an enquiry are both regulated by the contract of employment or the provisions regulating the conditions of service. But the last category of suspension referred to earlier is the right of the master to forbid his servant from doing the work which he had to do under the terms of the contract of service or the provisions governing his conditions of service at the same time keeping in force the master's obligations under the contract. In other words the master may ask his servant to refrain from rendering his service but he must fulfil his part of the contract.

7. The legal position as regards a master's right to place his servants under suspension is now well settled by the decisions of this Court. In *Management of Hotel Imperial, New Delhi v. Hotel Workers' Union*, (1960) 1 SCR 476 = (AIR 1959 SC 1342), the question whether a master could suspend his servant during the pendency of an enquiry came up for consideration by this Court. Therein this Court observed that it was well settled that under the ordinary law of master and

servant the power to suspend the servant without pay could not be implied as a term in an ordinary contract of service between the master and the servant but must arise either from an express term in the contract itself or a statutory provision governing such contract. It was further observed therein that ordinarily in the absence of such a power either in express terms in the contract or under the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work he will have to pay the wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relationship of master and the servant with the consequence that the servant is not bound to render service and the master is not bound to pay.

8. The same view was reiterated by this Court in *T. Cajee v. U. Jormanik Siem*, (1961) 1 SCR 750 = (AIR 1961 SC 276). The rule laid down in the above decisions was followed by this Court in *R. P. Kapur v. Union of India*, (1964) 5 SCR 431 = (AIR 1964 SC 787). The law on the subject was exhaustively reviewed in *Balvantray Ratilal Patel v. State of Maharashtra*, (1968) 2 SCR 577 = (AIR 1968 SC 800). Therein the legal position was stated thus: The general principle is that an employer can suspend an employee of his pending an enquiry into his misconduct and the only question that can arise in such a suspension will relate to the payment of his wages during the period of such suspension. It is now well settled that the power to suspend, in the sense of a right to forbid a employee to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some statute would mean that an employer would have no power to suspend an employee of his and even if he does so in the sense that he forbids the employee to work, he will have to pay the employee's

wages during the period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. It is equally well settled that an order of interim suspension can be passed against the employee while an enquiry is pending into his conduct even though there is no such term in the contract of employment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which, it could be withheld. The distinction between suspending the contract of a service of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not do the service required of him during a particular period. In other words the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must obey.

9. In support of the decision of the High Court, the learned Counsel for the respondent relied on the decisions of this Court in *State of West Bengal v. Nipendra Nath Bagchi*, (1966) 1 SCR 771 = (AIR 1966 SC 447) and *State of Punjab v. Khemi Ram*, Civil Appeal No. 1217 of 1966, D/- 6-10-1969 = (reported in AIR 1970 SC 214). He did not rely on the other decisions referred to in the judgment of the High Court. Hence it is not necessary to examine them.

10. In *Bagchi's case*, (1966) 1 SCR 771 = (AIR 1966 SC 447) (supra), one of the questions that arose for decision was whether on the strength of rule 75 (a) of the West Bengal Service Rules, an officer may be retained in service even after his superannuation for the purpose of holding a departmental enquiry against him. This Court held that the rule in question was not designed to be used for the purpose of retaining a person in ser-

vice for enquiry against him but to keep in employment persons with a meritorious record of service who although superannuated can render some more service and whose retention in service is considered necessary on public grounds. This decision does not bear on the point under consideration. In *Khemi Ram's case*, Civil Appeal No. 1217 of 1966, D/- 6-10-1969 = (reported in AIR 1970 SC 214) (supra) the impugned suspension order was made on the strength of statutory rules governing the conditions of service. Hence this Court came to the conclusion that the order of suspension in that case amounted to suspending the contract of service.

11. In the present case, the 'Rules' do not provide for suspension during the pendency of an enquiry. Therefore the impugned order of suspension cannot be considered as an order suspending the contract of service. From that conclusion it follows that when the appellant issued the notice terminating his services on June 6, 1964, the contract of service was in force and it was open to him to put an end to the same. For the reasons mentioned above, we hold that the High Court erred in opining that the true effect of the order of suspension made by the State Government on May 7, 1964 was to suspend the contract of service.

12. This takes us to the legality of the notice served by the appellant on June 6, 1964. That notice was evidently issued under rule 12 of the 'Rules'. That rule reads:

"12. (a) Subject to any provision contained in the order of appointment or in any agreement between the Government and the temporary Government servant, the service of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant:

Provided that the services of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice; or as the case may be, for the period by which such notice falls short of one month or any agreed longer period:

Provided further that the payment of allowances shall be subject to the conditions under which such allowance are admissible.

(b) The period of such notice shall be one month unless otherwise agreed between the Government and the Government servant."

13. There is hardly any room for dispute that the notice contemplated by the main cl. (a) of rule 12 can be given either by the Government or its temporary servant. The rule in question specifically says so. It is not necessary for us in the present case to decide whether the two provisos to that rule or cl. (b) thereof apply to a notice given by a government servant. The appellant has assumed that those provisions also apply to a notice given under that rule. We shall for the purpose of this case proceed on the basis of that assumption and see whether the appellant has satisfied that part of the rule also.

14. The material portion of the notice given by the appellant on June 6, 1964 reads thus:

"Whereas the undersigned holds no charge this day and is not on duty and intends to bring the termination of his employment with the Government of M. P. forthwith on receipt of this writing and

Whereas as required by the service rules the undersigned do hereby forfeit and relinquish his claim for one month's pay or allowance whichever is necessary. Now therefore this notice is hereby served as required under the rules on receipt whereof the relationship of employer and employee now existing between the Government of Madhya Pradesh and the undersigned shall cease to exist and consequently all rights, duties and obligations arising from and under the aforesaid relationship shall hereafter absolutely cease."

15. This notice was received by the Government on June 9, 1964. In that notice, the appellant has unequivocally informed the Government that he has terminated his services with the Government. This part of the notice satisfies the requirements of the main part of rule 12 (a). In that very notice he has also intimated that any amount payable by him to the government under the provisos to rule 12 (a) may be forfeited from the amounts due to him from the government. It may be noted that considerable amount must

have been due to him towards his salary during the period of his suspension. By his notice he intimated to the government that the amounts due from him to the government under the provisos to rule 12 (a) may be deducted from that amount. We fail to see how this notice is not in accordance with the requirements of rule 12. In our opinion the High Court was wrong in holding that the notice in question did not comply with the requirements of the said rule.

16. No other ground was urged on behalf of the respondent in support of the order of the High Court.

17. From the above findings, it follows that ever since June 9, 1964, the appellant was not in the service of the Government. Therefore it was not open to the government to take any disciplinary proceedings against him. Hence the impugned orders are liable to be quashed. We accordingly allow this appeal and quash those orders. No order as to costs.

Appeal allowed.

AIR 1970 SUPREME COURT 1498 (V 57 C 315)

(From : Orissa)

J. C. SHAH, K. S. HEGDE, AND
A. N. GROVER, JJ.

Orient Paper Mills Ltd., Appellant
v. Union of India, Respondent.

Civil Appeals Nos. 976-996 of 1966,
D/- 10-3-1970.

Central Excises and Salt Act (1944),
S. 4 — Assessment by Deputy Superintendent on instructions from Collector — Assessment vitiated — Decision of Central Government reversed.

The assessing authorities exercise quasi-judicial functions and they have duty cast on them to act in a judicial and independent manner. When the assessment is to be made by the Deputy Superintendent or the Assistant Collector, the Collector, to whom an appeal lies against his order of assessment, cannot control or fetter his judgment in the matter of assessment. If the Collector issues directions by which the Deputy Superintendent or the Assistant Collector is bound no room is left for the exercise of his own independent judgment. An appeal then to the Collector becomes an empty

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formality. The direction given by the Collector being invalid the proceedings before the Deputy Superintendent or the Assistant Collector are vitiated. AIR 1969 SC 48 Rel. on. Decision of Central Government reversed.

(Paras 4, 5)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 48 (V 56)=

1969-1 SCR 245, Orient Paper Mills Ltd. v. Union of India 4

The following judgment of the court was delivered by

GROVER, J.: All these appeals by special leave against the orders made by the Central Government under section 36 of the Central Excises and Salt Act, 1944, hereinafter called the "Act", involve common questions and shall stand disposed of by this judgment.

2. The facts and circumstances relating to C. A. 976 of 1966 may alone be stated. The appellant carries on business, inter alia, of manufacturing and selling various kinds of paper and boards at its factory at Brajrajnagar in the district of Sambalpur in the State of Orissa. It manufactures various types and qualities of paper. It is stated that there are three types of paper which are principally manufactured. These are Creamwove paper, map litho paper and writing paper. In the appeal the facts of which are under consideration we are concerned with creamwove paper on which excise duty was levied. From the year 1960 till July 1961 creamwove paper was being assessed as printing and writing paper under item 17 (3) of the First Schedule to the Act, the rate being 35 np. per Kg. Sometimes in July 1961 the Central Excise authorities required the appellant to send samples of the said paper to the Chemical Examiner of the Central Excise authorities for the purpose of chemical test. The appellant received a letter dated August 10, 1961 from the Superintendent, Central Excise. In a footnote it was stated that this paper of gram weight 116 and above per sq. metre was to be assessed under item 17 (10) in view of the Chemical Examiner's report. It is not disputed that the rate under that item would be the same as under item 17 (1). The Collector of Customs issued instructions to the Deputy Superintendent whose duty it was to make assessment of the appellant directing him to assess creamwove paper of a certain weight under item 17 (1) of the tariff at the

rate of 50 np. per Kg. with effect from September 5, 1961. By means of a letter dated September 7, 1961 the Deputy Superintendent informed the appellant that in accordance with the decision of the competent authority creamwove paper of the weights mentioned in the letter would be assessable as cartridge paper under item 17(1) of the tariff in the Schedule. It was further stated that

"I have also been directed to serve demands for short levy of excise duty on past clearances of creamwove paper, where due".

The Deputy Superintendent addressed another letter dated September 13, 1961 to the same effect. It was added therein that map litho paper weighing 85 grams per sq. metre and above was also to be taken as cartridge paper for the purpose of assessment under item 17(1) as per the decision of the competent authority. On September 19, 1961 the appellant made an inquiry from the Deputy Superintendent as to the basis on which classification in the matter of assessment of duty had been made. The Deputy Superintendent sent the following reply on September 20, 1961:

".....I am to inform you that the classifications as intimated to you in respect of the above-mentioned varieties of paper are as per decision of the competent authority".

It was further admitted in the letter of the Asstt. Collector Cuttack to the Collector, Central Excise dated April 7, 1962 that the classification of the paper in question was made under item 17(1) of the tariff as cartridge paper in accordance with instructions contained in the Collector's letter of September 5, 1961. The Deputy Superintendent had made the assessment accordingly. As regards the copy of the Chemical Examiner's Report it was stated that the matter had been referred to the higher authorities.

3. The Deputy Superintendent, Central Excise, had collected the excise duty on creamwove paper in accordance with item 17(1) of the tariff for the months of June and July 1962. The appellant lodged a claim with the Assistant Collector of Central Excise for refund of Rs. 38,809.81 being the sum assessed in excess. The Assistant Collector rejected the claim on the ground that no overcharge had been made. The appellant then appealed under

S. 35 of the Act to the Collector of Central Excise and Customs which was rejected by him. The Central Government was thereafter approached under S. 36 on the revisional side. The revision petition was dismissed by an order made in the following terms:

"The Government of India have carefully considered all the points made by the applicants, but they regret that they do not find any justification for interfering with the Order-in-Appeal, which is correct in law and based on facts. The revision petition is accordingly rejected."

4. Now it is common ground, it being admitted in the statement of case filed on behalf of the respondent that the paper was assessed to duty in accordance with the instructions from the Collector. The main question is whether an assessment made by a subordinate officer in accordance with the instructions issued by the Collector to whom an appeal lay against the order of that subordinate officer can be called a valid assessment in the eye of law. As has been pointed out in *Orient Paper Mills Ltd. v. Union of India*, (1969) 1 SCR 245 = (AIR 1969 SC 48) in which the parties were the same as before us now no authority, however high, can control the decision of a judicial or a quasi-judicial authority that being the essence of our judicial system. In the present case, when the assessment is to be made by the Deputy Superintendent or the Assistant Collector, the Collector, to whom an appeal lies against his order of assessment, cannot control or fetter his judgment in the matter of assessment. If the Collector issues directions by which the Deputy Superintendent or the Assistant Collector is bound no room is left for the exercise of his own independent judgment.

5. According to the learned Attorney General the assessment proceedings are not of a quasi-judicial nature nor is the assessing authority a quasi-judicial authority. We are unable to agree. It is apparent from the judgment referred to above and numerous other decisions of this court delivered in respect of various taxation laws that the assessing authorities exercise quasi-judicial functions and they have duty cast on them to act in a judicial and independent manner. If their judgment is controlled by the directions given by the Collector it cannot be said to be their independent judgment in

any sense of the word. An appeal then to the Collector becomes an empty formality. In the previous decision of this court mentioned above the appeal and the revision had been rejected by the Collector and the Central Government on the ground that a direction had been issued by the Central Board of Revenue to the effect that the paper in question be treated as belonging to a particular classification. This court entertained no doubt that the direction given by the Board was invalid and it vitiated the proceedings before the Collector as well as the Government. Similarly in the present appeal the direction given by the Collector was invalid and the proceedings before the Deputy Superintendent or the Assistant Collector were vitiated. This position obtains in all the appeals although the type and quality of paper are different. The Central Government merely affirmed the order made by the Collector in each case and did not give any independent reasons for upholding the levy of duty made in accordance with the directions of the Collector.

6. It is unnecessary to deal with other points raised on behalf of the appellant because, in our opinion, these appeals must succeed on the ground that the impugned orders were vitiated for the reasons given and deserve to be set aside. We accordingly quash these orders. The assessing authorities, namely, the Deputy Superintendent or the Assistant Collector shall make fresh assessment of duty in accordance with law and thereafter the question of refund will be decided by the appropriate authorities. Appeals are thus allowed with costs. One hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 1500
(V 57 C 316)

(From : Punjab and Haryana)

S. M. SIKRI, V. BHARGAVA
AND C. A. VAIDIALINGAM, JJ.

Pratap Singh, Appellant v. Hardwari Lal, Respondent.

Civil Appeal No. 1192 of 1969, D/-4-3-1970.

(A) Representation of the People Act (1951), S. 123 (4) — Corrupt practice — Publication of false and defamatory

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matter — Matter relating to personal character or conduct of candidate — Illustrative case.

In an election petition filed by the respondent for setting aside the election of the appellant in the mid-term elections in Haryana in May 1968, on the ground, inter alia, of corrupt practice under S. 123 (4), it was alleged that the appellant carried on a campaign throughout the constituency by means of posters and handbills and by distribution of copies of two newspapers, viz., Vidrohi and Kalakar containing false allegations against the respondent's personal character and that those posters, handbills and newspapers were printed and published by the appellant or with his consent.

One of the posters (X-1) referred to the fact that in the general elections of 1967, the respondent received in the form of garlands of currency notes, a large amount which he had promised to utilize for payment of fees to poor students and that the said amount had been misused. It was further stated that fees were being collected from the children of Haryana and instead of increasing the salaries of teachers, the respondent was enjoying himself in the Mount View Hotel at Chandigarh. It wound up by the statement that the respondent started a weekly, 'Sentinel', and received money from people in the shape of subscription but the paper itself came to a stop after four or six months and that the respondent should explain the reasons for stopping the publication. Another poster (X-3) contained a general allegation that during the by-election the respondent who wore saffron gold clothes resigned his membership of the Legislative Assembly, but nevertheless continued to be a Minister and the so-called resignation was merely a stunt to collect money. The document concluded by saying that in the current mid-term election the voters of Bahadurgarh were bound to avenge the stunt enacted by the respondent in May 1967. Another poster (X-4) made certain general allegations about the respondent leaving the Congress and joining the Swatantra Party which was a party of rich Rajahs and Maharajahs and one could not be sure as to how long he would stick to that party. It was further finally stated that the respondent had forfeited the faith of the voters.

Another poster (X-5) was published in the form of a Supplement to the Vidrohi Weekly. The writing therein was in Hindi and on the right half of it there was a cartoon showing the respondent in front of an almirah full of currency notes, faced by a large number of Swatantra candidates during the Haryana mid-term elections. The cartoon depicted the Swatantra candidates demanding from the respondent their share of financial assistance, and Rajaji, the founder of the Swatantra Party, was shown as standing on one side in great wonder and bewilderment at the misconduct of the respondent in appropriating to himself the funds provided by the Swatantra Party. This issue of the Vidrohi containing the cartoon did not contain any date.

One handbill (X-6) with the caption "Do not vote for the corrupt" alleged in brief that the respondent was removed from Government service because he accepted bribes and that after becoming a Member of the Public Service Commission he was removed from that position before the expiry of his term for the same reason and that even after joining the Swatantra Party he had misappropriated the entire money of his comrades or colleagues and the public of Bahadurgarh constituency were asked whether they would allow themselves to be deceived even after having been made aware of the said misdeeds of the respondent:

Held (i) that the statements in the posters (exhibits X-1, X-3 & X-4) related to the political status or reputation of the respondent as a politician. Though those statements erred on the side of exaggeration, they could not be brought under S. 123 (4) as relating to the personal character and conduct of the respondent.

(Para 13)

(ii) But the position regarding the poster (X-5) and the handbill (X-6) was entirely different. The statements contained therein related to the personal conduct and character of the respondent and were not in the nature of a political propaganda decrying the activities of the respondent (which was common in election) and asking the electors not to vote for such a candidate. (Paras 13, 14, 15)

(B) Representation of the People Act (1951), S. 123 (4) — Evidence of corrupt practice — Election of appellant challenged — Appellant's own polling

agents giving evidence against him as witnesses—Their evidence has to be treated with great caution.

(Para 47)

(C) Representation of the People Act (1951), S. 123 (4) — Corrupt practice — Publication of false and defamatory matter — Posters, handbills and copies of newspapers containing false and defamatory statements relating to the personal character and conduct of respondent (petitioner) circulated and distributed amongst the voters of the constituency by appellant and his agents — Statements found to be false and could not be believed to have been true — Statements made by the appellant to prejudice the prospects of respondent in the election — Appellant held was guilty of a corrupt practice under S. 123 (4). (Para 52)

The following judgment of the Court was delivered by

VAIDIALINGAM, J.: The appellant, Pratap Singh, was declared elected to the Haryana State Assembly from Bahadurgarh constituency in the first midterm elections which took place on May 14, 1968. There were three contestants from this constituency, the appellant Pratap Singh being the Congress Party candidate, the respondent Hardwari Lal being the Swatantra Party candidate and the independent candidate Ram Narain, being the third candidate. The appellant obtained 23,714 votes and the respondent obtained 19,279 votes and the appellant was declared duly elected to the Assembly. It is not necessary to refer to the third candidate Ram Narain as he is not before us in these proceedings.

2. On an election petition filed by the respondent herein for setting aside the election of the appellant, the High Court of Punjab and Haryana set aside the appellant's election by its judgment dated January 21, 1969 and this appeal, under S. 116-A of the Representation of the People Act, 1951 (hereinafter referred to as the Act), is directed against the said decision.

3. In the election petition before the High Court, the respondent had challenged the election of the appellant on various grounds. As the election of the appellant has been set aside by the High Court only on the findings recorded under issue No. 3, it is not really necessary to elaborately advert to the other grounds alleged by the respondent in his election petition. It is enough to state that the

respondent alleged that the change of date of poll from May 12, 1968 to May 14, 1968 was done with a view to give undue advantage to the Congress candidate (the appellant herein) and that it materially affected the result of the election and that the Police and Executive Officers of the District acted in a partial manner and helped the Congress candidate against the respondent and thus jeopardized his chances of winning the election and that huge amounts were spent by the appellant during the election days and such expenditure far exceeded the maximum limits laid down in S. 77 of the Act. The High Court found that these allegations had not been substantiated and, as such, recorded findings against the respondent.

4. A further allegation was made by the respondent that a somewhat systematic campaign was undertaken throughout the constituency by means of posters and handbills and by distribution of copies of two papers viz., Vidrohi and Kalakar containing false allegations against the respondent's personal character and that those posters and handbills were printed and published by the appellant and with his consent. In support of this allegation, the respondent relied upon the posters Exhibits X-1 to X-5 and the handbill Exhibit X-6 and three issues of Vidrohi dated April 22, 1968, May 6, 1968 and May 13, 1968 and one issue of Kalakar dated May 3, 1968. According to the respondent the posters and handbills had been published and distributed by the appellant or at his instance and with his consent and that they contained false statements as to his personal character and conduct, thus constituting a 'corrupt practice' under Section 123 (4) of the Act. The allegations set out above were stoutly controverted by the appellant and he denied that any posters, handbills or issues of papers referred to by the respondent were either printed or published by him nor had they been printed or published at his instance or with his consent or knowledge. The allegations referred to above formed the subject matter of issue No. 3 which was as follows:

"3 (a) Were the posters X-1 to X-5 and the hand-bill X-6, or any one or more of them, published or distributed by the respondent or at his instance or with his consent, as mentioned in para 5?

(b) Were the three issues of 'Vid-rohi', dated 22nd April 1968; 6th of May, 1968 and 13th of May 1968 and one issue of 'Kalakar' dated 3rd of May, 1968, published with the consent, knowledge and at the instance of the respondent?

(c) If so, does any one or more of the above posters or issues of papers contain defamatory matters relating to the personal character or conduct of the petitioner?

(d) If so, were such statements believed by the respondent to be true or not believed by him to be false?"

The parties led fairly voluminous oral and documentary evidence. The High Court, after a consideration of the entire evidence, has held that the posters X-1 to X-5 and the handbill X-6 were published and distributed by the appellant at his instance and with his consent. It also found that the three issues of Vidrohi and one issue of Kalakar were published at the instance and consent of the appellant and that all these contained false statements relating to the personal character and conduct of the petitioner. The High Court further found that these posters and handbills and the newspapers were widely circulated in the entire constituency before the date of the poll and at the instance and with the knowledge of the appellant. But it however held that the poster X-2, though it contained certain allegations against the respondent, could not be said to be objectionable in the sense that the same contained allegations which may not have been believed to be false. Therefore, in view of this finding regarding Exhibit X-2, it has become unnecessary to refer to the contents of that document.

5. So far as the other documents were concerned, the High Court held that the evidence clearly led only to one irresistible conclusion that the writings contained in those documents were published either by the appellant or at least with his consent and that they contained false allegations regarding the personal conduct and character of the respondent and were of a type which were likely to further the prospect of the appellant and to prejudice the prospect of the respondent. On these findings, the High Court found issue No. 3 in favour of the respondent and held the appellant guilty of 'corrupt practice'

under S. 123 (4) of the Act. In view of this finding on issue No. 3, the High Court set aside the election of the appellant with a direction for payment of costs to the respondent.

6. On behalf of the appellant, Mr. Gupte, learned counsel, attacked the findings recorded by the High Court for setting aside the election of the appellant. According to the learned counsel the evidence on record does not establish that the posters, pamphlets and the publication in the newspapers were printed and published either by the appellant or with his consent, nor is there any evidence to establish that they were circulated in the constituency by the appellant or at his instance or with his consent. The counsel further pointed out that most of the witnesses whose evidence had been accepted by the High Court were all associated with the appellant during his election campaign and the fact that they had appeared in Court to give evidence against the appellant would clearly show that they had been won over by the respondent and were giving false testimony. In any event, the counsel urged that even if the printing and publication of these Exhibits were held to have been made either by the appellant or at his instance, the statements contained therein and which have been held to be false did not relate to the personal character or conduct of the respondent so as to attract S. 123 (4). The statements were purely in the nature of political propaganda which is inevitable in elections. Finally, Mr. Gupte urged that the High Court should have accepted the evidence adduced on behalf of the appellant and dismissed the election petition.

7. Mr. Hardev Singh, learned counsel for the respondent, on the other hand, fully supported the findings recorded against the appellant under issue No. 3. In fact, according to the learned counsel, the High Court should have also found the other issues in favour of his client. The statements contained false allegations relating to the personal conduct and character of the respondent and they have been made deliberately by the appellant or with his consent. The wide circulation given to these documents by the appellant or at his instance were all calculated to bring down the respondent in the estimation of the electorate. The findings recorded by the High Court

are all supported by the evidence on record. The counsel further pointed out that the High Court itself had taken due note of the fact that some of the witnesses who had given evidence on the side of the respondent were associated with the appellant during the election and it had accepted their evidence because it found corroboration for their evidence from other independent witnesses. The setting aside of the election of the appellant was fully justified.

8. The questions that arise for consideration in this appeal are: (1) whether the posters, handbills and the publications complained of by the respondent, contained matters relating to the personal character or conduct of the respondent; (2) whether the documents under consideration had been printed, published and distributed with the consent, knowledge and at the instance of the appellant; and (3) whether the statements contained in those documents were false or not believed by the appellant to be true.

9. It is needless to state that in order to constitute a 'corrupt practice' under S. 123 (4) of the Act, the documents must be held to contain false statements as to the personal character or conduct of the respondent. According to Mr. Gupte, learned counsel for the appellant, none of the statements contained in the documents in question can be considered to have been made in relation to the personal character or conduct of the respondent, but, on the other hand, they referred to the political position or reputation or action of the respondent and therefore S. 123 (4) is not attracted. There may be, the counsel pointed out, a slight exaggeration regarding the political reputation of the respondent, but the High Court was not justified in holding that the statements contained in those documents referred to the personal character or conduct of the respondent. We have already pointed out that the High Court has taken the view that excepting the poster, Exhibit X-2, all the other documents contained derogatory allegations regarding the character and conduct of the respondent for which there was no basis for the appellant believing them to be true. This finding is strenuously attacked by Mr. Gupte. Therefore it becomes necessary for us to refer briefly to the documents themselves.

10. Poster X-1 refers to the fact that in the general elections, 1967, the respondent received in the form of garlands of currency notes, a large amount which he had promised to utilize for payment of fees to poor students and that the said amount had been misused. It is further stated that fees were being collected from the children of Haryana and instead of increasing the salaries of teachers, the respondent was enjoying himself in the Mount View Hotel at Chandigarh. It winds up by the statement that the respondent started a weekly, 'Sentinel', and received money from people in the shape of subscription but the paper itself came to a stop after four or six months and that the respondent should explain the reasons for stopping the publication.

11. Exhibit X-3 is again a poster with the headings 'Sant ji or Stunt ji'. This poster contains a general allegation that during the by-election the respondent who wore saffron gold clothes resigned his membership of the Legislative Assembly, but nevertheless continued to be a Minister and the so-called resignation was merely a stunt to collect money. The document concludes by saying that in the current mid-term election the voters of Bahadurgarh are bound to avenge the stunt enacted by the respondent in May 1967.

12. Exhibit X-4 is a poster and makes certain general allegations about the respondent leaving the Congress and joining the Swatantra Party which is a party of rich Rajahs and Maharajahs and one cannot be sure as to how long he would stick to that party. It is further finally stated that the respondent has forfeited the faith of the voters.

13. The High Court has considered the explanation given by the respondent in respect of the statements contained in these three posters and it has held that the statements contained in these posters make insinuations that the respondent is not an honest and straight man and therefore the statements contained therein must be held to relate to the personal character or conduct of the respondent. Though Mr. Hardev Singh urged that the view taken by the High Court regarding these three documents is correct, after going through the various statements contained therein, we are not satisfied that they relate to the personal chara-

cter or conduct of the respondent. On the other hand, those statements relate more to the political status or reputation of the respondent as a politician. Though these statements may err on the side of exaggeration, in our opinion they cannot be brought under Section 123 (4) as relating to the personal character and conduct of the respondent.

14. But the position regarding the Poster Exhibit X-5 and the handbill Exhibit X-6 is entirely different and, as we are satisfied that the statements contained therein relate to the personal character or conduct of the respondent, it is not necessary for us to refer in great detail to the three publications in Vidrohi dated April 22, 1968, May 6, 1968 and May 13, 1968 and to the publication in Kalakar, Exhibit PW 9/1, dated May 3, 1968. These publications are more or less on the same pattern as the statements contained in the handbill Exhibit X-6.

15. Exhibit X-5 is a poster published in the form of a Supplement to the Vidrohi Weekly. The writing therein is in Hindi and on the right half of it there is a cartoon showing the respondent in front of an almirah full of currency notes, faced by a large number of Swatantra candidates during the Haryana mid-term elections. The cartoon depicts the Swatantra candidates demanding from the respondent their share of financial assistance and Rajaji, the founder of the Swatantra Party, is shown as standing on one side in great wonder and bewilderment at the misconduct of the respondent in appropriating to himself the funds provided by the Swatantra Party. This issue of the Vidrohi containing the cartoon does not contain any date. There is a true translation in English of what was printed in Hindi on the left-hand side of the cartoon, which purports to be an appeal made by the respondent to the Swatantra candidates and is as follows:

Brothers I have no shop
I have no quota, no permit and no brick-kiln licence
I have no property from which I can get any income

I am neither in any service nor am I practising as a lawyer. I have no source from which I can meet my monthly expenses of Rs. 5,000/-. I roped in Swatantra Party with great difficulty

I have purchased a car. In the next 4 years I shall have to depend on this money. You are all young people. You can earn your livelihood anywhere else.

I foresee defeat even in this election
Daily Vidrohi, Delhi.

Give us our share of lacs of rupees secured from the Swatantra Party for the election

*	*	*	Lacs of rupees misap-
*	Cartoon	*	propriated by Hard-
*	*	*	wari Lal

Swatantra Party

Rajaji

Vishal Haryana Press,
Delhi

It will be seen from the statements contained therein that there is a very serious allegation that lacs of rupees of the Swatantra Party entrusted with the respondent, have been misappropriated by him and not given to the other candidates. We cannot but hold that the statements in Exhibit X-5, taken along with the cartoon, cast serious reflection upon the personal character and conduct of the respondent. As to whether those statements are true or not, will be considered by us under point No. 5.

16. Exhibit X-6 is a handbill dated May 11, 1968. The caption to this handbill is 'Do not vote for the corrupt' and it purports to have been issued from Bahadurgarh on May 11, 1968 in the form of a letter, addressed to the voters of Bahadurgarh and it purports

to have been issued by 'indicators of correct path to the voters'. The pamphlet itself is as follows:

Bahadurgarh,
11-5-1968

Dear Voter,

We have seen this morning a letter, addressed by the so-called Sant Hardwari Lal to the voters of the Bahadurgarh Constituency. You should not allow yourself to be deceived. You have been deceived thrice already. This man has been winning elections through false self praise. How worthy he is of praise, has already been made clear by the posters, which you must have read during the last 15-20 days. But Shri Hardwari Lal has not yet stopped praising himself. And he has made a last attempt to deceive the public. We are guardians of the public and we shall certainly frustrate this

last attempt of Shri Hardwari Lal. It would have been better for Shri Hardwari Lal if he had kept quiet. If he had done that, his past record would have remained hidden. But when a jackal is fated to die, he makes for the village abadi. We give below, details of Shri Hardwari Lal's misdeeds.

In 1951, Shri Hardwari Lal was dismissed from Government service because he was taking bribes. He then managed to secure the Principalship of a College. He had to quit the College also fairly soon. He then deceived Kairon into appointing him a Member of the Service Commission. In the Commission he accepted bribes on account of which he was turned out, before the expiry of his tenure. For the last 6 years now, he has been moving here and there in the political field. He found no chance of making any material gains in the Congress, and he, therefore, joined the Swatantra Party. This Party possesses billions of rupees and it was substantially to support its candidates in the current elections. But 'Stunt' Hardwari Lal has misappropriated his 'comrades' or colleagues' share of the money. Will the public of Bahadurgarh allow itself to be deceived even with all this in its knowledge?

In his letter, Shri Hardwari Lal, has boasted that he does not like to throw mud at his rival Shri Pratap Singh. Shri Hardwari Lal has had six weeks. If he had anything against Shri Pratap Singh in his possession he would have acquainted the public with it. With nothing in his possession, in this connection, he feels helpless and says that he does not want to say anything against Shri Pratap Singh. Even now he has two or three days during which he can say anything he likes. This is our open challenge.

Your True Guides,
Voters of Bahadurgarh".

New Bharat Press,
Original Road,
Karol Bagh,
New Delhi.

A reading of the document, in our opinion, clearly establishes that most of the allegations relate to the personal character and conduct of the respondent. It alleges that the respondent was removed from Government service because he accepted bribes and that after becoming a Member of the Public Service Commission he was remov-

ed from that position before the expiry of his term for the same reason and that even after joining the Swatantra party he had misappropriated the entire money of his comrades or colleagues and the public of Bahadurgarh are asked whether they would allow themselves to be deceived even after having been made aware of the said misdeeds of the respondent. Regarding this document, again, we are satisfied that the statements relate to the personal conduct and character of the respondent. We cannot accept the contention of Mr. Gupte that Exhibits X-5 and X-6 are only in the nature of a political propaganda decrying the activities of the respondent which is common in elections — and asking the electors not to vote for such a candidate. On the other hand, we have already pointed out that the allegations in X-6 are that the respondent was dismissed from Government service for having taken bribes and that he was also sent out of the Public Service Commission before the expiry of his term of office because he accepted bribes and that he has misappropriated the funds of the Swatantra Party. These allegations relate to the personal character and conduct of the respondent. Here, again, the truth or otherwise of these statements will be considered by us under point No. 3.

17. We have already pointed out that the statements contained in the three issues of the Vidrohi and one issue of Kalakar contained almost similar allegations with slight modification. Though they contained statements similar to those in Exhibits X-1 to X-4 which have been held not to relate to the personal character and conduct of the respondent, nevertheless they do contain further allegations regarding misappropriation of party funds and receiving bribes while the respondent was a Government servant. Those averments are similar to those contained in Exhibits X-5 and X-6 which, we have already held, will come under S. 123(4) as relating to the personal character and conduct of the respondent.

18. Before we consider the question of publication and distribution, we shall deal with the question under point No. 3, as to whether the statements contained in these documents were believed by the respondent to be false or not believed by him to be true. The High Court has stated that it was not

disputed that the allegations in the posters, handbills and the newspapers generally related to the personal character and conduct of the petitioner and that there was further no dispute that those allegations were likely to affect adversely the chances of success of the respondent. The High Court further states that though in issue No. 3 the question as to whether these allegations were false or not believed to be true by the appellant was there, yet with regard to the majority of them no suggestion was made to the witnesses during the course of the evidence that the statements were false and that even the appellant while giving evidence had not made any suggestion that the allegations in these objectionable writings were believed by him to be true. Notwithstanding these statements contained in the judgment of the High Court, we have already referred to the matters contained in Exhibits X-5 and X-6 and hold that the statements therein relate to the personal character and conduct of the respondent.

19. The High Court has also elaborately gone into the question as to whether the allegations were false or not believed by the respondent to be true. In considering the statements contained in the handbill Exhibit X-6, the High Court has very elaborately considered the service record of the respondent and also the circumstances under which the respondent left Government service. The High Court has found that the allegations contained in Exhibit X-6 are totally false and could not have been believed by the respondent to be true. Similarly, with regard to the allegations contained in Exhibit X-5, the High Court has referred to the evidence of Dandekar, P. W. 3, the General Secretary of the Swatantra Party. P. W. 3 has given evidence to the effect that he was in charge of the Central Office of the Swatantra Party in the mid-term poll in Haryana and that all Swatantra candidates were given monetary assistance directly by him and every candidate was given the same measure of help and support and that the respondent was not entrusted with any huge amount as alleged, nor had he misappropriated any of the Party's funds. No attempt was made in cross-examination of this witness by the appellant to suggest the basis on which such a serious allegation of misappropriation could have been made against the res-

pondent; nor were any circumstances elicited from P. W. 3 which may have enabled the respondent to believe those allegations to be true, or, at any rate, not to be false. Mr. Gupte, learned counsel for the appellant, was not able to satisfy us that the findings recorded on this aspect by the High Court were erroneous. We agree with the findings of the High Court and hold that the statements in Exhibits X-5 and X-6 were totally false and the respondent could not have believed them to be true.

20. The same considerations apply to the three issues of Vidrohi and the one issue of Kalakar, which contained statements similar to those in Exhibits X-5 and X-6. That takes us on to point No. 2 which relates to the question as to whether the relevant documents had been printed, published and circulated by the appellant, or at his instance, or with his consent.

21. It must be stated at the outset that the witnesses who speak to the printing, publication and distribution of the documents under consideration give evidence regarding Exhibits X-1 to X-4. Though Exhibits X-1 to X-4 have been held by us as not relating to the personal character and conduct of the respondent, nevertheless the evidence regarding those documents will be adverted to only to consider whether the evidence connecting the appellant with the printing, publication and distribution of the other documents has been rightly accepted by the High Court.

22. Exhibits X-1 to X-4, the four posters bear the press line indicating that they were printed at the New Bharat Press, New Delhi and Sood Litho Press, Delhi. These four posters are said to have been printed and published before May 1, 1968 X-1 and X-2 on April 22 1968 and X-3 and X-4 on April 27, 1968. The handbill Exhibit X-6 is in Hindi and bears the press line of the New Bharat Press printed in red ink and also purports to be printed and published on behalf of the voters of Bahadurgarh constituency. Exhibit X-6 is stated to have been printed on May 11, 1968, that is, just two days before the date of poll. We have already held that Exhibit X-6 contains very serious allegations showing the respondent as a man of very low character.

23. P. W. 14, Dewan Sohan Lal, is the Proprietor of the New Bharat

Press New Delhi and P. W. 12 is the Keeper of Sood Litho Press, Daryaganj, Delhi, of which he has stated that his wife is the Proprietrix. P. W. 14 has given evidence to the fact that his press did some printing work for the appellant during the mid term election held in May 1968. According to him, he printed about 10,000 copies of the life-sketch of the appellant which is Exhibit P. W. 14/1, for which the block and paper were supplied by the appellant himself. The order for printing the life-sketch is stated to have been given on April 15, 1968 and the copies were supplied on April 20, 1968. Though the appellant Pratap Singh did not come on the date when the order for printing the life-sketch was given, P. W. 14 says that on April 20, 1968 the appellant, accompanied by Surajmal and Pritam Singh came and took delivery of the copies. At this stage, it may be mentioned that the appellant himself has admitted that Pritam Singh was a worker on his behalf during his election campaign and he has also admitted though reluctantly, that Surajmal was also his counting agent.

24. P. W. 14 further states that on the day when the appellant and the two others came to take delivery of the life-sketch P. W. 14/1, they brought the manuscript for two posters for Exhibits X-1 and X-2 and an order was placed for printing a thousand copies of each, for which, again, paper was supplied by the appellant. As his press had no arrangement for litho printing, he made arrangements with Sood Litho Press for having them printed. He has further stated that the manuscript for Exhibit X-1 was prepared in his presence by Surajmal who had accompanied the appellant. After two or three days, Surajmal accompanied by Jagdish Chander Grover (P. W. 24) came and gave instructions for printing 2,000 copies each of Exhibits X-3 and X-4. P. W. 24 was introduced to the witness by Surajmal as a very influential person. These posters were also got printed through Sood Litho Press. The witness has given in detail, with reference to the books of account, the dates when the orders were placed for printing these posters as well as the charges received by him for printing the same and the amount paid to Sood Litho Press. The various entries in the books of account as well as the vouchers re-

ferred to by him and considered by the High Court, clearly support the oral evidence of P. W. 14 regarding these posters.

25. Coming to Exhibit X-6, P. W. 14 speaks to having printed 10,000 copies on May 11, 1968. According to him, the appellant Pratap Singh and Suraj Mal both visited his Press with the manuscript and the original manuscript was P. W. 3/2B. As the manuscript was in Hindi and as the witness could read Hindi only in print and as he saw the heading 'Rishwatkhori ko rai mat do' he asked Surajmal to write it out in his presence and, accordingly, Surajmal wrote out the same as P. W. 3/2-C. He further deposes that the handbills were printed at his press and he charged Rs. 50 as printing charges, the payment having been made on the same day, viz., May 11, 1968. As the entire quantity of 10,000 could not be printed on the same day, the witness delivered on May 11, 1968 itself the quantity that was printed and the rest of the copies were delivered the next day. He has referred to his books of account regarding the printing charges received for the same. According to him the paper for printing handbills was supplied by the appellant himself. He also speaks to having received a letter, dated June 12, 1968 from the respondent regarding this pamphlet and his having replied to the same.

26. In cross-examination, this witness has stated that he has no litho machine and as Exhibits X-1 to X-4 could not be printed in his press he made arrangements with Sood Litho Press for printing the same. He states that when Pratap Singh came to his press he was introduced as the candidate standing for election against the respondent. He has also stated that as he did not know the appellant personally and as they wanted the election posters to be printed, he felt reluctant to do the same, in the first instance. Therefore, when the appellant came with Surajmal to take delivery of the life-sketch, Exhibit P. W. 14/1, he brought a letter of introduction from Sashi, P. W. 10, Editor and Publisher of Vidrohi, Delhi. That letter, Exhibit P. W. 14/7 was dated April 16, 1968 and was given to the witness by Surajmal when he and the appellant came to take delivery of Exhibit P. W. 14/1. He has further stated that he knew P. W. 10 from 1964 as both of

them were occupying, for some time, portion of the same building bearing Door No. 2104, Original Road. As the letter was written on the letter-head and as he was familiar with the handwriting of P. W. 10, he accepted his recommendation and did the necessary further printing as required by the appellant. Though suggestions were put to this witness that the appellant never visited the witness and the life-sketch P. W. 14/1 as well as the other posters, including Exhibit X-6 were never got printed at the instance of the appellant, the witness has denied those suggestions and has positively stated that the appellant did visit him on the occasions mentioned by him. The witness has also referred in great detail to his cash book and other account books, P. W. 14/4, 4-A and 4-B and P. W. 14/5, regarding the printing as well as the charges received for the life-sketch P. W. 14/1 and Exhibits X-1 to X-4 and X-6.

27. Similarly, P. W. 12, the keeper of Sood Litho Press, K. A. Agarwal, has given evidence regarding the printing at the instance of P. W. 14 the posters Exhibits X-1 to X-4. He has also produced his registers, Exhibits P. W. 12/1 and 2, as well as the counterfoil of his receipt book, P. W. 12/3-A to prove the receipt of charges in respect of the said printing. In fact the counterfoil of the receipt contains the initials of P. W. 14 in token of having taken delivery of the copies. Though the appellant very vehemently denied having had anything to do with the printing through P. W. 14 of his life sketch P. W. 14/1 as well as Exhibits X-1 to X-4 and X-6, we are not impressed with his evidence. The books of account regularly kept in the course of business and produced by P. W. 14 and P. W. 12 clearly establish that P. W. 14/1 and Exhibits X-1 to X-4 and X-6 were printed at the instance of the appellant and the necessary materials were also supplied by him. The life-sketch of the appellant, P. W. 14/1 contains very detailed particulars regarding his career and it is idle to suggest that the particulars contained therein have not been furnished by him and he has given very prevaricating answers regarding P. W. 14/1.

28. The appellant has not made any suggestion to P. W. 10 that he did not give a letter of introduction, Exhibit

P. W. 14/7 to Sohanlal. The documentary evidence in the nature of account books, receipt books, cash-books and the letter of introduction produced by P. W. 14 and P. W. 12, clearly support the evidence of P. W. 14 that the appellant visited his press and gave instructions for printing the life-sketch P. W. 14/1 and also Exhibits X-1 to X-4 and X-6. Therefore the connection with the printing of exhibit X-6 and the appellant's responsibility for the statements contained therein, are well established.

29. In this connection, it may also be noted that P. W. 34, who was the polling agent of the appellant, has spoken to distributing the handbills P. W. 14/1 containing the biography of the appellant. In fact he has also spoken to distributing the handbill exhibit X-6. He is a Congressman and he belongs to the party of the appellant. The evidence of P. W. 34 also further establishes that the distribution of the life-sketch of the appellant P. W. 14/1 and of the handbill Exhibit X-6 must have been at the instance and with the consent of the appellant.

30. Coming to the printing of the three issues, dated April 22, 1968, May 6, 1968 and May 13, 1968 of the Vidrohi and the defamatory poster, Exhibit X-5, the evidence in that regard is furnished by R. K. Shashi, P. W. 10, editor of Vidrohi Weekly. He has deposed to the effect that he knows the appellant and that he was sent for by Pratap Singh about 20 or 25 days before the date of poll. He met the appellant, his elder brother Priya Vrat, Surajmal and certain others who were with the appellant in his election office. The appellant gave material to be published in the Vidrohi relating to the respondent Hardwari Lal. They were published on April 22, 1968, May 6, 1968 and May 13, 1968. The witness is positive that the various statements and news items contained in these articles published in the three issues, were made on the basis of information and material supplied by the appellant. He further says that he collected some other material from the friends of the appellant.

31. Regarding Exhibit X-5, he admits having published the poster with the cartoon and the statements contained therein regarding the respondent. According to P. W. 10, those statements were made on the basis of the

material supplied by the appellant which had also been published by him in the three editions of the weekly already adverted to. In fact in his cross-examination, he also refers to having received a notice from the respondent, P. W. 42/1 regarding Exhibit X-5 and to his sending a reply, P. W. 10/4 in July 68. In this reply, P. W. 10 had stated that as the respondent did not require his assistance, he had met the Congress candidate Pratap Singh who gave materials for being published against the respondent and that on the basis of those materials published by the appellant, he had written articles in Vidrohi in the three issues. Even the cartoon, Exhibit X-5, along with the statements contained therein, was published on particulars given by the appellant and that he had also supplied 2000 copies of Exhibit X-5 for which he received the charges. He has also referred to a further reply, Exhibit P. W. 10/6, sent to the respondent wherein he has stated that he charged Rs. 2,100 for supplying posters etc., to the appellant. In his evidence also P. W. 10 has stated that the appellant purchased 2000 copies of each of the issues of Vidrohi as well as the poster Exhibit X-5 and received in all a sum of Rs. 2,100. He has also spoken to the fact that commercial advertisements relating to the appellant's factory which manufactures engines and pumping sets, continued to be published in his weekly.

32. In his cross-examination he has stated that he had frequent talks with the appellant and Surajmal and it was the latter who suggested that a poster with a cartoon Ex. X-5 should be published. Accordingly he arranged to have a cartoon drawn by an artist at Delhi and the poster, along with the cartoon, Exhibit X-5 was published on May 1, 1968. He has also stated that he sent, as required under the Press Registration Act, necessary copies of his publications to the Government within a week of their publication. The appellant disowned all contact with either Shashi, P. W. 10, or his Weekly, Vidrohi. In fact his claim was that he never gave any instructions to P. W. 10, either to publish the articles in the three issues referred to by him, or to print the cartoon and the matters contained in Exhibit X-5. The appellant even went to the extent of deposing that he had never given any advertisement for publication in the Vidrohi.

33. The appellant, when he gave evidence as R. W. 22, has been severely cross-examined when he disowned all contact with the Vidrohi. He admitted that he was a partner of one dozen firms and the names of the firms were also given by him. In particular he admitted that he is a partner of M/s. Hindusthan Automobile Industries. He also admitted that this firm is owned by him and his brother Priya Vrat in equal shares. Though the appellant was prepared to go to the extent of saying that he has never heard of Vidrohi before, he was squarely faced with an advertisement in the Vidrohi, Exhibits R. W. 22/3 to 6. He admitted that these exhibits related to the advertisement regarding his firm M/s. Hindusthan Automobile Industries and he gave a very evasive reply by saying that the advertisements may have been given by the Manager of the firm. In fact a suggestion was made to the witness that they were giving more advertisements to Vidrohi after the articles against the respondent and in favour of the appellant were published during the election, and he frankly admitted that he cannot either contradict or affirm this suggestion.

34. The answers given by the appellant clearly show that he was making a desperate attempt to disown all knowledge of the Vidrohi because if once his intimacy with the Vidrohi is established, the natural conclusion would be that he is responsible for the statements contained in the three issues of the Vidrohi and Exhibit X-5. The same is the case with the publication in the Urdu Weekly Kalakar, dated May 3, 1968, Exhibit 9/1. Here again P. W. 11, the printer and publisher of this Weekly has deposed to his meeting the appellant and the latter giving him certain materials to be published in Kalakar against the respondent. He has also spoken to the fact that he accordingly published Exhibit P-9/1 on May 3, 1968 and at the request of the appellant supplied him 2000 copies for which he received a sum of Rs. 200.

35. The appellant no doubt disclaimed any connection with the publication Exhibit P-9/1 or the statements contained therein. But it is not possible to accept his evidence. The evidence of P. Ws. 10 and 11 clearly establishes that it was the appellant who furnished the necessary materials against the respondent as contained in

the three issues of Vidrohi and Exhibit X-5 and P-9/1.

36. Mr. Gupte, learned counsel for the appellant, referred us to the evidence of P. W. 13 who was himself a printer and publisher at Bahadurgarh, and who is stated to have been contacted by the appellant for printing. According to Mr. Gupte it was unnecessary for the appellant to have gone about from press to press in New Delhi, as facilities were available even in Bahadurgarh. We are not inclined to accept this contention, for P. W. 13 himself has stated that Hindi and Urdu posters could not be printed at his press and that his idea was to arrange to have them printed from Delhi. But his evidence makes it clear that the appellant and Surajmal had come to him for printing certain materials and that on the next day they informed him that they would have the necessary materials printed at Delhi itself and took back the materials given to P. W. 13. This evidence also makes it clear that the appellant was going with Surajmal to the press of P. W. 13 and, if this be so, there is nothing strange in his having gone personally to P. Ws. 10, 11 and 14.

37. Exhibit X-5, we have already pointed out, does not give the date as such, but the evidence of P. W. 10 is that it was published on May 1, 1968. That it must have been published on May 1, 1968, as spoken to by P. W. 10 is corroborated by the evidence of Khosla, P. W. 4. He is the Staff Reporter of the Tribune for Rohtak District and his report P. W. 4/2R, dated May 2, 1968 refers to his having seen huge posters one of which is Exhibit X-5.

38. P. W. 3, Dandekar, who was the General Secretary of the Swatantra Party, has also given evidence to the effect that during his tour of the constituency before the 6th or 7th of May 1968 he saw the poster Exhibit X-5 in several places. Therefore the evidence of P. Ws. 3 and 4 clearly establishes that the poster Exhibit X-5 had been published and circulated, at any rate, in Bahadurgarh town before the date of the poll. The evidence of Dandekar is also corroborated by the evidence of Professor Ranga, who was examined on commission.

39. Similarly, regarding Exhibit X-6, the evidence of Dandekar, P. W. 3 establishes that it had been widely circulated in Bahadurgarh before the

date of the poll. That will be seen from the fact that P. W. 3 has produced a copy of the pamphlet, Exhibit X-6, with an endorsement of the respondent, dated May 11, 1968. The endorsement has been marked as P. W. 3/2-A to the effect: "Mr. Dandekar, you may like to see this is an example of the sort of propaganda that I am being subjected to.—Hardwarilal, 11-5-68". P. W. 3 has stated that he received this handbill with the endorsement of the respondent on May 12, 1968 and the copy produced by him contained the initials of P. W. 3. He has stated that the allegations contained therein are absolutely false.

40. So far as we can see, no cross-examination has been made of P. W. 3 when he has spoken to Exhibits X-5 and X-6 having been pasted and distributed in Bahadurgarh before the date of the poll. It is also in evidence that on May 11, 1968 Mr. Chavan was to address a meeting in support of the appellant and that is why he was very anxious that the handbills, Exhibits X-6, should be made available to him for distribution to the members of the public who come to attend the meeting. We have already referred to the evidence of P. W. 14 that he got printed 10000 copies of Exhibit X-6 and gave as many copies as he could print even on May 11, 1968.

41. As pointed out above, the evidence of P. Ws. 3 and 4 and of Professor Ranga, clearly establish that Exhibits X-5 and X-6 were circulated and distributed before the date of the poll.

42. P. Ws. 15 and 16 have also spoken to distribution of Exhibits X-5 and X-6 near the villages round about Bahadurgarh. P. W. 24, Jagdish Grover, who was a Municipal Commissioner of Bahadurgarh, has given evidence to the effect that during the mid-term election he worked for the appellant and he was in charge of the city election office in the Dharamsala of Ram Kanwar (R. W. 5) which was at a distance of about 3 furlongs from the Adda. According to him there are two Dharamasalas of R. W. 5, one in the city and the other near the Adda. It was his duty to engage rickshaw-wallas and other workers for pasting the posters and distributing and making arrangements for the meetings to be held in Bahadurgarh. He had engaged before the date of the poll all

the rickshaws for transporting the voters. He has stated that Amar Lal, P. W. 15, was engaged not by him, but by Surajmal. He has referred to issuing under instructions from the appellant, to the workers for distribution the handbill Exhibit X-6 and the poster Exhibit X-5 as well as the issues of Vidrohi and Kalakar. All these were distributed in the city of Bahadurgarh. He has stated that he has nothing to do with their distribution in the rural areas. He further speaks to having made arrangements for having shamianas from Kamla Tent House put up for the meeting organised by the appellant on May 11, 1968. He further states that he worked as counting agent of the appellant.

43. According to the appellant, Jagdish Grover was not in charge of his election office and that on the other hand it was really Ram Kanwar Gupta, R. W. 5 who was in charge of his election office in the Dharamshala near the bus stand. But he admitted ultimately that he had cited Grover as one of his witnesses, but did not examine him. He also admitted that Grover was one of his counting agents but his explanation in this regard as to why he appointed him as a counting agent is very flimsy. He says that as Jagdish Grover happened to be near the counting booth on the date of poll, he appointed him as his counting agent. We have no hesitation in rejecting the evidence of the appellant that Grover was not in charge of his city office. In fact it is seen that the respondent in the election petition had specifically stated that the appellant had six offices and there has been no denial by the appellant in this regard, though in the witness box he was prepared to say that he had only one election office. It is no doubt true that P. W. 15 does not refer to Grover being in charge of the city office, but we have already referred to the fact that Grover was appointed as the counting agent by the appellant even on his own admission & the further fact that he included him as one of the witnesses to be examined on his behalf, clearly shows that Grover must have played a very prominent part in connection with the mid-term poll on behalf of the appellant. The evidence regarding the arrangements made by P. W. 24 for the meeting held on May 11, 1968 in connection with the visit of Mr. Chavan to address an election meeting in support of the appellant is

corroborated by the evidence of the proprietor of Kamala Tent House, P. W. 26, Shiv Dev Singh. P. W. 26 has stated that he had supplied shamiana, loud-speaker, stage etc., to the respondent in connection with the election meeting held on May 10, 1968, and at the request of Grover, P. W. 24, he allowed all those articles to be utilised for the meeting to be held on May 11, 1968 in support of the appellant and that he received the necessary charges for the same from Grover, P. W. 24. We have also referred to the fact that P. W. 14, Sohanlal, has spoken to the fact that Surajmal a close associate of the appellant during one of his visits was accompanied by Jagdish Grover. The evidence of P. Ws. 30 and 34, who are both polling agents of the appellant, shows that Exhibits X-5 and X-6 and the issues of Vidrohi and Kalakar had been widely distributed in Bahadurgarh.

44. The evidence of P. W. 34 who was one of the polling agents of the appellant, clearly refers to the two Dharamsalas of Ram Kanwar one in the city and one near the bus stand. This clearly supports the evidence of Jagdish Grover, P. W. 24 that there was an election office in the city and also another near the Adda.

45. Mr. Gupte, learned counsel for the appellant, sought to discredit the evidence of P. W. 24 by relying upon the evidence of Ram Kanwar Gupta, R. W. 5 who has given evidence to the effect that the election office of the appellant was in the Dharamsala near the Adda and that there was no election office in the City. He also claimed to be in charge of the election office of the appellant at the Adda and he has stated that Grover was neither a Congress worker nor was in charge of the appellant's election office. The evidence of R. W. 5 does not impress us as that of a truthful witness. R. W. 5 had not been cited by the appellant as his witness for this purpose and, as pointed out by the High Court, the case that R. W. 5 was in charge of the office is clearly an after-thought.

46. To conclude, the evidence of P. Ws. 3, 4, 15, 16, 24, 30 and 34 and of Professor Ranga, clearly establish that Exhibits X-1 and X-5 were widely distributed and published in Bahadurgarh before the date of the poll. The evidence of some of the witnesses discussed above and as stated earlier, also show that the distribution and circula-

tion were at the instance and with the consent of the appellant.

47. Regarding the distribution of Exhibits X-5, X-6, the three issues of Vidrohi and Kalakar in the rural areas, the evidence is furnished by several witnesses, P. Ws. 9 and 17 to 23. Most of these witnesses were the polling agents of the appellant and one criticism that was levelled against accepting their evidence was that they, once worked for the appellant during the elections and the fact that they had now turned against him, would show that their evidence could not be true. It is no doubt true that most of these witnesses were all the polling agents of the appellant and the fact that they are giving evidence against the appellant is urged as a ground for their evidence being rejected in toto. We are aware that under those circumstances, their evidence will have to be treated with great caution. But, in this case there is the evidence of P. W. 25 which clearly shows that these posters, handbills and copies of Vidrohi and Kalakar were very widely distributed in the rural areas before the date of the poll. He was a congressman and he fought the election against the respondent in 1962, 1967 as also in the by-election in 1967 but lost in all those elections. Even during the mid-term election in question, he applied for a Congress ticket, but it was given to the appellant. Being a Congressman, he was working on behalf of the Congress candidate, viz., the appellant. He has stated that in his tour round the various villages he came across Exhibits X-5 and X-6 and the copies of Vidrohi and Kalakar which were very widely distributed on behalf of the appellant. He has also referred to the fact that Surajmal was an ardent supporter of the appellant. All these posters and other things were seen by him before the date of the poll. P. W. 25 has spoken to the fact that the respondent, when he was a Minister, had suspended him while he was working as a Sarpanch and that clearly shows that he cannot be too friendly with the respondent. There is no suggestion as to the polling agents of the appellant who have given evidence that they have been won over by the respondent, nor is it established that their evidence is false, as their statements are well corroborated by the other evidence on record.

48. Another witness, R. W. 19 also speaks to having seen the poster with the cartoon, Exhibit X-5. The other witnesses referred to above, clearly speak to the manner in which the distribution of these posters, handbills and copies of Vidrohi and Kalakar were made on behalf of the appellant and at his instance. Their evidence has been considered in great detail by the High Court and we do not think it necessary to traverse the ground over again. Their evidence clearly establishes that the documents under consideration were all published and circulated in the rural areas on behalf of and with the consent of the appellant before the date of the poll.

49. Mr. Gupte, learned counsel, urged that Surajmal has been referred to as having played a very important part in support of the appellant in the elections and that he had also given manuscripts to P.Ws. 10, 11 and 14. He urged that the burden of proving the corrupt practice alleged against the appellant is on the respondent and he should have examined Surajmal to prove that the necessary materials contained in the pamphlets and newspaper publications in question were furnished by the appellant and that the publication and circulation were also made by the appellant or with his consent.

50. We are not impressed with this contention of the learned counsel. That Surajmal was actively associated with the appellant is borne out by the evidence already discussed. The appellant himself has admitted, as R. W. 22, that Hari Chand, brother of Surajmal and their employee one Sia Ram, were his counting agents. No doubt he has stated that he appointed Hari Chand and Surajmal as his counting agents because they happened to be near the polling station along with certain other workers of the appellant. This is the same explanation that the appellant gave regarding Jagdish Grover and has not been accepted by us. The only explanation that the appellant gave for not examining Surajmal was that he was neutral. In fact, in his evidence as R. W. 22, the appellant had further stated that he was not prepared to join even in any joint request that may be made to the court for examining Surajmal as a Court witness. So far as we can see, there is absolutely no suggestion to P. Ws. 10,

11 and 14 that the manuscripts produced by them are not in fact in the handwriting of Surajmal.

51. In view of all these circumstances, the non-examination of Surajmal, by the respondent, is of no consequence.

52. It follows, in view of what is stated above, that the appellant must be held guilty of a corrupt practice, under S. 123 (4) of the Act, in respect of the printing, publication, circulation and distribution of Exhibits X-5, X-6, the three issues of Vidrohi and the issue of Kalakar, which contained statements relating to the personal character and conduct of the respondent and which have been held to be false and which the appellant could not have believed to be true. Those statements had been made by the appellant to prejudice the prospects of the respondent in the election.

53. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

**AIR 1970 SUPREME COURT 1514
(V 57 C 317)**

(From: Bombay)

A. N. RAY AND I. D. DUA JJ.

Hargun Sunder Das Godeja and others, Appellants v. The State of Maharashtra, Respondents.

Criminal Appeals Nos. 153, 155 and 172 of 1967 D/- 26-3-1970.

(A) Evidence Act (1872), S. 101 — Burden of proof — Criminal trial — Charge of criminal misappropriation under Prevention of Corruption Act — Nature of burden of proof on prosecution, negative — Burden can be discharged by circumstantial evidence — Duty of court under S. 342 A, Cr. P. C. pointed out.

Where the accused were charged with criminal conspiracy to commit criminal misappropriation on allegation that they had dishonestly and fraudulently misappropriated or converted to their own use some bags of wheat from the bags released from the ship, it is no doubt true that the onus on the prosecution is of a negative character and also that the failure on the part of the accused to give evidence on the question as to when, where and to whom

the controversial bags were delivered cannot under our law give rise to any presumption against them. The criminal courts holding trial under the Criminal P. C. have to bear in mind the provisions of S. 342-A of the Code and to see that their mind is not influenced by such failure on the part of the accused. But that does not mean that such negative onus is not capable of being discharged by appropriate circumstantial evidence. If the circumstantial evidence is trustworthy and establishes facts and circumstances the combination of which, does not admit of any safe inference other than that of the guilt of the accused then there can hardly be any escape for him and the Court can confidently record a verdict of guilty beyond reasonable doubt. The Court would, of course, be well advised in case of circumstantial evidence to be watchful and to ensure that conjectures or suspicions do not take the place of legal proof. The chain of evidence to sustain a conviction must be complete and admit of no reasonable conclusion consistent with the innocence of the accused. (Paras 1, 6)

(B) Constitution of India Art. 136 — Supreme Court when will review evidence.

The Supreme Court under Art. 136 does not normally proceed to review the evidence in criminal cases unless the trial is vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This Article reserves to the Supreme Court a special discretionary power to interfere in suitable cases when for special reasons it considers that interference is called for in the larger interests of justice. This article cannot be so construed as to confer on a party a right of appeal where none exists under the law. Cr. A. No. 125 of 1967 D/- 12-1-1968 (SC) Ref. (Para 9)

(C) Criminal P. C. (1898) S. 342A — Duty of Court in the matter of appreciating evidence pointed out. (Para 6)

(D) Prevention of Corruption Act (1947), S. 5—Misappropriation—Negative burden on prosecution can be discharged by circumstantial evidence. (Para 6)

Cases Ref: Chronological Paras
 (1968) Cri. Appeal No. 125 of 1967

D/- 12-1-1968 (SC), Chidda
 Singh v. State of Madh Pra 9

Following judgment of the Court was delivered by

DUA, J.: The four appellants in these three appeals by special leave were tried in the Court of the Special Judge for Greater Bombay on a charge of conspiracy punishable under S. 120-B, I. P. C. Accused No. 1 (Shiv Kumar Lokumal Bhatia) was a godown clerk; accused No. 2 (Hargun Sunderdas Godeja) was the Senior Godown Keeper and accused no. 3 (Hundraj Harchomal Mangtani) was the Godown Superintendent at the General Motors Godown at T-Shed, Sewri, Bombay, belonging to the Food Dept. of the Government of India, Accused No. 4 (Shankar Maruthi Phadtare) was a driver of Truck No. 2411. The allegation against them was that all these accused during the month of July, 1963 were parties to criminal conspiracy to commit criminal breach of trust in respect of 1060 bags of red wheat which were released from the ship S. S. Hudson on July 7, 1963 at Bombay for storing them in the G-M. 2 Godown at Sewri. In pursuance of this conspiracy, it was alleged, they had dishonestly and fraudulently misappropriated or converted to their own use 80 bags of red wheat out of 1060 bags released from the ship. Accused Nos. 1, 2 and 3 were also charged under Section 409 read with Section 34, I. P. C., Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act, 1947 read with Section 34, I. P. C., Section 5 (2) read with Section 5 (1) (c) of the Prevention of Corruption Act read with Section 34, I. P. C. and Section 477-A read with Section 34, I. P. C.

2. The learned Special Judge on a consideration of the evidence on the record held that the prosecution has succeeded in proving the conspiracy on the part of all the four accused to commit criminal breach of trust in respect of the 80 bags of red wheat. Accused Nos. 1, 2 and 3 were also held to have gained pecuniary advantage and further to have altered the records of the T Shed. Holding the offences to be serious in view of the general shortage of food grains in the country the court felt that the case called for deterrent sentences. Under

S. 120-B I. P. C. all the accused were sentenced to rigorous imprisonment for four years. Accused Nos. 1, 2 and 3 were in addition held guilty under S. 409, I. P. C. read with S. 34, I. P. C. and under S. 5 (2) read with S. 5 (1) (c) of the Prevention of Corruption Act read with S. 34, I. P. C., under Section 5(2) read with S. 5(1)(d) of Prevention of Corruption Act read with S. 34, I. P. C. and also under S. 477-A read with S. 34, I. P. C. and sentenced to rigorous imprisonment for four years on each of these four counts, the sentences to be concurrent.

3. On appeal the High Court confirmed the order of the trial court as against accused No. 4 and dismissed his appeal. The conviction of accused No. 1 under S. 5(2) read with S. 5(1)(c) of the Prevention of Corruption Act read with S. 34, I. P. C. was set aside. But his conviction and sentence under S. 120-B, I. P. C. and under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act read with S. 34, I. P. C. as also under S. 477-A read with S. 34, I. P. C. was confirmed. His conviction under S. 409 read with S. 34, I. P. C. was altered to one under S. 409, I. P. C. but without altering the sentence. The convictions of accused Nos. 2 and 3 under S. 409, I. P. C. read with S. 34, I. P. C. as also under S. 5(2) read with S. 5(1)(c) of the Prevention of Corruption Act read with S. 34, I. P. C. were set aside but their conviction and sentence under S. 120-B, I. P. C. and under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act read with S. 34, I. P. C. was confirmed.

4. In this Court Shri Chari questioned the appellants' conviction on the broad argument which was indeed the main plank of his challenge against the impugned order that there was a great confusion in the matter of storage of stocks of the foodgrains in the T-Shed and there was complete want of regularity and considerable inefficiency in the matter of keeping the records of the arrivals and storage of the stocks with the result that it would be highly unsafe to rely on the evidence relating to the records of the stocks in the T-Shed, for holding the appellants guilty of the criminal offences charged. The learned counsel appearing on behalf of the other appellants, while generally adopting Shri Chari's arguments, supplemented them by reference to the distinguishing features of the case against their individual clients.

trucks in the godown does not as already noticed contain any entry in respect of the truck in question. The reverse of Ex. 41 is not printed in the printed paper book but we have checked up from the original record that the witness Shinde is right. Non-inclusion of the entry of the truck in question in Ex. 41, is in our view, very material. In Ex. 53 the daily Arrival Tally book for July 7, 1963 the entry at Sl. No. 68 shows departure of the truck; in question at 12.15 afternoon whereas in Ex. 41 it is shown as at 1.15 p. m. and in Ex. 11-B at 12.15 afternoon. This, according to P. W. 18, was designed to show that the truck was unloaded during the recess period which, according to evidence on the record, was not done. The explanation of accused No. 1 is that on July 7, 1963 he was not feeling well though he attended the office. He had to get chits from the warners and count the number of bags in the truck and order the labourers to unload them from the trucks. The suggestion appears to be that due to these multifarious duties and due to his being unwell he had perforce to enter the truck chits in the tally books only when he could get time and meanwhile he had no other alternative but to put the unentered truck chits in his pocket. According to him, it was on July 10, 1963 when he was giving his clothes to the washerman that he discovered the solitary chit in question left by mistake in his pocket. The explanation is far from satisfactory and we are not impressed by it. It may in this connection be pointed out that July 7, 1963 was a Sunday and the three accused persons were specially called for receiving the grain that had arrived by the two steamers. The amount of work to be done on that day can thus scarcely be considered to be excessive. And then the fact that only one solitary truck chit relating to the 80 bags in question should happen to have remained in the pocket of accused No. 1 to be discovered only on July 10, 1963 is also not without some significance. We agree with the High Court in holding this explanation to be unconvincing and that the 80 bags in question were in fact not received at the T-Shed on July 7, 1963. In our opinion, the material on the record to which our attention has been invited fully supports the conclusions of the High Court. We may appropriately repeat what has often been pointed out by this Court

that under Article 136 of the Constitution this Court does not normally proceed to review the evidence in criminal cases unless the trial is vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This Article reserves to this Court a special discretionary power to interfere in suitable cases when for special reasons it considers that interference is called for in the larger interests of justice. As observed by this Court in *Chidda Singh v. State of Madhya Pradesh*, Cri. A. No. 125 of 1967 D/- 12-1-1968 (SC) this Article cannot be so construed as to confer on a party a right of appeal where none exists under the law. We, however, undertook in this case to go through the evidence to which our attention was invited to see whether or not the conclusions of the High Court are insupportable. We are not persuaded to hold that in this case there is any cogent ground for interference with those conclusions. This appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 1518
(V 57 C 318)

(From Calcutta)

F. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Commissioner of Income-tax, West Bengal, Calcutta, Appellant v. Prem Bhai Parekh and others, Respondents.

Civil Appeal No. 2272 of 1966, D/- 20-4-1970.

(A) Income-tax Act (1922), S. 16(3) — Section creates artificial income — Hence it is to be strictly construed. AIR 1965 SC 866, Foll (Para 8)

(B) Income-tax Act (1922), S. 16(3) — Income to minors from partnership firm — When can be included in income of father.

Before an income can be held to come within the ambit of S. 16(3), it must be proved to have arisen directly or indirectly from a transfer of assets made by the assessee in favour of his wife or minor children. The connection between the transfer of assets and the

FN/FN/B877/70/BNP/M.

income must be proximate. The income in question must arise as a result of the transfer and not in some manner connected with it. (Para 8)

Hence income arising to minors out of partnership firm cannot be included in the total income of father when there is no nexus between such income and the assets which are transferred by assessee to the minors. (Para 8)

Cases Ref: Chronological Paras
(1965) AIR 1965 SC 866 (V 52) =

(1965) 55 ITR 637, Commr. of Income-tax, Gujarat v. Keshavlal Lallubhai Patel 9

The following judgment of the Court was delivered by

HEGDE J.: This is an appeal by certificate, granted by the High Court of Calcutta under S. 66A(2) of the Indian Income-tax Act, 1922 (to be hereinafter referred to as the Act) against the decision of that Court in a reference under S. 66(1) of that Act.

2. The two questions of law referred to the High Court by the tribunal are: (1) Whether S. 16(3) of the Act was ultra vires the Central Legislature and (2) Whether on the facts and in the circumstances of the case, the income arising to the three minor sons of the assessee by virtue of their admission to the benefits of the partnership of M/s. Ajitmal Kanhaiyalal was rightly included in the total income of the assessee under S. 16(3)(a)(iv) of the Act.

3. The assessee at whose instance those questions were referred did not press for an answer in respect of question No. 1. Therefore that question was not dealt with by the High Court. Hence we need not go into that question. The High Court answered the second question in favour of the assessee.

4. The facts necessary for the purpose of deciding the point in dispute as set out in the statement of the case submitted by the tribunal are as follows:

5. The assessee Shri Ajitmal Parekh was a partner of the firm M/s. Ajitmal Kanhaiyalal having 7 annas share therein. He continued to be a partner of that firm till July 1, 1954 which was the last date of the accounting year of the firm, relevant for the assessment year 1955-56. On July 1, 1954, the assessee retired from the firm. Thereafter he gifted to each of his four sons Rs. 75,000. Out of his four sons, three were minors at that time. There was

a reconstitution of the firm with effect from July 2, 1954 as evidenced by the partnership deed dated July 5, 1954. The major son of the assessee became a partner of the reconstituted firm and his minor sons were admitted to the benefits of that partnership in the reconstituted firm. The major son had 2 annas share. His three minor brothers were admitted to the benefits of the partnership, each one of them having 2 annas share. In the assessment year 1956-57, the Income-tax Officer held that the income arising to the minors by virtue of their admission to the benefits of the partnership came within the purview of S. 16(3)(a)(iv) of the Act. He included that income in the total income of the assessee for that year. In appeal the Appellate Assistant Commissioner substantially upheld the order of assessment made by the Income-tax Officer but he held that the minors were entitled to only 1-9 pies share in the firm. The assessee took up the matter in appeal to the Income-tax Appellate Tribunal. The tribunal upheld the decision of the Appellate Assistant Commissioner.

6. On the facts found by the tribunal, the High Court came to the conclusion that answer to question No. 2 should be in the negative and in favour of the assessee.

7. The tribunal found that the capital invested by the minors in the firm came from the gift made in their favour by their father, the assessee. That finding was not open to question before the High Court nor did the High Court depart from that finding. But on an interpretation of S. 16(3)(a)(iv) the High Court opined that the answer to the question must be in favour of the assessee. Section 16(3)(a)(iv) reads:

"In computing the total income of any individual for the purpose of assessment, there shall be included (a) so much of the income of a wife or minor child of such individual as arises directly or indirectly.....

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter by such individual otherwise than for adequate consideration."

8. Before any income of a minor child can be brought within the scope of S. 16(3)(a)(iv), it must be established that the said income arose directly or indirectly from assets transferred directly or indirectly by its father. There

is no dispute that the assessee had transferred to each of his minor sons, a sum of Rs. 75,000. It may also be that the amount contributed by those minors as their share in the firm came from these amounts. But the question still remains whether it can be said that the income with which we are concerned in this case arises directly or indirectly from the assets transferred by the assessee to those minors. The connection between the gifts mentioned earlier and the income in question is a remote one. The income of the minors arose as a result of their admission to the benefits of the partnership. It is true that they were admitted to the benefits of the partnership because of the contribution made by them. But there is no nexus between the transfer of the assets and the income in question. It cannot be said that that income arose directly or indirectly from the transfer of the assets referred to earlier. Section 16(3) of the Act created an artificial income. That section must receive strict construction as observed by this Court in *Commr. of Income-tax Gujarat v. Keshavlal Lallubhai Patel*, (1965) 55 ITR 637 = (AIR 1965 SC 866). In our judgment before an income can be held to come within the ambit of Section 16(3), it must be proved to have arisen—directly or indirectly—from a transfer of assets made by the assessee in favour of his wife or minor children. The connection between the transfer of assets and the income must be proximate. The income in question must arise as a result of the transfer and not in some manner connected with it.

9. For the reasons mentioned above, this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1520
(V 57 C 319)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER JJ.

Sirpur Paper Mills Ltd. Appellant v.
Commissioner of Wealth Tax, Hyderabad, Respondent.

Civil Appeals Nos. 2269-2270 of 1966,
D/- 20-4-1970.

FN/FN/B879/70/KSB/M

(A) Constitution of India, Art. 136 — Practice of Supreme Court — Direct appeal in taxing matter by-passing normal procedure not entertained — Supreme Court when would interfere.

Ordinarily Supreme Court does not encourage an aggrieved party to appeal directly to it against the order of a Tribunal exercising judicial functions under a taxing statute, and thereby to by-pass the normal procedure of appeal and reference to the High Court, but where a question of principle of great importance arises the Supreme Court may entertain it. (Para 2)

Thus, where the Commissioner of Wealth Tax misconceiving the nature and extent of his revisional jurisdiction under S. 25, Wealth Tax Act has surrendered his authority and judgment to the directions issued by the Board of Revenue without exercising his own independent judgment, the Supreme Court set aside the order and directed the Commissioner to dispose of the revision according to law.

(Paras 2, 10 and 11)

(B) Wealth Tax Act (1957), S. 25 — Revisional power of Commissioner — Nature and extent of.

The power conferred by S. 25 is not administrative; it is quasi judicial. The expression "may make such inquiry and pass such order thereon" does not confer any absolute discretion on the Commissioner. In exercise of the power the Commissioner must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consistent with the principles of natural justice. He cannot permit his judgment to be influenced by matters not disclosed to the assessee nor by dictation of another authority. (Para 3)

(C) Wealth Tax Act (1957), S. 13 — Instructions and directions issued by Board of Revenue control exercise of power of officers of department in matters administrative but not quasi judicial — Proviso to S. 13 does not imply that Board may give directions to Wealth Tax Officer or Commissioner in exercise of his quasi judicial function. (Para 3)

The following judgment of the Court was delivered by

SHAH, J.: In proceedings for determination of Wealth Tax for the assessment years 1957-58 and 1958-59 the appellant Company claimed depreciation

allowance on plant, building and machinery at the rates prescribed under the Income-tax Act and the Rules framed thereunder. The Wealth Tax Officer adopted the method prescribed by S. 7, sub-section (2) of the Wealth Tax Act and admitted the value of the assets as shown in the certified balance sheets on the respective valuation dates. In appeal, the Appellate Assistant Commissioner of Wealth Tax confirmed the order passed by the Wealth Tax Officer. The Company then moved revision applications before the Commissioner of Wealth Tax under S. 25 of the Wealth Tax Act. Against the order passed by the Commissioner of Wealth Tax rejecting the applications, the Company has filed these appeals under Art. 136 of the Constitution.

2. Against the orders of the Appellate Assistant Commissioner appeals lay to the Income-tax Appellate Tribunal, but the Company preferred revision applications before the Commissioner.

We do not ordinarily encourage an aggrieved party to appeal directly to this Court against the order of a Tribunal exercising judicial functions under a taxing statute, and thereby to by-pass the normal procedure of appeal and reference to the High Court but in the present case, it appears to us that a question of principle of great importance arises. We have entertained these appeals because in our judgment the Commissioner of Wealth Tax has surrendered his authority and judgment to the Board of Revenue in deciding the questions which were sought to be raised by the Company in its revision applications.

3. Section 25 of the Wealth Tax Act provides insofar as it is material:

"(1) The Commissioner may, either of his own motion or on application made by an assessee in this behalf call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him, and may make such inquiry, or cause such inquiry to be made, and, subject to the provisions of this Act, pass such order thereon, not being order prejudicial to the assessee, as the Commissioner thinks fit:

x x x"

The power conferred by S. 25 is not administrative, it is quasi judicial. The expression "may make such inquiry and pass such order thereon" does not confer any absolute discretion on the

Commissioner. In exercise of the power the Commissioner must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consistent with the principles of natural justice; he cannot permit his judgment to be influenced by matters not disclosed to the assessee nor by dictation of another authority. Section 13 of the Wealth Tax Act provides that all officers and other persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Board. These instructions may control the exercise of the power of the officers of the Department in matters administrative but not quasi judicial. The proviso to Section 13 is somewhat obscure in its import. It enacts that no orders, instructions or directions shall be given by the Board so as to interfere with the discretion of the Appellate Assistant Commissioner of Wealth Tax in the exercise of his appellate functions. It does not, however, imply that the Board may give any directions or instructions to the Wealth Tax Officer or to the Commissioner in exercise of his quasi judicial function. Such an interpretation would be plainly contrary to the scheme of the Act and the nature of the power conferred upon the authorities invested with quasi judicial power.

4. The Commissioner appears, in our judgment, to have wholly misapprehended the true character of the jurisdiction with which he is by the Act entrusted and has surrendered his judgment to the directions of the Board of Revenue. The order sheet of the Commissioner (at pp. 10-36 of the printed Paper Book) bears eloquent testimony to the manner in which the Commissioner has merely carried out the directions of the Board of Revenue, instead of deciding the case according to his own judgment.

5. In entry dated December 31, 1959, there is a reference to the instructions contained in the Board's Circular No. 7-D (WT) of 59 dated November 12, 1959 received on November 30, 1959.

6. Under entry dated April 28, 1960 there is again a reference to the Board's Circular No. 7-D of 1959 suggesting the manner in which depreciation has to be worked out for the purpose of determining wealth tax.

7. Again in the entry dated June 17, 1960 under item No. 4 it is stated that the Board's instructions were "specific on the point that no adjustment to depreciation relating to the period prior to March 31, 1957 should be made while determining the total wealth of an assessee on the basis of 'global' valuation".

8. Under entry dated August 7, 1963, recorded by the Inspector, it is stated that "upon reference to the Board for instructions, it was recommended that the petitions be kept pending decision of the matter till" it was decided by the High Court in which the same question was raised. When on January 27, 1966, the Company requested that the applications be kept pending till the disposal of the reference application by the High Court for the assessment year 1959-60 in which a similar point was involved, the Commissioner was of the view that the application need not be kept pending, but still directed "write to the Board". A letter was written to the Board and the Commissioner acted according to the directions of the Board.

9. There is another entry dated March 14, 1966 which refers to the letter of the Board agreeing that the revision applications for the two years may be rejected.

10. It is unnecessary to refer to any more entries made in the case sheet maintained by the Commissioner of Wealth Tax. From the inception of the proceedings the Commissioner of Wealth Tax put himself in communication with the Board of Central Revenue and sought instructions from that authority as to how the revision applications filed before him should be decided. He exercised no independent judgment. The Commissioner also recorded that the case did not require a personal hearing but since the Director of the Company had made a personal request for an interview it was "thought desirable" from "the point of view of public relations to give an interview." Here also the Commissioner misconceived the nature and extent of his jurisdiction.

11. Counsel appearing on behalf of the Commissioner of Wealth Tax in these appeals has not attempted to support the order under appeal. We set aside the order passed by the Commissioner and direct that the revision applications be heard and disposed of according to law and uninfluenced by

any instructions or directions given by the Board of Revenue. The Company will get its costs in this Court. One hearing fee.

Order accordingly.

AIR 1970 SUPREME COURT 1522 (V 57 C 320)

(From Patna: 1967 BLJR 17)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

M/s. Veena Theatre, Patna, Appellant
v. The State of Bihar, Respondent.

Civil Appeal No. 1337 of 1967, D/- 23-4-1970.

(A) Bihar Entertainment Tax Act (35 of 1948), S. 21 — Rules under — Rule 28(4) is not ultra vires S. 21 of Act.

The power given under S. 21(1) is wide enough to make rules for the determination of the tax liability of an assessee. The mode and the manner in which that liability is to be determined can be provided under the rules. The main purpose of the Act is to levy and collect entertainment tax. Therefore it is idle to say that in exercise of the powers conferred on the State Government under S. 21(1) of the Act that Government cannot make rules for the determination of the tax liability of an assessee. Rule 28(4) which empowers the taxing authorities to determine the tax liability is not ultra vires S. 21 of the Act. (Para 5)

(B) Bihar Entertainment Tax Act (35 of 1948), Sec. 21 — Rules under Rule 28(4) — Best judgment assessment can be made under R. 28 (4).

In view of sub-rule (4) of Rule 28, the Superintendent or Assistant Superintendent, as the case may be, is competent to make an assessment on the basis of best judgment. It cannot be said that the power conferred under sub-rule (4) of rule 28 is available only if the assessee fails to make a return or having made it, fails to comply with the terms of the notice issued under sub-rule (2) or to produce any evidence under sub-rule (3). The assessee has to satisfy that the return made by him is a correct one. If the return made by the assessee is rejected on a relevant ground, such a return cannot be considered as a good return under sub-rule (1) of rule 28.

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In that event, the assessee is deemed to have made no return as required by rule 28 (1) and consequently he is liable to be assessed on the basis of best judgment. (Para 7)

(C) Bihar Entertainment Tax Act (35 of 1948), S. 9(2) — Rule 28 of Rules made under the Act is not repugnant to S. 9(2).

Rule 28 covers a field uncovered by S. 9(2). The provisions relating to the imposition of penalty found in S. 9(2) are not inconsistent with or repugnant to the provisions contained in Rule 28. Rule 28 deals with assessment whereas sub-section (2) of Section 9 deals with imposition of penalty. (Para 8)

The following judgment of the Court was delivered by

HEGDE J.: This appeal by certificate under Article 133(1)(a) of the Constitution arises from the decision of the High Court of Judicature at Patna dismissing the appellant's writ petition under Arts. 226 and 227 of the Constitution. In that writ petition, the appellant asked the High Court to quash the entertainment tax of Rs. 67,500 levied on it for the period from 1-4-1959 to 30-9-1959. The High Court rejected that prayer.

2. The appellant is the owner of 'Veena Cinema' in the town of Patna. As required by the provisions of the Bihar Entertainment Tax Act, 1948 (Bihar Act XXXV of 1948) (to be hereinafter referred to as the Act) and the rules framed thereunder, for the period 1-4-1959 to 30-9-1959, the appellant submitted a return showing a tax liability of Rs. 36,860. It deposited that amount. But the Additional Superintendent, Commercial Taxes Patna rejected its return and assessed it on the basis of best judgment and levied a tax of Rs. 67,500 on it for the period in question. The appellant unsuccessfully appealed to the Appellate Assistant Commissioner, Commercial Taxes and thereafter took up the matter in revision before the Deputy Commissioner of Commercial Taxes. That officer made some minor modification in the assessment order; but he substantially upheld the order of the Additional Superintendent. Aggrieved by that order, the appellant took up the matter to the High Court as mentioned above.

3. Before the High Court as well as this Court the appellant raised four questions of law namely (1) Rule 28(4)

of the rules is beyond the rule-making power conferred on the State Government under S. 21 of the Act; (2) No power is given either under the provisions of the Act or under the rules to assess on the basis of best judgment; (3) Rule 28(4) is repugnant to Section 9 (2) of the Act and (4) The assessing authority had arbitrarily fixed the assessee's receipts.

4. The return submitted by the appellant was rejected by the authorities on the grounds that the books of account produced by the appellant were entirely unreliable; that the appellant had maintained duplicate sets of tickets and had suppressed the sale of the tickets. These findings were based on the result of a surprise inspection. All the authorities under the Act have concurrently come to the conclusion that the account-books produced by the appellant were entirely unreliable; that it had maintained duplicate sets of tickets and that it suppressed the sale of tickets. These findings were not challenged before the High Court and therefore we did not allow the learned Counsel for the appellant to challenge those findings. In view of those findings, it cannot be denied that the taxing authorities were justified in rejecting the return submitted by the appellant.

5. Section 9 of the Act deals with submission of returns and payment and recovery of entertainments. That section does not prescribe the procedure to be adopted in determining the receipts of the assessee by the sale of tickets. Sub-section (1) of that section merely says that every proprietor of entertainment shall furnish such returns by such dates and to such authority as may be prescribed. No provision in the Act deals with the mode of determination of tax payable by an assessee. That aspect of the matter is left to be governed by the rules to be made. Section 21 of the Act empowers the State Government to make rules. Sub-section (1) of that section provides that the State Government may make rules, consistent with the Act for securing the payment of entertainments tax and generally for the purpose of carrying into effect the provisions of the Act. The power given under this provision is wide enough to make rules for the determination of the tax liability of an assessee. The mode and the manner in which that liability is to be determined can be provided under the

rules. The main purpose of the Act is to levy and collect entertainment tax. Therefore it is idle to say that in exercise of the powers conferred on the State Government under S. 21(1) of the Act that Government cannot make rules for the determination of the tax liability of an assessee. Hence we reject the contention that Rule 28(4) which empowers the taxing authorities to determine the tax liability is ultra vires S. 21 of the Act.

6. Rule 28 reads:

"(1) If the Superintendent or Assistant Superintendent is satisfied without requiring the presence of the proprietor or production by him of any evidence that the return furnished in respect of any period is correct and complete, he shall assess the amount of tax due from the proprietor on the basis of such return.

(2) If the Superintendent or Assistant Superintendent is not satisfied without requiring the presence of the proprietor or production of evidence that the return furnished in respect of any period is correct and complete, he shall serve a notice in form XI on such proprietor requiring him on a date and at a place to be specified therein either to attend in person or to produce or cause to be produced any evidence on which the proprietor relies to prove the correctness of such return or to submit such other accounts, registers or documents of the proprietor as may be considered necessary by the Superintendent or Asstt. Superintendent for the purpose of determining the amount of tax due against the proprietor.

(3) On the date specified in the notice or as soon afterwards as may be, the Superintendent or Assistant Superintendent after hearing such evidence as the proprietor may produce and such other evidence as the Superintendent or Assistant Superintendent may require on specified points shall assess the amount of tax due from the proprietor.

(4) If the proprietor fails to make a return or having made the return, fails to comply with all the terms of the notice issued under sub-rule (2) or to produce any evidence required under sub-rule (3), the Superintendent or Assistant Superintendent shall, after giving the proprietor a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax, if any, due from the proprietor."

7. This rule is similar to S. 23 of the Indian Income-tax Act, 1922. Sub-rule (4) of Rule 28 is analogous to sub-section (4) of S. 23. In view of sub-rule (4) of Rule 28, the Superintendent or Assistant Superintendent, as the case may be, is competent to make an assessment on the basis of best judgment. The contention that the power conferred under sub-rule (4) of Rule 28 is available only if the assessee fails to make a return or having made it, fails to comply with the terms of the notice issued under sub-rule (2) or to produce any evidence under sub-rule (3), overlooks the fact that the assessee must satisfy that the return made by him is a correct one. If the return made by the assessee is rejected on a relevant ground, such a return cannot be considered as a good return under sub-rule (1) of Rule 28. In that event, the assessee is deemed to have made no return as required by Rule 28(1) and consequently he is liable to be assessed on the basis of best judgment.

8. There is no substance in the contention that Rule 28 is repugnant to Section 9(2) of the Act. That rule covers a field uncovered by Section 9(2). The provisions relating to the imposition of penalty found in S. 9(2) are not inconsistent with or repugnant to the provisions contained in Rule 28. Rule 28 deals with assessment whereas sub-section (2) of Section 9 deals with imposition of penalty. Hence the contention that Rule 28 is inconsistent with Section 9(2) has to be rejected.

9. We are unable to accept the contention that the assessment in this case was arbitrarily made. The Assistant Superintendent of Commercial Taxes had computed the tax liability of the assessee on relevant grounds. He arrived at the conclusion that the tax liability of the assessee for the period in question is Rs. 67,500 after taking into consideration materials which were relevant in that regard. Dealing with that aspect of the case this is what that officer says in his order:

"The Veena cinema has a capacity so as to yield a tax of nearly 500 per show, if the house goes full. If, therefore, the Cinema had run to the capacity of all days and in each show of the assessment period, the tax would have amounted to Rs. 2,70,000. But it is a known fact that the shows run full to the capacity only on the first days of

the start of exhibition of a good and popular picture and that too only in the evening shows. The matinee and the night shows full (sic). As the picture gets older, the sale decreases. Towards the end, the number of persons to witness the picture thin down considerably and the amount of tax falls even below Rs. 50. Taking these points into consideration I feel that the business done by this Cinema in the assessment period was such as to give tax at the average rate of Rs. 125 per show. At this rate the total amount of tax payable in the assessment period comes to Rs. 67,500. This cinema is therefore, assessed to pay a tax of Rs. 67,500 for the period from 1-4-59 to 30-9-1959."

10. The facts mentioned above are cogent and relevant in the matter of computing the probable receipts by sale of cinema tickets.

11. For the reasons mentioned above this appeal fails and the same is dismissed with costs.

Appeal dismissed.

(C) Constitution of India, Art. 136 — New plea — Plea abandoned by appellant in High Court — Not open before Supreme Court. (Para 16)

(D) Limitation Act (1908), S. 14 — Prosecution of proceedings with due diligence — Sale of property in execution proceedings — Sale however set aside pursuant to objection by judgment-debtor under U. P. Encumbered Estates Act — Held decree holder prosecuted execution proceedings in good faith and with due diligence and was entitled to protection of Section 14. (Paras 15, 16)

(E) Civil P. C. (1908), Section 11 — Applicability of principle to execution proceedings — Principle of res judicata applies to execution proceedings — Judgment-debtor not raising any objection as to limitation in regard to execution of decree but asking for setting aside sale on basis of revival of execution proceedings — Held, judgment debtor was barred by principle of res judicata from questioning order reviving execution proceedings. (Para 18)

Cases Ref: Chronological Paras
(1952) AIR 1952 Mad 186 (V 39) =
1951-2 Mad LJ 668 (FB),
Kandaswami Pillai v. Kannappa Chetty 17

The following judgment of the Court was delivered by

RAY, J.: This appeal is by special leave from the judgment dated 21st March, 1966 of the Madras High Court dismissing the appeal preferred by the appellant against the decree holders' application for execution of the decree.

2. The appellant is one of the judgment-debtors brought on record as legal representative of a deceased judgment-debtor Lala Baijnath Prasad. Respondent No. 1 Lakshman Prasad Gupta was one of the plaintiffs. Pratap Chand and Basudeb Prasad respondents Nos. 2 and 3 respectively are the sons of a judgment-debtor Girdharilal Agarwala.

3. The plaintiff respondent Lakshman Prasad Gupta was married to the sister of Lala Bansilal. Bansilal belonged to the joint family which consisted inter alia of the appellant's father. There were five branches of the said joint family of the judgment-debtors, three whereof were at Banaras, Calcutta and Naini and the other two were the branches of the descendants of Mohan-

AIR 1970 SUPREME COURT 1525

(V 57 C 321)

(From: Madras)

A. N. RAY AND I. D. DUA, JJ.

Prem Lata Agarwal, Appellant v. Lakshman Prasad Gupta and others, Respondents.

Civil Appeal No. 350 of 1970, D/- 23-4-1970.

(A) Limitation Act (1908), S. 15 (1) — "Limitation prescribed" — Meaning of — Applicability to S. 48, Civil P. C. (before its deletion).

The expression 'prescribed' in S. 15(1) applies not only to limitation prescribed in the first Schedule to the Limitation Act but also to limitation prescribed in general statute like S. 48 of Civil P. C. (as it stood prior to its deletion). AIR 1952 Mad 186 (FB), Relied on.

(Para 17)

(B) Civil P. C. (1908), S. 38 — Simultaneous execution in more places than one.

Simultaneous execution proceedings in more places than one can be allowed in exceptional cases by imposing proper terms so as to avoid hardship to the judgment-debtors. (Para 13)

lal and of Lala Baijnath Prasad, father of the appellant, respectively. The said joint family had valuable properties in and around the town of Arrah in Bihar. There are alleged to be valuable properties of the joint family also at Allahabad, Banaras, Bombay, Calcutta and Madras.

4. Some time in the year 1926 Lala Pratap Chand, one of the descendants of Mohanlal who was a grand-uncle of Lala Bansilal filed a partition suit in the court of the Subordinate Judge at Allahabad. A preliminary decree was passed in the said partition suit on 14th February, 1927. An appeal was preferred and it was dismissed. An amicable settlement was arrived at in the partition suit on 13th January, 1931 for partition of the properties into five equal lots and allotment of the shares. Thereafter a Commissioner was appointed in the partition suit to go into accounts and prepare five lots. The branches inter se raised disputes as to liability for loans alleged against the joint family. The Commissioner prepared his report on 18th May, 1936. Final decree was passed on 13th January, 1939. An appeal was preferred against the said final decree in the partition suit to the High Court at Allahabad. The appeal was disposed on 6th December, 1949.

5. The plaintiff Lakshman Prasad Gupta and six others filed suit No. 76 of 1937 in the Court of the First Subordinate Judge at Arrah in Bihar and obtained a decree on 20th July, 1938 for Rs. 18,540 and for costs Rs. 1,840/4/- aggregating Rs. 20,380/4/-. This decree was against Banwarilal and other members of the joint family to which the appellant's father belonged. The decree was transferred from Arrah to the Court of the Civil Judge at Allahabad where on 2nd June, 1941 the decree-holder commenced execution proceedings marked as Execution Petition No. 38 of 1941. In that execution petition the decree-holders prayed for attachment and sale of Shri Krishna Desi Sugar Works at Jhusi known as the Jhusi Sugar Mills in the District of Allahabad which belonged to the joint family.

6. The execution proceedings were according to the decree-holders stayed under orders of the Allahabad High Court and after the stay order was vacated the execution proceedings were revived on 13 May, 1950. The

Jhusi Sugar Mill was attached on 11th July, 1952 and it was sold on 19th February, 1955. The sale was set aside on 31st May, 1955 pursuant to objections of the judgment-debtors that the Jhusi Sugar Mill could not be sold because of the provisions of the U. P. Encumbered Estates Act, 1934. It may be stated here that some time in the month of September, 1935 Baijnath Prasad filed an application before the Collector of Allahabad for protection and relief under the U. P. Encumbered Estates Act of 1934 and it was registered as Encumbered Estates Suit No. 25 of 1935.

7. Thereafter the decree-holders on 17th March, 1956 made an application in the Arrah Court for transfer of the decree. On 6th June, 1956, the Subordinate Judge at Arrah transferred the decree to the Madras High Court. On 13th August, 1956 the decree-holders filed in the Madras High Court an application for attaching the properties of the joint family. This application in the Madras High Court is the subject matter of the present appeal.

8. The matter was heard first by the Master of the High Court of Madras who held that the application for execution was barred by limitation. An appeal from the decision of the Master was heard by the learned Single Judge of the Madras High Court who held that the application was not within the mischief of bar of limitation. Thereafter Letters Patent Appeal was heard by a Division Bench of the Madras High Court. The appeal is from the Bench decision upholding the judgment of the learned Single Judge.

9. Before the Master of the Madras High Court the contention on behalf of the judgment-debtors was that the decree was passed on 20-7-1938 and therefore the execution petition filed on 13 August, 1956 was barred by limitation. The decree holders on the other hand contended that the execution of the decree which commenced on 2 June, 1941 before the Civil Judge at Allahabad was stayed till the end of 1949 and was revived on 13 May, 1950 and finally disposed on 31 May, 1955, and, therefore, the execution petition filed on 13th August, 1956 was within time. The Master held that the decree holders had failed to prove as to from what point of time the execution of the

decree was stayed pursuant to the order of the Allahabad High Court and also the time when the stay was vacated. The application for execution was therefore found by the Master of the Madras High Court to be barred by limitation.

10. The learned Single Judge of the Madras High Court referred to the revival of execution proceedings before the Civil Judge at Allahabad on 13th May, 1950 and also the finding of the Civil Judge at Allahabad who in passing the final order on 31 May, 1955 setting aside the sale of the Jhusi Sugar Mill stated that the execution proceedings were stayed by orders of the High Court at Allahabad. The Civil Judge at Allahabad set aside the sale because of the mandatory provisions of Sections 7(2) and 9(5) of the U. P.-Encumbered Estates Act. The Madras High Court placed reliance on Exhibits P. 2, P. 3 and P. 3A on the question of stay of execution proceedings. It may also be stated here that the judgment-debtor did not dispute the translation of those Exhibits P. 3 and P. 3A. The Exhibits set out the orders of the Civil Judge at Allahabad. Exhibit P. 2 is the judgment dated 31 May, 1953 passed by the Civil Judge setting aside the sale of the Jhusi Sugar Mill. Exhibits P. 3 and P. 3A comprise the orders passed by the Civil Judge. The three relevant orders in Exhibits P. 3 and P. 3A are dated 18th August, 1941, 23rd August, 1941 and 30th August, 1941 in the said execution proceedings.

11. The order dated 18th August, 1941 was to the effect that the receivers were to be informed about the execution proceedings and their objections, if any. The receivers were the receivers in the partition suit No. 4 of 1926. The said order further recited that the orders of the High Court at Allahabad in the partition suit were also received in the executing court. The order dated 23rd August 1941 recited that the execution application of the decree-holder was presented in the presence of the lawyers of the decree-holder and the receivers. Further, the order was that the request for permission should be submitted in suit No. 4 of 1926, namely, the partition suit of the defendants judgment-debtors. The order dated 30, August, 1941 recorded by the Civil Judge at Allahabad was inter alia as follows:

"The proceedings remain stopped on account of the injunction of the High

Court. Hence it was ordered that receivers should be informed accordingly. Further steps will be taken after getting permission."

These orders are relied on by the decree-holder to substantiate the case of stay of execution proceedings.

12. The contention which was advanced before the Madras High Court and repeated in this Court was that there was no absolute stay of the execution of the decree. It was amplified to mean that the execution proceedings before the Civil Judge at Allahabad related only to one property and therefore the decree holders would not be entitled to claim benefit of exclusion of time by reason of partial stay of execution proceedings at Allahabad. The Madras High Court rightly found that there was no evidence that the judgment-debtors were possessed of other properties in Allahabad where the decree was being executed. The Madras High Court rightly held that the decree holders were restrained by injunction issued by the Allahabad High Court from executing the decree and were therefore entitled to claim the benefit of Section 15 of the Limitation Act in respect of the period of stay of execution of the decree.

13. It was contended by counsel for the appellant that the decree holder could start execution proceedings in Madras or in other States where the judgment-debtors had properties. Simultaneous execution proceeding in more places than one is possible but the power is used sparingly in exceptional cases by imposing proper terms so that hardship does not occur to judgment-debtors by allowing several attachments to be proceeded with at the same time. In the present case, however, the important features are that a partition suit was instituted in the year 1926 among the defendants and receivers were appointed of the properties. The judgment of the Allahabad High Court dated 6th December, 1949 disposing the appeals filed by the parties in the partition suit directed inter alia

"that the parties will be put in possession of the immoveable properties at once, but the two receivers will be legally discharged only after they have accounted for the period they were in charge of the properties".

Counsel for the decree holder rightly relied on this portion of the judgment of the Allahabad High Court that this

would fortify the construction that there was stay of execution of the decree.

14. In the present case, the effect of the order passed by the Allahabad High Court was recorded by the Civil Judge, Allahabad in his judgment dated 31st May, 1955 to amount to stay of execution proceedings. The order of the Civil Judge, Allahabad dated 30th August, 1941 was that "proceedings remain stopped on account of the injunction order issued by the High Court". In the Madras High Court the parties proceeded on the basis of the order as recorded by the Civil Judge at Allahabad. The order indicates that the stay of execution proceedings was in unqualified terms, namely, that the execution proceedings were stopped. It is not possible to spell out any order of partial stay in the facts and circumstances of the present case as was contended by counsel for the appellant. The order is on the contrary to the effect that there was an absolute stay of execution proceedings. It is, therefore, manifest that the execution proceedings before the Civil Judge at Allahabad were stayed and the decree holder was rightly found by the Madras High Court entitled to the benefit of exclusion of time during which the execution was stayed.

15. Though the judgment-debtors did not question before the Master of the Madras High Court the bona fides of the decree-holder in prosecuting the execution proceedings, that contention was advanced before the learned Single Judge of the Madras High Court. The learned Single Judge of the Madras High Court held that the decree-holders commenced execution proceedings for sale of the Jhusi Sugar Mill for realisation of the decretal amount but the attempt of the decree-holder failed because of the objections of the judgment-debtors under the provisions of the U. P. Encumbered Estates Act. The sale was set aside by reason of the mandatory provisions of the statute. The learned Single Judge of the Madras High Court rightly held that the decree-holders prosecuted the execution case in good faith and with due diligence and were entitled to protection under Section 14 of the Limitation Act.

16. Before the Division Bench of the Madras High Court no argument was advanced touching the bona fides

or good faith with which the execution proceedings were carried on. Counsel for the appellant repeated the contention that the decree holders were guilty of lack of good faith and diligence. It is not open to the judgment-debtors to advance that contention having abandoned the same before the Division Bench of the Madras High Court. We are furthermore of opinion that the conclusion of the learned Single Judge of the Madras High Court on that point is correct.

17. The other question which arose before the Madras High Court was whether S. 15 of the Limitation Act, 1908 would apply to limitation prescribed in statutes other than the Limitation Act. Section 48 of the Code of Civil Procedure until its amendment on the passing of the Limitation Act, 1963 enacted that the decrees of the Civil Courts were to be executed within 12 years and not after that. The present case is governed by S. 48 of the Code of Civil Procedure as it stood prior to the deletion of that section along with the passing of the Limitation Act, 1963. In S. 15 of the Limitation Act, 1908 it is enacted that in computing the period of limitation prescribed for any suit or application for a decree execution of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded. In the Madras High Court it was argued that the word 'prescribed' occurring in Section 15 of the Limitation Act could apply only to cases of limitation prescribed by the First Schedule to the Limitation Act, 1908 with the result that the benefit of exclusion of time by reason of operation of stay could not be availed of in cases of limitation prescribed by Section 48 of the Code of Civil Procedure. The Madras High Court relied on the decision in *Kandaswami Pillai v. Kananappa Chetty*, (1951) 2 Mad LJ 668 = (AIR 1952 Mad 186) (FB) which held that the expression 'prescribed' in Sec. 15 (1) of the Lim. Act would apply not only to limitation prescribed in the First Schedule to the Limitation Act but also to limitation prescribed in general statutes like the Code of Civil Procedure. That is the correct statement of law and counsel for the appellant did not advance any contention to the contrary. It may, however, be stated that the effect of Section 48 of the Code of Civil Procedure is not to supersede the law of limitation with

regard to execution of decrees. The Limitation Act prescribes a period of limitation for execution of decrees. Section 48 of the Code of Civil Procedure dealt with the maximum limit of time provided for execution, but it did not prescribe the period within which each application for execution was to be made. An application for execution was to be made within three years from any of the dates mentioned in the third column of Article 182 of the Limitation Act, 1908. An application for execution of a decree would first have to satisfy Article 182 and it would also have to be found out as to whether section 48 of the Code of Civil Procedure operated as a further bar.

18. In the present case, there was stay of execution proceedings. On 13 May, 1950 the execution proceedings were revived. The judgment-debtors did not challenge the order dated 13 May, 1950. The judgment-debtors impeached the sale only on a ground covered by the U. P. Encumbered Estates Act, 1934. The judgment-debtors further in impeaching the sale of Jhusi Sugar Mill did not advance before the Civil Judge at Allahabad any contention that any of the orders of the Civil Judge at Allahabad reviving the execution proceedings, attaching the Jhusi Sugar Mill and directing the sale of the Sugar Mill was barred by limitation. The principle of *res judicata* applies to execution proceedings. The judgment-debtors in the present case did not raise any objection as to limitation in regard to execution of the decree before the Civil Judge at Allahabad. On the contrary the judgment-debtors asked for setting aside the sale on the basis of revival of execution proceedings. The revival of execution was not challenged and the judgment-debtors are thereby barred by the principle of *res judicata* from questioning directly or indirectly the order dated 13 May, 1950 reviving the execution proceedings.

19. When the appellant made the application for special leave, the appellant referred to an affidavit affirmed by the appellant's father on 12 February, 1957 in the execution proceedings in the Madras High Court. The copy of the said affidavit annexed to the petition for special leave in this Court is in seven paragraphs. In para-

graph 6 of the said affidavit it is alleged that the decree is against 5 branches and the plaintiff Lakshman Prasad in collusion with the other branches excluded the other four branches and chose to proceed only against the appellant's branch though the other four branches were possessed of vast properties. The further allegations in paragraph 6 of the said affidavit are that the object of the plaintiff is to harass only one branch and the application is not bona fide. The plaintiff respondent in answer to the petition for special leave affirmed an affidavit in this Court that paragraph 6 in the said affidavit was an interpolation and was not at all in existence in the affidavit filed in the Madras High Court. The plaintiff respondent obtained a photostat copy of the said affidavit filed in the Madras High Court. The photostat copy established that paragraph 6 was not there and further that the affidavit was affirmed at Allahabad on 12 February, 1957 and not at Madras. Furthermore, the affidavit was explained to the deponent Baijnath Prasad as will appear from the photostat copy as annexed to the petition whereas in the copy annexed to the petition for special leave there was no such statement. It is a serious matter that the appellant asked for relief on the basis of false copies of affidavits. An explanation was suggested in the affidavit of the appellant that the copy was annexed in accordance with the draft that had been sent by the Madras lawyer. It is beyond comprehension as to how an incorrect copy would be sent by the Madras lawyer. Counsel for the appellant realised the gravity of the situation and conceded that the matter should be proceeded with on the basis as if paragraph 6 did not exist. The appellant is guilty of lack of *uberrima fides*. We have therefore proceeded on the basis that paragraph 6 did not exist in the copy of the said affidavit.

20. The Madras High Court upheld the order of the learned Single Judge entitling the decree-holder to the exclusion of the period spent in prosecuting prior infructuous execution proceedings before the Civil Judge at Allahabad. The decree-holder was allowed to proceed with the execution proceedings and the Madras High Court remitted the matter to the Master to consider the questions indicated in the judgment and the judgment-debtors

were allowed to raise objections to the executability of the decree apart from those of limitation as indicated in the judgment of the learned Single Judge. We are of opinion that the Madras High Court is right in holding that the decree-holder is entitled to the benefit of exclusion of time during which the execution proceedings were stayed by the order of the Allahabad High Court and the decree-holder proceeded with the said execution proceedings in good faith and with due diligence.

21. For these reasons we are of opinion that the appeal fails. The appellant will pay the costs to the respondents.

Appeal dismissed.

AIR 1970 SUPREME COURT 1530 (V 57 C 322)

(From Madras : (1963) 2 Mad LJ 118)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Indian Overseas Bank Ltd. Appellant v. The Commissioner of Income Tax Madras, Respondent.

Civil Appeal No. 615 of 1967, D/- 23-4-1970.

Income-Tax Act (1922), S. 10 (2) (vi) (b) Proviso (b)—Development rebate — Condition precedent — Creation of reserve in compliance with Section 17 of Banking Companies Act is not a sufficient compliance with the requirement of proviso (b) — Reserve contemplated by the Proviso is an independent reserve — (1963) 2 Mad LJ 118, Affirmed. (Paras 2 and 9)

Cases Referred: Chronological Paras (1965) AIR 1965 Mad 533 (V 52)=

(1965) 55 ITR 35, Commr. of Income Tax v. Veeraswami Nainar

The following judgment of the Court was delivered by

HEGDE, J.: At the instance of the assessee, the Income Tax Appellate Tribunal (Madras Bench) referred to the High Court of Madras a statement of case under S. 66 (1) of the Indian Income Tax Act, 1922 (to be hereinafter referred to as the Act). The High Court answered one of the questions submitted along with the statement of case in favour of the assessee and the other in favour of the Revenue.

FN/FN/B953/70/CWM/P

nue. The Revenue has not appealed against the decision of the High Court to the extent it went against it but the assessee has brought this appeal by certificate challenging the correctness of the view of the law taken by the High Court on question No. 1 submitted for its opinion.

2. The question of law that we have to consider in this appeal is:

"Whether the creation of a reserve in compliance with S. 17 of the Banking Companies Act is sufficient compliance with the requirements of S. 10 (2) (vi) (b) proviso (b) of the Indian Income-tax Act, 1922"

3. The authorities under the Act as well as the High Court have answered this question in the negative.

4. The appellant is a public Limited Company carrying on banking business. For the calendar year 1958 the previous year relating to the assessment year 1959-60, the appellant claimed allowance by way of development rebate under proviso (b) of S. 10 (2) (vi) (b) amounting to Rs. 1,37,836/- in the computation of its business income.

5. The admitted facts of the case are: that during the accounting year relating to the assessment year, the appellant Company had transferred a sum of Rs. 6 lakhs from the profit and loss account to the reserve fund. This sum is sufficient to meet the requirements of S. 17 of the Banking Companies Act, 1949 as well as of proviso (b) to S. 10 (2) (vi) (b) of the Act but no separate reserve fund as required by proviso (b) to S. 10 (2) (vi) (b) had been created. The contention of the appellant is that as the transfer to the reserve is sufficient to meet the requirements of Section 17 of the Banking Companies Act, 1949 as well as of proviso (b) to section 10 (2) (vi) (b) of the Act, in substance, if not in form, it has complied with the requirements of law and therefore it is entitled to the allowance of the rebate claimed. We are in agreement with the High Court that the appellant is not entitled to the allowance by way of development rebate claimed. The rebate under proviso (b) of S. 10(2) (vi) (b) is a concession granted but that concession is made subject to fulfilment of certain requirements. The grant of this allowance is made subject to the conditions prescribed in proviso (b) to Explanation (2) to S. 10(2) (vi) (b). The relevant portion of that proviso reads:

".....an amount equal to seventy-

five per cent of the development rebate to be actually allowed is debited to the profit and loss account of the relevant previous year and credited to a reserve account to be utilised by him during a period of ten years for the purposes of the business of the undertaking except....."

6. The creation of the reserve contemplated by this provision is a condition precedent for obtaining the allowance of development rebate. Admittedly the appellant has not created any such separate reserve. Section 17 of the Banking Companies Act, 1949 prescribed:

"Every banking company incorporated in India shall maintain a reserve fund, and shall, out of the net profits of each year and before any dividend is declared, transfer a sum equivalent to not less than twenty per cent of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.

Explanation: For the purposes, of this section, the expression 'net profits' shall have the meaning assigned to it in sub-section (3) of section 87C of the Indian Companies Act, 1913 (VII of 1913)."

7. The reserve contemplated by that provision is a separate reserve. The amount transferred to that reserve cannot be utilised for business purposes. The reserve contemplated by proviso (b) to section 10 (2) (vi) (b) of the Act is an independent reserve. The amount to be transferred to that reserve is debited before the profit and loss account is made up. That amount is required to be credited to a reserve account to be utilised by the assessee during a period of ten years for the purposes of the business of the undertaking. The nature of the two reserves are different. They are intended to serve two different purposes. As observed by the Madras High Court in Commr. of Income Tax v. Veeraswami Nainar, (1965) 55 ITR 35 = (AIR 1965 Mad 533) that the object of the legislature in allowing a development of the assessee's business from out of the reserve fund is apparent from the terms of the proviso. The entries in the account books required by the proviso are not an idle formality. The assessee being obliged to credit the reserve fund for a specific purpose, he cannot draw upon the same for purposes other than those of the business and that amount cannot be distributed

by way of dividend. It is also clear from the terms of the proviso that the transfer to the reserve fund should be made at the time of making up the profit and loss account.

8. The assessee not having complied with the requirements of S. 10 (2) (vi) (b) read with Explanations thereto, he is not entitled to claim the allowance in question.

9. In the result our answer to the question formulated above is in the negative. This appeal is accordingly dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1531 (V 57 C 323)

(From Calcutta : AIR 1967 Cal 530)
J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Commissioner of Income Tax, Calcutta, Appellant v. Birla Bros. (P) Ltd., Respondent.

Civil Appeal Nos. 2380 and 2381 of 1966, D/- 23-4-1970.

Income-tax Act (1922), S. 10 (2) (xi) — Bad debt — Conditions for claiming allowance — Assessee managing agents — Assessee guaranteeing repayment of debt advanced to selling agent of managed company — Amount paid in discharge of guarantee — Held not permissible deduction — AIR 1967 Cal 530, Reversed.

'Bad debt' means a debt which would have gone into the balance sheet as a trading debt in the business or trade. It must arise in the course of and as a result of the assessee's business. The deduction claimed should not be too remote from the business carried on by the assessee.

(Para 5)

The assessee company carrying on the business of banking, financing and managing agency had stood guarantee, for a loan advanced by G Bank to the selling agents of one of the companies managed by the assessee. Since the selling agents failed to repay the loan the assessee paid the amount to G Bank in pursuance of the guarantee. But as the selling agents had gone into liquidation, the assessee treated the amount paid as bad debt and claimed it as allowable deduction under S. 10 (2) (xi). Neither the memorandum of

association nor the managing agency agreement contained any provision by which it could be said that the guaranteeing of the loan made by the Bank to the selling agents was done in the course of the managing agency business. There was no privity of contract or any legal relationship between the assessee and the selling agents. Neither under custom nor under any statutory provision or any contractual obligation was the assessee bound to guarantee the loan advanced by the Bank to the selling agents.

Held that on the facts and circumstances the allowance claimed was not admissible under Sec. 10(2) (xi). AIR 1956 SC 571 Rel. on; (1957) 31 ITR 72 (Bom) and (1967) 65 ITR 625 (SC) Disting; AIR 1967 Cal 530, Reversed.

(Paras 5 to 7)

Cases Referred: Chronological Paras

(1967) 65 ITR 625 (SC), Essen

Pvt. v. Commr. of I. T. Madras 5

(1957) 31 ITR 72 (Bom), Commr.

of I. T. Bombay v. Abdullabhai

Abdulkadar 5

(1956) AIR 1956 SC 571 (V 43)=

30 ITR 174, Madan Gopal Bagla

v. Commr. of I. T. W. B. 5

Following Judgment of the Court was delivered by

GROVER, J.: These appeals by certificate arise out of a common judgment of the Calcutta High Court in two Income Tax References.

2. The assessee is a private limited company. It carried on the business of banking and financing as also of managing agency. Starch Products Ltd. was one of the various companies which was being managed by the assessee. Starch Products had appointed the U. P. Sales Corporation Ltd. as its selling agent. The assessee claimed to have stood guarantee for a loan of Rs. 6 lakhs which was advanced to the U. P. Sales Corporation Ltd. by the Gwalior Industrial Bank Ltd. The borrower failed to pay the loan which on August 2, 1948 stood at Rs. 5,60,199/-. This amount was paid by the assessee pursuant to the guarantee. Thereafter the assessee treated the U. P. Sales Corporation Ltd. as its debtor for the aforesaid amount. That company went into liquidation and as the assessee could not recover anything from it a sum of Rs. 5,60,199/- was written off in the books of the assessee company. The claim was not entertained either

by the Income tax Officer or the Appellate Assistant Commissioner. Before the Income tax Officer the said amount was claimed as bad debt, vide assessee's letter dated September 12, 1957. The Income tax Officer rejected the explanation furnished by the assessee for advancing such large amount to a company whose financial position was far from satisfactory. According to him the advance was not a bona fide money lending investment. Subsequently it was sought to be established before the Income tax Officer that indemnity had been given to the Gwalior Industrial Bank Ltd. in the matter of the loan account of the U. P. Sales Corporation Ltd. and the payment had been made on its failure to clear the debt of the Bank. According to the Income tax Officer the assessee was asked to produce evidence about the guarantee having been furnished but he was not satisfied that there was any directors' resolution authorising the furnishing of a guarantee or that the document purporting to be a guarantee had been properly stamped or that there was other sufficient evidence to establish the transaction. Before the Appellate Asst. Commr. the only substantial ground taken was that the Income tax Officer had wrongly disallowed the claim for bad debt amounting to Rs. 5,60,199/-. The Appellate Assistant Commissioner considered the question of the aforesaid amount being an admissible deduction or allowance under S. 10 (2) (xi) of the Income tax Act 1922. In his opinion the guaranteeing of a loan though made in the interest of the assessee's business and as a matter of commercial expediency, did not represent an advance made in the normal course of the assessee's business. Such an advance could have been made only if it had been made to the company managed by the assessee under a contractual obligation to guarantee the finances of the managed company. According to him the claim for irrecoverable loan would have been also admissible if the assessee could establish that the loan represented an interest bearing advance made in the course of the assessee's money lending business but that was not the case of the assessee. And since the loan had been advanced to assist a concern having trade relations with one of the managed companies it could not be allowed as a permissible deduction.

3. The appellate tribunal did not agree with the finding of the Appellate Assistant Commissioner that the loss was not directly incidental to the assessee's business. This is what the tribunal stated in its order:

"The Appellate Assistant Commissioner, in our opinion, failed to appreciate the special nature of the business carried on by the assessee. This is not a case where any money was advanced by the assessee for the purpose of earning interest. All that the assessee did was to stand surety for the money advanced by a Bank to the selling agent of one of its managed companies. If, such a guarantee was not given Messrs. Starch Products Ltd., one of the managed companies, would have had to give extended credit to the selling agent and this could be possible if the managed company in its turn was financed either by the managing agents or a third party. It was to obviate the necessity of such borrowing by the managed company that the assessee company stood guarantee for the loan given by Gwalior Industrial Bank Ltd. to U. P. Sales Corporation Ltd. It was only on the failure on the part of the borrower, i.e. U. P. Sales Corporation Ltd., to fulfil its commitment that the assessee as a guarantor came into the picture. There was, therefore, no question of earning of any interest on any money advanced. It was in the larger interest of the assessee's business that the guarantee was given. The standing of surety for the sales organisation of the managed company and the consequent loss arising therefrom was in our opinion germane to the assessee's business. It is now well established that a sum of money extended not of necessity and with a view to give a direct and immediate benefit to the trade but voluntarily and on the ground of commercial expediency and in order to indirectly facilitate the carrying on of the business, may yet be an allowable deduction in computing the profits and gains of the business."

The Tribunal held that the assessee's claim for the loss of Rs. 5,60,199/- was an admissible deduction. At the instance of the Commissioner of Income tax, the Tribunal referred the following question of law to the High Court:

"Whether on the facts and in the circumstances of the case, the sum of

Rs. 5,60,199/- was an admissible deduction in computing the business profits of the assessee."

Three other questions were referred to the High Court on an application made under S. 66 (2) of the Act. It is unnecessary to refer to them as the real controversy has centred on the above question alone.

4. The High Court addressed itself to the question whether the amount in dispute fell within S. 10 (2) (xi) of the Act. The finding of the Appellate Assistant Commissioner that the guarantee had in fact been furnished to the Bank was not disputed. This is what the High Court said after referring to certain decided cases and the relevant portion of the Tribunal's judgment:

"We agree that it was in the larger interest of the assessee's business that the guarantee was given and we are of the opinion that the debt was incidental to the business of the assessee within the meaning of S. 10 (2) (xi) of the Act and such a debt was found to be irrecoverable in the relevant accounting year commencing on the 31st October 1951 and ending on the 18th October 1952."

5. While computing profits or gains of business under S. 10 certain allowances have to be made under sub-section (2). The allowance covered by clause (xi) thereof has to be made when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, of such sum, in respect of bad and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money-lending business, of such sum in respect of loans made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee. Now bad debt means a debt which would have gone into the balance sheet as a trading debt in the business or trade. It must arise in the course of and as a result of the assessee's business. The deduction claimed should not be too remote from the business carried on by the assessee. In *Madan Gopal Bagla v. Commr. of I. T. W. B.*, 30 ITR 174 = (AIR 1956 SC 571) the principle which was accepted was that the debt in order to fall within Section 10(2)(xi) must be

one which can properly be called a trading debt i.e. a debt of the trade, the profits of which are being computed. It was observed that the assessee in that case was not a person carrying on business of standing surety for other persons nor was he a money-lender. He was simply a timber merchant. There was some evidence that he had from time to time obtained finances for his business by procuring loans on the joint security of himself and some other person. But it was not established that he was in the habit of standing surety for other persons along with them for the purpose of securing loans for their use and benefit. Even if such had been the case any loss suffered by reason of having to pay a debt borrowed for the benefit of another would have been a capital loss to him and not a business loss at all. A businessman may have to stand surety for some one in order to get monies for his own business. There may be a custom of the business by which that may be the only method whereby he could get money for the purpose of his own business. If he is to discharge a surety debt and if any such custom is established it would be a business debt. If the assessee has made a payment not voluntarily but to discharge a legal obligation which arises from his business he would be entitled to have the amount deducted as a bad debt under Section 10(2)(xi); see Commr. of I. T. Bombay v. Abdullabhai Abdulkadar, (1957) 31 ITR 72 (Bom). In *Essen Private Ltd. v. Commr. of I. T. Madras*, (1967) 65 ITR 625 (SC) the appellant carried on business as a managing agent of several concerns. Pursuant to the agreement with one of the companies managed by it it advanced large sums of money to the managed company and also guaranteed a loan of Rs. 2 lakhs obtained by that company from a Bank. The managed company failed in its business and upon the Bank pressing for payment the appellant in accordance with its guarantee made certain payments to that Bank. The assessee had ultimately to write off certain sums in its books as bad debts and it claimed that allowance under Section 10(2)(xi). The Tribunal found that the advances to the managed company and the agreement guaranteeing the loan to the managed company were in pursuance of its objects and were made in the course of its business and the claim was allowed. That decision was finally

affirmed by this court. In this case there was a clause in the memorandum of association by which the assessee was entitled to lend monies and to guarantee the performance of contracts. Similarly the managing agency agreement contained a clause about lending and advancing of money to the managed company. It was found by the appellate tribunal that it was a part of the managing agency to provide funds to the managed company. In the present case none of those facts has been found. Neither the memorandum of association nor the managing agency agreement contained any such provision by which it could be said that the guaranteeing of the loan made by the Bank to the selling agents was done in the course of the managing agency business.

6. In our judgment the facts relied upon by the appellate tribunal and the High Court are barely sufficient for bringing the allowance claimed under Section 10(2)(xi). It may be mentioned that the case of the assessee was confined to that provision and no reliance was placed on any other provision under which such an allowance could be claimed. There was no privity of contract or any legal relationship between the assessee and the selling agent. Neither under custom nor under any statutory provision or any contractual obligation was the assessee bound to guarantee the loan advanced by the Bank to the selling agent. It is difficult how it was in the interest of the assessee's business that the guarantee was given. There was even no material to establish that the managed company was under any legal obligation to finance the selling agent or to guarantee any loans advanced to the selling agent by a third party. It is incomprehensible in what manner the guaranteeing of the loan advanced to the selling agent indirectly facilitated the carrying on of the assessee's business. It is equally difficult to appreciate the observations of the High Court that it was in the larger interest of the assessee's business that the guarantee was given. In our opinion the view of the appellate tribunal was based on a complete misapprehension of the true legal position. The High Court also fell into the same error. The allowance which was claimed did not fall within Section 10(2)(xi). No attempt was made nor indeed it could be usefully made to claim any allow-

ance under Section 10(2)(xv) of the Act.

7. For the reasons given above the correct answer to the question referred should be in the negative and against the assessee. The appeals are thus allowed with costs and the judgment of the High Court is set aside. One hearing fee.

Appeals allowed.

AIR 1970 SUPREME COURT 1535 (V 57 C 324)

(From: AIR 1965 Kerala 294)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Gift Tax, Kerala, Appellant v. Dr. George Kuruvilla, Respondent.

Civil Appeal No. 764 of 1967, D/- 24-4-1970.

Gift Tax Act (1958), S. 5(1)(xiv) — Exemption — Gift must be in the course of carrying on business etc. and made bona fide for purpose of such business etc. — Gift is not exempt from tax merely because it is made by person carrying on business or because property gifted is used for purpose for which it was used by donor — Gift by medical practitioner to his son out of love and affection not exempt — AIR 1965 Ker 294, Reversed. (Para 6)

The following Judgment of the Court was delivered by

SHAH, J.: By our order dated 1-1-1969, we directed the Income-tax Appellate Tribunal to submit a supplementary statement of the case together with a copy of the deed of gift dated February 3, 1960 executed by the respondent. The Tribunal has submitted the supplementary statement of the case together with a copy of the deed of gift executed by the respondent on February 3, 1960.

2. The respondent is a medical practitioner. By the deed dated February 3, 1960 he has given to his son Thomas four items of property: (1) one-fifth share in cardamom estate valued at Rs. 3,030.80; (2) 1.38 cents of garden land valued at Rs. 4,500; (3) G. K. Hospital Building erected on the garden land valued at Rs. 17,250; and (4) Other rights valued at Rs. 6,000.

3. In response to a notice under Section 13(2) of the Gift Tax Act 18 of

1958 the assessee filed a return for the assessment year 1960-61 disclosing taxable gifts of property valued at Rupees 27,251. But he claimed exemption in respect of Item No. (2), i.e. the garden land. In the course of the hearing the respondent claimed that the G. K. Hospital Building Item No. (3) was also exempt from liability to gift-tax because of Section 5(1)(xiv) of the Gift-tax Act. It was the case of the respondent that his son Thomas had graduated in the medical science at an examination held in December 1959 and had joined the respondent's profession as a House Surgeon in July 1960, and on that account the gifts in respect of Items (2) and (3) were exempt from liability to tax. The Gift-tax Officer rejected the claim. The Appellate Assistant Commissioner confirmed the order of the Gift tax Officer. The Appellate Tribunal held that the respondent was entitled to exemption in respect of Items (2) and (3).

4. At the instance of the Commissioner of Gift Tax, the Tribunal referred the following question to the High Court of Kerala for opinion:

"Whether on the facts and in the circumstances of the case, the assessee was entitled to the exemption in respect of G. K. Hospital and the adjoining land of 1.38 cents under Section 5 (1) (xiv) of the Gift Tax Act?" The High Court answered the question in the affirmative. The Commissioner of Gift Tax, Kerala, has appealed to this Court.

5. Section 5 of the Gift Tax Act provides for exemption in respect of certain gifts: insofar as it is relevant it provides:

"(1) Gift-tax shall not be charged under this Act in respect of gifts made by any person—

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(xiv) in the course of carrying on a business, profession or vocation, to the extent to which the gift is proved to the satisfaction of the Gift-tax Officer to have been made bona fide for the purpose of such business, profession or vocation."

The respondent practises the profession of medicine. A few months after the deed of gift his son Thomas also qualified to be a medical practitioner. But there is nothing in the deed of gift which even remotely suggests that the gift was made by the respondent in the course of his profession and bona fide for the purpose of carry-

In paragraph 14 it is averred that Ranu Misser had appointed Rangin son of Bouku as adopted son and that Ranu thereafter lived with him and on his death Rangin performed the obsequial ceremonies and entered into possession and occupation of his entire estate as legal heir and had been appropriating the produce thereof since that day. These averments clearly show that the three branches were in separate possession of their respective shares.

5. Pursuant to the award made by the arbitrators and the decree passed by the Court the Commissioner appointed by the Court had made a memorandum of partition setting out the shares of the three branches between whom the properties were divided. Again after this suit was instituted for partition by Bouku in 1949 a Commissioner was appointed to inspect the lands in respect of which the share was claimed by Bouku and his descendants. It was found that each disputed plot of land in the villages Saurath and Pokhrauni was found divided into three parts. Apparently these lands were found entered in the names of the parties in the revenue records. The Zamindar treated the three brothers as holders of the land jointly under him but that did not alter the true relation inter se between them. It is also not disputed by the plaintiffs that they and the other branches had sold some parts of the land as their exclusive property and had mortgaged some others and had been collecting rents and profits in respect of those properties.

6. Plaintiff and other members of the family have been dealing since 1914 with the joint family properties in their possession. For instance, Ext. A series are sudbharana bonds of different dates executed by different members of the family including the plaintiff Bouku. Then there is a document Ext. B of June 1929 which is a deed executed by Bouku to one Hitlal, whereby 5 kathas 10 dhurs were exchanged by Bouku out of Khasra No. 1643 for another land. There are again two documents Exts. C and C/-1, Ext. C being a sale deed by Jaibodh son of Basudeo and Ext. C/-1 by Basudeo under which lands which fell to the share of Basudeo had been sold. These documents clearly indicate that parts of the land which were in the possession of Basu-

deo and his sons were transferred by them. Exhibit C/2 is a sale deed executed by one Subans Pasban and others to Maneshwar Jha and in that document there was a recital stating that "out of three landlords, Balkrishna Missir (son of Makund) was the landlord to the extent of 6 annas, Bouku Missir was to the extent of 5 annas and Jaibodh (son of Basudeo) to the extent of remaining 5 annas".

7. These transactions are referable to the title arising under the award made in the suit filed by Basudeo being suit No. 187 of 1914 in the Court of the Subordinate Judge, Darbhanga. Suit No. 187 of 1914 was filed by Basudeo against Makund and Bouku and two others. On September 14, 1914 the Subordinate Judge ordered that a preliminary decree be passed in terms of the arbitrators' award and that a Commissioner be appointed to effect partition according to the award of the arbitrators. The terms of the award were:

"We have heard the parties and their witnesses. It appears to us that they had settled amongst themselves before the arbitrators of the suit that the plaintiff (Basudeo) should be given 5 annas share, that Bouku should be given 5 annas and Makund should get six annas share in all the properties, movable and immovable. We are also of opinion that the settlement is a fair one inasmuch as Makund was the earning member of the family and by his exertion above the bulk of the properties was acquired. Therefore, we give effect to this settlement and hold that the plaintiff will get 5 annas, Bouku will get 5 annas and Makund will get 6 annas. We also hold that all the properties are joint and hence they should be divided in proportion to the above shares. The property which has been given to the widow of the deceased Ranu under will of September 8, 1913 will remain in her possession during her lifetime, without any power of alienation and on her death it will devolve upon the three brothers or their heirs and representatives in proportion to the said shares. We are also satisfied that Makund's son Toonai has performed the Sradh of Ranu. Hence he should be given one hundred rupees from joint fund. . . .

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Be it noted that the properties to be divided are the lands, houses and

bonds only. The claim for rest of the movable properties is disallowed".

8. It appears that after this preliminary decree was passed by the Court, a Commissioner was appointed. But ultimately the suit was dismissed on the ground that the Commissioner's fee was not paid. But the dismissal of the suit cannot operate to wipe out the preliminary decree.

9. Counsel for the plaintiffs sought to raise two contentions before us in support of the plea that the decree was not binding upon the plaintiffs: (1) that Bouku was not served as a party in the suit; and (2) that the arbitrators had acted improperly in giving to Makund 6 annas share, whereas he was entitled to only $\frac{5}{4}$ (five annas four pies) share. There is no substance in either contention.

10. But, pursuant to the division made in 1914 the shares of the three branches were demarcated by the Commissioner and the three branches remained in separate possession of the properties allotted to them under that partition. The record of the suit No. 187 of 1914 was it was reported destroyed. But that fact will not enable the plaintiff to get any advantage because the subsequent conduct of Bouku clearly shows that he had taken possession of the properties pursuant to the award and had acted upon the award as being effective. It would be reasonable to infer that a decree binding a person would not be made unless he was duly served with the writ of summons from the Court.

11. The ground that the arbitrators had awarded to Makund a larger share cannot also invalidate the award. It appears that the division was made by agreement between the parties, and Makund was given 6 annas share. Apparently Makund claimed that he was the eldest member and that some of the properties claimed by Basudeo to be joint family properties were acquired by him by his own exertion. The arbitrators apparently accepted that contention and the parties agreed to the award, 35 years after that date and after the terms of the award were carried out, it was not open to one of the parties to raise a contention that the arbitrators had acted improperly in awarding to Makund a larger share than what was awardable to him under the Hindu Law relating to partition.

12. The claim to a half anna share in the properties on the footing that Ranu's share had devolved upon Bouku is futile. The award in terms provides that Ranu's share was to remain in the possession of Alikrani and on her death to be divided between the three branches in the same proportion in which the joint family property was divided. Alikrani died in 1946. Ranu could obviously not make a will of his undivided share in the properties. But the parties agreed that the share of Ranu should be held by his widow, Alikrani for her life and after her death it should be divided according to the shares in the joint property. Under the terms of the award Bouku gets no interest in the property and his claim that his son Rangī was adopted, and that he Bouku had by adverse possession acquired title to Ranu's share is not supported by any evidence.

13. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 1539 (V 57 C 326)

(From Patna — 1966 B. L. J. R. 142)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Kanpur Sugar Works Ltd. Appellant v. State of Bihar and others, Respondents.

Civil Appeal No. 169 of 1967, D/- 6-3-1970.

Tenancy Laws — Bihar Land Reforms Act (30 of 1950), S. 7 (1) — Homestead—Factory having for benefit of workers, staff quarters, clubs, kitchens etc. — Buildings would not fall within S. 7 (1) — Definition of 'factory' in Factories Act cannot be any guide in determining meaning of 'factory' in S. 7 — 1966 B. L. J. R. 142, Reversed.

Where a factory has, for the benefit of the workmen and managerial staff working in the factory, constructed buildings used as bungalows, quarters for employees, clubs, kitchens, garage, dispensary, rest-house, outhouses etc., but which are not directly used as factory or mill buildings, the buildings would not fall within S. 7 (1) as buildings in the possession of an intermediary and used as golas, factories or

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mills. These lands are homestead and are claimable by an intermediary under S. 5 (1) : if they are used for the purpose of letting out they would be liable to pay fair and equitable ground-rent under the proviso to sub-section (1) of S. 5. 1966 B. L. J. R. 142, Reversed. (Para 5)

The definition of "factory" in the Factories Act cannot be a guide, much less a useful guide, in determining the meaning of the expression "factory" as used in S. 7 (1). (Para 6)

The following judgment of the Court was delivered by

SHAH, J.: Kanpur Sugar Works Ltd. a public limited Company is engaged in the business of manufacturing sugar in village Marhowrah, District Saran, in the State of Bihar. Prior to 1956 it possessed a considerable zamindari property. Under a notification issued in exercise of the power under the Bihar Land Reforms Act 30 of 1950 the entire zamindari vested in the State with effect from January 1, 1956. But by the provisions of the Act homestead lands and lands of the factory remained in the occupation of the Company. The Circle Officer commenced a rent assessment proceeding under the Bihar Land Reforms Act for determining the rent payable by the Company. The Company claimed to classify lands in its occupation under three heads : (i) 12 bighas 9 kathas 7 dhurs on which the factory buildings stood, and on that account assessable to rent under S. 7 of the Bihar Land Reforms Act, 1950; (ii) 50 bighas 3 kathas 13 dhurs of cultivable land under Khas cultivation of the Company liable to assessment of rent under S. 6 of the Act; and (iii) 71 bighas 2 kathas 12 dhurs as homestead land not liable to assessment under sub-s. (1) of S. 5 of the Act.

2. By order dated February 10, 1961 the Circle Officer fixed rent at the rate of Rs. 187-8-0 per acre in respect of 80 bighas 16 kathas 15 1/2 dhurs of land under S. 7 of the Act. The circle Officer rejected the contention of the Company that 71 bighas 2 kathas 12 dhurs of land on which there stood residential bungalows, quarters, garage, kitchens, clubs, dispensary, rest-house, outhouses, office buildings, tube-well and water tank, godown, cattle-shed, weighbridge house etc. was homestead and was on that account exempt from liability to pay rent. Appeal against

that order was dismissed by the Collector of Saran by his order dated August 6, 1962.

3. The Company then moved a petition in the High Court of Patna for a writ quashing the order of the Circle Officer and the Collector fixing the rent under S. 7 of the Bihar Land Reforms Act, 1950, in respect of the land claimed to be homestead. The High Court rejected the petition. In the view of the High Court the expression "factory" could not mean merely the place where the machinery is installed and the process for the manufacture of sugar or distillation of liquor is carried on, but the whole area of land including the courtyard necessary for carrying on various operations. The High Court recorded the conclusion as follows:

"... the buildings and structures used for the aforesaid ancillary purposes of the factory must also be held to form part of the factory and the land on which they stand must include not only the actual site on which the structures are erected but also the adjacent land necessary for the convenient use of the said structures and buildings. The whole of the land covered by the outer enclosure would, therefore, be, on a reasonable interpretation of S. 7 (1) of the Act, included within the words "buildings or structures" used as factories for the purpose of the said sub-section, even though that area may include some vacant land as well."

The High Court further observed that the proviso to S. 5 (1) of the Act had no application, because (1) the staff quarters cannot be clearly demarcated from the other structures and buildings located within the outer enclosure used for the purpose of the factory, such as rest-house, outhouses, office-buildings, tube-well, water tanks, godowns, cattle-shed, weighbridge etc; and (2) though the occupants of the staff quarters pay rent to the factory, nevertheless it cannot be said that those quarters are used "for the purpose of letting out on rent." The High Court then proceeded to state that

"the mere fact that some rent is incidentally collected from the occupants will not detract from the main purpose for which the quarters are used, namely, to facilitate the proper working of the factory. The occupation by a member of the staff of the factory of those quarters is that of a

servant of the factory and not that of an ordinary tenant. It was not alleged, nor is there a finding to the effect, that he can continue to occupy the quarters if he ceases to be a member of the staff of the factory or else that he can sub-let the house to some other person like an ordinary tenant. The relationship between the occupant of these quarters and the factory continues to be that of a master and servant and not that of an ordinary landlord and tenant."

Against the order dismissing the writ petition, this appeal has been filed with certificate granted by the High Court.

4. In our view, the order passed by the High Court cannot be sustained. It appears that there are two enclosures which comprise the total area of 83 bighas odd in respect of which the dispute arises. One is the inner enclosure in which are situate the buildings of the factory in which sugar is manufactured and the process of distillation of liquor is carried on. The outer enclosure consists of an area of 71 bighas 2 kathas and 12 dhurs. In the statement of land in the Khas possession of the company all these lands are described as used for residential quarters, cutcheri, dispensary, rest-house, bungalows, outhouses, kitchen quarters, latrines, garage, club, control office, watertank, "bakery house", cane office quarters, godowns, cattle-shed, weighbridge house, tube-well etc." The dispute raised by the Company is that the land on which these buildings stand is homestead, and is governed by S. 5 of the Act.

5. By a notification issued under S. 3 of the Bihar Land Reforms Act, 1950, the State Government may declare that an estate or tenure of the proprietor or tenure-holder, specified in the notification has passed to and become vested in the State. The consequences of vesting are set out in S. 4. But the vesting under Ss. 3 and 4 is subject to the provisions of Ss. 5, 6 and 7. Under sub-s. (1) of S. 5 it is provided:

"With effect from the date of vesting, all homesteads comprised in an estate or tenure and being in the possession of an intermediary on the date of such vesting shall, subject to the provisions of sections 7A and 7B be deemed to be settled by the State with such intermediary and he shall be en-

titled to retain possession of the land comprised in such homesteads and to hold it as a tenant under the State free of rent:

Provided that such homesteads as are used by the intermediary for purposes of letting out on rent shall be subject to the payment of such fair and equitable ground-rent as may be determined by the Collector in the prescribed manner."

Section 6 deals with the right of the previous holder of land used for agricultural or horticultural purposes which were in khas possession of an intermediary on the date of vesting. In this case, we are not concerned with any dispute relating to such land. By S. 7 (1), insofar as it is relevant, it is provided:

"Such buildings or structures together with the lands on which they stand, other than any buildings used primarily as offices or cutcheries referred to in clause (a) of section 4, as were in the possession of an intermediary at the commencement of this Act and used as golas, factories or mills, for the purpose of trade, manufacture or commerce or x x x and constructed or established and used for the aforesaid purposes before the first day of January 1946, shall x x be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession of such buildings or structures together with the lands on which they stand as a tenant under the State subject to the payment of such fair and equitable ground-rent as may be determined by the Collector x x x "

It is clear from a bare perusal of sub-section (1) of S. 7 that the buildings which are primarily used as offices or cutcheries referred to in cl. (a) of S. 4 as were in the possession of an intermediary at the commencement of the Act are excluded from the terms of S. 7 (1). Again, sub-s. (1) only applies to such buildings or structures together with the lands on which they stand which are used as golas, factories or mills for the purpose of trade, manufacture or commerce or used for storing grains or keeping cattle or implements for the purpose of agriculture. The expression employed by the Legislature is "used as golas, factories or mills" and not "used for golas, factories or mills". The expression "lands on which they stand" may include the land which is necessary

for the efficient user of the building for the purpose for which it is intended to be used. We are unable however to hold that because a factory has, for the benefit of the workmen and managerial staff working in the factory, constructed buildings used as bungalows, quarters for employees, clubs, kitchens, garage, clubs, dispensary, rest-house, outhouses etc., but which are not directly used as factory or mill buildings, the buildings would be deemed to fall within S. 7 (1) as buildings in the possession of an intermediary and used as golas, factories or mills. In our judgment, these lands are homestead and are claimable by an intermediary under S. 5 (1): if they are used for the purpose of letting out they would be liable to pay fair and equitable ground-rent under the proviso to sub-s. (1) of section 5.

6. The High Court was, we think, in error in relying upon the definition of "factory" used in the Factories Act, 1948. The scheme and subject of the Factories Act are different. The Act is intended to regulate labour in factories, to protect workmen from being subjected to unduly long working hours, for making provision for healthy and sanitary conditions of service, and for protecting the workmen from industrial hazards. The definition of "factory" in the Factories Act cannot be a guide, much less a useful guide, in determining the meaning of the expression "factory" as used in the Bihar Land Reforms Act, 1950. The liability to pay rent under the Bihar Land Reforms Act, 1950, on the footing that the land remained in the possession of the intermediary on which buildings or structures used as golas, factories or mills, for the purpose of trade, manufacture or commerce must be determined on the terms used in the Bihar Land Reforms Act, and not by incorporating words used in another statute of which the scheme and object are different.

7. The revenue authorities erred in holding that the entire area of 83 bighas odd was liable to be assessed to rent under S. 7(1) of the Bihar Land Reforms Act, 1950. Undoubtedly an area of 12 bighas 9 kathas 7 dhurs is liable to be assessed to rent under Section 7(1) of the Act. If there are other lands which strictly fall within the expression "buildings or structures together with the lands" used as golas,

factories or mills for the purpose of trade, manufacture or commerce, it will be open to the Collector to assess those lands to rent under S. 7(1), but the lands not covered by buildings and structures used for golas, factories or mills, will be governed by S. 5(1) of the Act.

8. We are, on the materials on the record, unable to specify the buildings and lands falling within S. 7 of the Act for the purpose of determination of assessment of rent. The evidence on the record before us is not clear as to what structures or buildings stand on the lands in the outer enclosure and the purpose for which they are used. We are also not clear as to the precise meaning of the expression "golas" used in S. 7 — the expression not being defined in the Act.

9. The appeal is allowed and the orders of the Circle Officer and of the Collector assessing rent in respect of 71 bighas 2 kathas and 12 dhurs in the outer enclosure in respect of which rent has been assessed under S. 7 of the Bihar Land Reforms Act, 1950, are quashed. The appellant will be entitled to its costs in this Court and in the High Court.

Appeal allowed.

AIR 1970 SUPREME COURT 1542
(V 57 C 327)

(From: Madras)

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

Mohd. Ibrahim, etc., Appellants v. The State Transport Appellate Tribunal, Madras, etc. Respondents.

Civil Appeals Nos. 2322-2324, 2326-2328, 2332, 2337, 2343-2352, 2338-2342, 2353-2362, 2368, 2378-2380, 2409, 2452-2457, 2478, 2479, 2485, 2486, 2518-2520, 2523, 2524, 2532, 2575, 2576, 2584 and 2608 of 1969 and 248, and 8 of 1970, D/ 30-4-1970.

(A) Motor Vehicles Act (1939), Section 47(3) — Limiting number of stage carriages — Hearing operators — Necessity.

The Regional Transport Authority is not obliged to hear operators while exercising jurisdiction under Sec. 47 (3) in fixing the limit of number of stage carriage permits. (Para 9)

FN/FN/B987/70/DHZ/P

The total absence in S. 47(3) of any reference to representations mentioned in Section 47(1) indicates that the Regional Transport Authority under S. 47(3) is not required to take into consideration any representations of the nature mentioned in S. 47(1).

(Para 7)

Neither the right of appeal nor the right to apply for revision is itself decisive of the question. (Para 8)

(B) Motor Vehicles Act (1939), Section 47(3) — Limiting number of stage carriages — Time — Determination of limit of number of permits is to be made before grant of permits under Section 57. AIR 1969 SC 1130, Rel. on. (Para 15)

(C) Motor Vehicles Act (1939), Section 47(3) — Scope — Order under Section 47(3) is not contemplated in the case of inter-state or inter-regional stage carriage permits.

In the case of inter-state permit an application has to be made to the Regional Transport Authority of the State as mentioned in S. 45 and the permit is to be countersigned by the State Transport Authority of the other State or by the Regional Transport Authority concerned as mentioned in S. 63. Section 47(3) will not apply to inter-state permits as it is confined in its operation in or within the region.

(Para 12)

The reasons which do not make Section 47(3) applicable to inter-State permits apply proprio vigore to inter-regional permits. (Para 13)

(D) Motor Vehicles Act (1939), Section 64(i) — Right of appeal against order under S. 47(3) — According to Madras Motor Vehicles Rules there is separate right of appeal against an order under S. 47(3) — Order under S. 47(3) made at a sitting on same day on which applications for grant of permits were considered — There cannot be any grievance that there being no sufficient space between two orders person aggrieved by order under Section 47(3) could not prefer appeal there being separate right of appeal against Order under S. 47(3). (Paras 17, 64)

(E) Motor Vehicles Act (1939), Section 64 — Jurisdiction of State Transport Appellate Authority — Appeal against Order refusing grant of permit — Jurisdiction of Appellate Authority is confined to that aspect only — Authority cannot modify Order under Section 47(3). AIR 1963 SC 64, Rel. on. (Para 18)

(F) Motor Vehicles Act (1939), Section 47(3) — Regional Transport Authority itself under Section 57(2) inviting applications for grant of permits and appointing dates for reception of applications — This indicates that there was valid determination of the number of stage carriage permits to be granted under Section 47(3). AIR 1963 SC 64, Rel. on. (Para 21)

(G) Motor Vehicles Act (1939), Section 47(3) — Question whether there was Order under S. 47(3) — Considerations.

An order under S. 47(3) is not a matter of mere form but of substance. If from the record of the Regional Transport Authority it can be spelt out that that Authority fixed the limit of number of stage carriage permits before consideration of the applications for grant of permits there is a compliance with the provisions of S. 47(3).

(Paras 19, 59)

Cases Ref: Chronological Paras
(1969) AIR 1969 SC 1130 (V 56) =

1969-1 SCR 730, R. Obliswami

Naidu v. Addl. State Transport
Appellate Tribunal, Madras

3, 15, 62, 63

(1968) Civil Appeal No. 727 of
1965, D/- 22-3-1968 (SC), Baluram
v. State Transport Appellate
Authority Madhya Pradesh 3

(1967) Civil Appeal No. 95 of
1965 D/- 27-10-1967 = (1967) 2
SCWR 857, M/s. Jaya Ram
Motor Service v. S. Rajarathi-
nam 3, 15, 62

(1963) AIR 1963 SC 64 (V 50) =
(1963) 3 SCR 523, Abdul Mateen
v. Ram Kailash Pandey 3, 9, 15,
18, 60

The following judgment of the Court was delivered by

RAY, J. : These appeals by certificate turn primarily on the interpretation of Section 47(3) of the Motor Vehicles Act, 1939 (hereinafter called the Act) and raise two questions. First, whether the Regional Transport Authority in limiting the number of stage carriages for which stage carriage permits may be granted in the region or in any specified area or on any specified route in the region is required to hear persons or the said Authority can limit the number of stage carriages for which permits may be granted by an administrative order under Section 47(3) of the Act. The second question is whether in the

facts and circumstances of these appeals there was in each case a valid order under Section 47 (3) of the Act limiting the number of stage carriages for which permits might be granted.

2. Chapter IV of the Act deals with control of transport vehicles. Chapter IV consists of Sections 42 to 68. Section 42 speaks of permits for use of transport vehicles. Section 44 contemplates the Transport Authorities which are the State Transport Authorities or the Regional Transport Authorities. A State Transport Authority co-ordinates and regulates the activities and policies of the Regional Transport Authorities of the State and performs the duties of a Regional Transport Authority where there is no such Authority and settles all disputes and decides all matters on which difference of opinion arises between the Regional Transport Authorities. Section 45 of the Act mentions the Authority to whom application for permit shall be made. Section 46 of the Act gives the particulars which an application for stage carriage permit shall contain. Section 47 of the Act deals with procedure of a Regional Transport Authority in considering applications for stage carriage permits. Section 48 confers power on the Regional Transport Authority to grant stage carriage permits. Section 57 relates to the procedure in applying for and granting permits. Section 63 deals with validation of permits for use outside the region in which it is granted. We have referred mainly to the sections which are important for purposes of determination of the questions involved in these appeals.

3. We shall first deal with the question as to whether a Regional Transport Authority in limiting the number of stage carriages for which permits may be granted as contemplated in Section 47 (3) of the Act is required to hear persons or it can determine the limit by an administrative order without hearing persons. In considering the question whether the Regional Transport Authority in limiting the number of stage carriage permits for which permits may be granted acts in a quasi-judicial or in an administrative manner, a distinction must be noticed between the jurisdiction and functions of a Regional Transport Authority in relation to grant of stage carriage permits on the one hand and limiting the number

of stage carriage permits on the other. Regional Transport Authority while acting under Section 47 (3) of the Act exercises authority and jurisdiction which is entirely different from the jurisdiction and authority of a Regional Transport Authority while considering applications for granting stage carriage permits. It has been decided by this Court in *Abdul Mateen v. Ram Kailash Pandey*, (1963) 3 SCR 523 = (AIR 1963 SC 64) and the later decisions in *M/s Jaya Ram Motor Service v. S. Rajarathnam*, Civil Appeal No. 95 of 1965, D/- 27-10-1967 (SC); *Baluram v. State Transport Appellate Authority, Madhya Pradesh*, Civil Appeal No. 727 of 1965, D/- 22-3-1968 (SC) and *R. Obliswami Naidu v. Addl. State Transport Appellate Tribunal, Madras*, (1969) 1 SCR 730 = (AIR 1969 SC 1130) that the Regional Transport Authority has to fix the limit of number of stage carriage permits under Section 47 (3) of the Act prior to the grant of stage carriage permits.

4. The difference between jurisdiction of the Regional Transport Authority while limiting the number of stage carriage permits and its jurisdiction in relation to grant of permits is recognised in Section 57 of the Act. Section 57 deals with procedure in applying for and granting permits. A Regional Transport Authority is required to dispose of applications for grant of permits at a public hearing at which the applicant and the persons making representations in connection with the application are heard. The Regional Transport Authority is further required to give reasons in writing for refusal to grant permits to an applicant. The right of persons to make representations in connection with the application for the grant of permit arises by reason of section 57 (3) of the Act which provides for the publication of an application for a stage carriage permit together with a notice of the date before which representations in connection therewith should be made to the Regional Transport Authority.

5. This procedure of hearing applications and representations in connection therewith is not applicable when the Regional Transport Authority limits the number of stage carriages for which permits may be granted. Sections 47, 48 and 57 of the Act

deal mainly with jurisdiction, power and procedure of the Regional Transport Authority in relation to consideration of application for and grant of permits. Section 47 (3) of the Act is the only provision which is applicable to the jurisdiction, power and procedure of the Regional Transport Authority while limiting the number of stage carriages for which permits may be granted. In section 47 (3) of the Act it is said that a Regional Transport Authority may have regard to the matters mentioned in sub-section (1) limit the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region.

6. Sub-section (1) of Section 47 of the Act states that a Regional Transport Authority shall in considering an application for stage carriage permit have regard to matters enumerated in clauses (a) to (f) thereof and shall also take into consideration any representations made by persons already providing transport facilities by any means along or near the proposed route or area, or by any association representing persons interested in the provision of road transport facilities or by any local authority or police authority within whose jurisdiction any part of the proposed route or area lies. In other words, section 47 (1) of the Act enjoins that a Regional Transport Authority while considering applications for stage carriage permits shall have regard to the matters mentioned in clauses (a) to (f) thereof and shall also take into consideration any representations as mentioned in the said sub-section.

7. Section 47 (3) of the Act, on the other hand, speaks only of the matters mentioned in sub-section (1) which a Regional Transport Authority may have regard to while limiting the number of stage carriages. The total absence in section 47 (3) of the Act of any reference to representations mentioned in section 47 (1) of the Act indicates that a Regional Transport Authority under section 47 (3) of the Act is not required to take into consideration any representations of the nature mentioned in Sec. 47 (1) of the Act. Representations mentioned in section 47 (1) of the Act are referable to representations contemplated in section 57 (3) of the Act. These representations

are those made by operators to the Regional Transport Authority after the publication of an application for a stage carriage permit. In view of the provisions of the Act and, in particular, section 48 of the Act which enacts that a Regional Transport Authority subject to the provisions of section 47 may grant a stage carriage permit, it is manifest that representations contemplated in sections 47 (1) and 57 (3) of the Act are representations subsequent to the application for grant of permit, and, therefore, these representations do not at all enter the field of determination of number of stage carriages under section 47 (3) of the Act. Representations mentioned in section 47 (1) of the Act relate to representations by and between the competitors and contenders for grant of a permit. These individual representations raise rival contentions between operators. When the Regional Transport Authority acts under S. 47 (3) of the Act it does not deal with any dispute between operators. The Regional Transport Authority is required to arrive at its decision under S. 47 (3) of the Act having regard to matters mentioned in S. 47 (1) of the Act independent of any representation by operators or any hearing. The deliberation as well as the decision of the Regional Transport Authority under section 47 (3) of the Act is confined to its own administrative policy and order. The Regional Transport Authority in limiting the number of stage carriage permits under section 47 (3) of the Act may address itself to the matters enumerated in sub-section (1) of section 47 of the Act and the said Authority is not required to hear operators at the time of the consideration of the matter of determining the limit of number of permits.

8. Counsel for the respondent relied on Section 64 of the Act which conferred a right of appeal on a person aggrieved by any order which may be prescribed as mentioned in clause (i) thereof and the rules framed under Section 68 of the Act by the Madras Government by General Order No. 1852 dated 28 May, 1965 and in particular Rule 147 (2) (i) which made an order passed under Section 47 (3) of the Act appealable. It was said by counsel for the appellant that the right of appeal by any person aggrieved by any order would indicate that a person had a right of being heard. Emphasis

was placed on the word 'aggrieved' to show that one's grievance arose because one had been denied relief in relation to one's representation. Prior to the introduction of the new Rules conferring right of appeal in respect of an order made under section 47 (3) of the Act one could apply to the State Transport Authority under section 64A of the Act for revision of an order in which appeal lay. Now that there is a provision of appeal the position is not altered. Neither the right of appeal nor the right to apply for revision is itself decisive of the true function of the Regional Transport Authority as to whether the said Authority has to grant hearing to persons at the time of fixing the limit of number of stage carriage permits. We have already referred to the elaborate procedure of publication of applications for grant of permits, representations by persons in connection therewith, a public hearing at the time of consideration of applications and representations, and written reasons being given by the Regional Transport Authority for refusing the permit. The Regional Transport Authority on the other hand while acting under S. 47 (3) of the Act is the master of its own procedure because it does not deal with individual or competing rights of operators but is required to arrive objectively at its own conclusion independent of any application or representation by operators.

9. We are of opinion that the Regional Transport Authority is not obliged to hear operators while exercising jurisdiction under section 47 (3) of the Act in fixing the limit of number of stage carriage permits. It is also to be noticed that the limit of number of stage carriage permits fixed by the Regional Transport Authority under section 47 (3) of the Act cannot be modified by the Regional Transport Authority when the said Authority exercises the separate power of granting permits under S. 48 of the Act or even by the State Appellate Transport Authority dealing with appeals against the grant of permits. This proposition was laid down in the case of *Abdul Mateen*, (1963) 3 SCR 523 = (AIR 1963 SC 64) (supra). This view fortifies the difference in the functions and jurisdiction of the Regional Transport Authority under section 47 (3) of the Act on the one hand and S. 48 of the Act on the other.

10. Another question arose in two appeals Nos. 2478 of 1969 and 2328 of 1969 as to whether in the case of Inter-State stage carriage permits and inter-regional stage carriage permits an order under section 47 (3) of the Act is contemplated prior to the grant of permits. Two sections are important in this behalf. They are sections 45 and 63 of the Act. Section 45 of the Act enacts that an application for permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles. If a vehicle is used in two or more regions within the same State then the application for permit shall be made to the Regional Transport Authority of the region in which the major portion of the route or area lies and in case the portion of the proposed route or area in each of the region is approximately equal, the application is made to the Regional Transport Authority of the region in which it is proposed to keep the vehicle. Then again if it is intended to use the vehicle in two or more regions lying in different States the application shall be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business. It, therefore, follows that in the case of inter-State permits application has to be made to the Regional Transport Authority of the region in which the applicant resides or has his principal place of business.

11. In the case of inter-State permits section 63A of the Act refers to Inter-State Transport Commission constituted by the Central Government. S. 63A (2) of the Act in clauses (a), (c) and (d) thereof refer to the performance by the Commission of inter alia the regulation of the operation of transport vehicles in an inter-State region, issuing of directions to the State Transport Authority or the Regional Transport Authority interested regarding grant, revocation and suspension of permits and of counter-signatures of permits for the operation of transport vehicles in respect of any route or are common to two or more States. Section 63C of the Act confers power on the Central Government to make rules inter alia for procedure to be followed in considering applications for a permit or for counter-signature of permit, as also appeals

against a decision of the Commission. We were not shown any relevant rule with regard to inter-State permits nor were we shown as to whether any inter-State Commission had issued directions to the State Transport Authority or the Regional Transport Authority regarding grant, revocation and suspension of permits common to two or more States.

12. Therefore, the only section which is relevant for determination of the question as to whether an order under section 47 (3) of the Act is contemplated for inter-State permit is section 63 of the Act. Section 63 (1) of the Act states that a permit granted in any one State shall not be valid in another State unless countersigned by the State Transport Authority of that other State or by the Regional Transport Authority concerned. Section 63 (3) of the Act states that the provisions of Chapter IV of the Act relating to grant, revocation and suspension of permits shall apply to the grant, revocation and suspension of countersignatures of permits. The proviso to section 63 (3) of the Act is that it shall not be necessary to follow the procedure laid down in section 57 of the Act for the grant of countersignatures of permits where permits granted in any one State are required to be countersigned by the State Transport Authority of another State or by the Regional Transport Authority concerned as a result of an agreement arrived at between the States. These provisions establish that in the case of an inter-State permit an application has to be made to the Regional Transport Authority of a State as mentioned in section 45 of the Act and the permit is to be countersigned by the State Transport Authority of the other State or by the Regional Transport Authority concerned as mentioned in S. 63 of the Act. Chapter IV consists of Ss. 42 to 68. Section 57 deals with procedure for application and grant of permits. That section will therefore, apply for the grant of inter-State permits. The effect of the proviso to section 63 (3) is that in the case of inter-State permits where an agreement has been arrived at between the States the provisions of section 57 of the Act need not be followed for the grant of countersignatures of permits. In other case the procedure in section 57 of the Act will apply in regard to grant, revocation and suspension of permits and

to countersignatures of permits as well. Section 48 of the Act which relates to power to grant of stage carriage permits will also apply to inter-State permits. The provisions contained in sub-section (1) generally and sub-section (2) of section 47 will apply to the Regional Transport Authority at the time of consideration of the application for inter-State stage carriage permit. Section 47 (3) of the Act will not in our opinion apply to inter-State permits because that provision relates to a Regional Transport Authority limiting the number of stage carriages for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region. In other words, section 47 (3) of the Act is confined in its operation in or within the region. The provisions of section 47 (3) of the Act do not apply to inter-State permits because an inter-State permit cannot be effective unless it is countersigned by the Authority of the other State. The suggestion that in regard to inter-State permits a limit has to be fixed in regard to number of stage carriages for inter-State routes will have the effect of adding words to the provisions in section 47 (3) of the Act. That will not be the proper way of giving effect to section 47 (3) of the Act. It will be misreading section 47 (3) of the Act if it will be applied to inter-State permits. The combined effect of Ss. 63, 63A, 63B and 63C is that the inter-State Commission will deal with inter-State permits. The Central Government under section 63C of the Act is authorised to make rules in regard to the procedure to be followed in considering an application for grant and countersignature of permits. In the absence of specific rules, the best way of harmonising the powers and functions is to allow these inter-State authorities to exercise their power within their respective spheres in regard to grant and countersignature of permits by agreement and accord.

13. In the case of inter-regional permits an application under S. 45 of the Act has to be made to the Regional Transport Authority of the region in which the major portion of the proposed route or area lies and in case the portion of the proposed route or area in each of the regions is approximately equal, to the Regional Trans-

port Authority of the region in which it is proposed to keep the vehicle or vehicles. Then under section 63 of the Act a permit granted by the Regional Transport Authority of one region shall not be valid in any other region unless the permit is countersigned by the Regional Transport Authority of that other region. Section 63 (3) of the Act makes the provisions of Chapter IV applicable relating to the grant, revocation and suspension of permits and to the grant, revocation and suspension of countersignature of permits. The result is that Sections 47 to 68 which occur in Chapter IV are therefore attracted in case of inter-regional permits. In view of the fact that section 47 (3) of the Act is restricted in its field in or within the region, the provisions in terms do not become applicable to inter-regional permits. Section 68 of the Act contemplates rules and conditions subject to which and the extent to which, a permit shall be valid in another region within the State without countersignature. We have not been shown any rules to that effect. The reasons which do not make section 47 (3) applicable to inter-State permits apply proprio vigore to inter-regional permits.

14. As in the case of inter-State permits the harmonious reading of the sections will be to make sections 42 to 68 of the Act applicable wherever it is possible to do so. The fixing of limit of number of stage carriage permits in or within the region is entrusted to the Regional Transport Authority because of the particular local matters contemplated in section 47 (1) of the Act, namely, adequacy of other transport services between the places to be served, benefit to a particular locality to be afforded by the service, conditions of the roads included in the proposed route or area. These considerations in the case of inter-State permits as also in the case of inter-regional permits cannot be said to be entrusted to the Regional Transport Authority to which the application is made because both in the case of inter-State permits and inter-regional permits considerations in different States and in different regions will become relevant and are not embraced within the scope and intent of section 47 (3) of the Act. We are therefore of opinion that S. 47 (3) of the Act will not apply either to grant or to coun-

tersignatures of permits both in the case of inter-State and inter-regional permits. The relevant authorities in two States or two regions will ensure agreement and act in concert as the case may be. The number of services in the region can of course be fixed by the Regional Transport Authority but they will be for the region only. The number of services for inter-regional or inter-State routes beyond the frontier of the region will have to be determined by agreement.

15. The next question which falls for determination is the point of time when a Regional Transport Authority will under section 47 (3) of the Act fix the limit of number of stage carriage permits. This Court in *Abdul Mateen's case*, (1963) 3 SCR 523 = (AIR 1963 SC 64) (supra) said that the General Order by the Regional Transport Authority under section 47 (3) of the Act in regard to the limit of number of stage carriage permits can be modified only by the Regional Transport Authority when exercising the jurisdiction under section 47 (3) of the Act. The Regional Transport Authority while acting under section 48 of the Act in regard to the grant of permits has no jurisdiction and authority to modify any order passed by the Regional Transport Authority under S. 47 (3) of the Act. In other words, the limit fixed by the Regional Transport Authority under section 47 (3) of the Act cannot be altered by the Regional Transport Authority at the time of grant of permits. It is, therefore, established that the determination of limit of number of permits is to be made before the grant of permits. That is why section 48 of the Act is prefaced with the words "subject to the provisions of section 47 of the Act" meaning thereby that the jurisdiction of the Regional Transport Authority to grant permits is subject to the determination of the limit of number of permits under section 47 (3) of the Act. This Court stated the legal position in *M/s Jaya Ram Motor Service's case*, Civil Appeal No. 95 of 1965 D/- 27-10-1967 (SC) (supra) and said "it is therefore clear that the authority has first to fix the limit and after having done so consider the application or the representations in connection therewith in accordance with the procedure laid down in section 57 of the Act." Again in the case of *R. Obliswami Naidu*,

(1969) 1 SCR 730 = (AIR 1969 SC 1130) (supra) this Court considered the submission in that case as to whether the Regional Transport Authority could decide the number of permits while considering applications for permits. This Court did not accept the submission because such a view would allow an operator who happened to apply first to be in a commanding position with the result that the Regional Transport Authority would have no opportunity to choose between competing operators and public interest might suffer. In the same case it is again said that the determination of the number of stage carriages for which stage carriage permits may be granted for the route is to be done first and thereafter applications for permits are to be entertained.

16. The four decisions of this Court to which we have referred establish two propositions. First, that the Regional Transport Authority should fix the limit of number of stage carriage permits under section 47 (3) of the Act and after having done so the Regional Transport Authority will consider the application for grant and representations in connection therewith in accordance with the procedure laid down in section 57 of the Act. Secondly, when a new route is opened for the first time and an advertisement is issued calling for applications for such a new route specifying the number of vacancies for it, it would be reasonable to hold that the number of vehicles is specified as the limit decided upon by the Regional Transport Authority. In the present appeals, the Regional Transport Authority in many cases fixed the limit of number of stage carriage permits on the same day on which it heard the applications for the grant of permits and representations in connection therewith. The Regional Transport Authority fixed the limit of number of stage carriage permits at a sitting separate from and prior to the sitting at which the Regional Transport Authority heard the applications for grant of permits and representations in connection therewith.

17. The present appeals are all governed by the Madras Motor Vehicles Rules. The Act under section 64 confers a right of appeal against an order under section 47 (3) of the Act. The Madras Motor Vehicles Rules

framed under section 68 of the Act confer a right of appeal against an order under section 47 (3) of the Act. Section 64 (i) of the Act confers a right of appeal against an order as may be prescribed by the Rules. That is how the Madras Motor Vehicles Rules have prescribed appeals against several orders which are otherwise not mentioned as appealable orders under section 64 of the Act. The result is that according to the Madras Motor Vehicles Rules there is a separate right of appeal against an order under section 47 (3) of the Act.

18. In the present appeals none of the parties preferred any appeal to the State Transport Appellate Tribunal against any order under section 47 (3) of the Act. The parties preferred appeals only against refusal to grant permit. In those appeals against refusal to grant permit though no specific ground was taken as to absence of a valid order under section 47 (3) of the Act the State Transport Appellate Tribunal in some cases allowed the parties to advance a contention in that behalf and in other cases the State Transport Appellate Tribunal suo motu went into the question as to whether there was a valid order under section 47 (3) of the Act. The jurisdiction of the State Transport Appellate Tribunal in appeals under section 64 of the Act against refusal to grant permit is confined only to that aspect. The jurisdiction of the Regional Transport Authority in the matter of orders under section 47 (3) of the Act is entirely separate from jurisdiction of the Regional Transport Authority in the matter of grant and refusal of permit under sections 48 and 57 of the Act. The distinction between the two jurisdictions is so well demarcated that this Court in Abdul Mateen's case, (1963) 3 SCR 523 = (AIR 1963 SC 64) (supra) said that neither the Regional Transport Authority at the time of grant of permit nor the State Transport Appellate Tribunal in hearing appeals against refusal to grant permit could modify orders under section 47 (3) of the Act.

19. The State Transport Appellate Tribunal however proceeded in the present appeals on the basis that the absence of a valid order under S. 47 (3) of the Act would rob the Regional Transport Authority of its jurisdiction to grant permit. In the present appeals, it became a question of fact as to

whether there was in each case an order under section 47 (3) of the Act. The State Transport Appellate Tribunal in some cases went into the records and held that there was no order in writing under section 47 (3) of the Act as to the limit of number of stage carriage permits. The records however contain evidence that the Secretary of the Regional Transport Authority on the basis of statistics advised the Regional Transport Authority to open new routes or to increase the number of permits and the Regional Transport Authority thereafter proceeded on that basis. In other cases the Regional Transport Authority of one State agreed with the Regional Transport Authority of another State for new or additional permits and thereafter applications were considered. An order under section 47 (3) of the Act is not a matter of mere form but of substance. When it became a question of fact as to whether the Regional Transport Authority fixed limit of number of permits before the grant of permits, the State Transport Appellate Tribunal fell into the error of overlooking the substance of the matter. We are of opinion that if from the records of the Regional Transport Authority it could be spelt out that the Regional Transport Authority fixed the limit of number of permits for stage carriages before the Regional Transport Authority considered the applications and representations for grant of permit, the Regional Transport Authority then complied with the provisions of the statute. In the facts and circumstances of the present appeals all operators competed for the grant of permits and thereafter preferred appeals only against the grant or refusal of permits.

20. We shall now deal with the appeals individually.

Civil Appeal No. 2322 of 1969

21. In this appeal the State Transport Appellate Tribunal set aside the grant of permit on the ground that there was no valid order under S. 47 (3) of the Act. The High Court also took the same view. In the present case there was proposal based on statistics to show the need for an additional bus. The Regional Transport Authority itself invited applications under Section 57 (2) of the Act for the grant of an additional permit on the route. It is significant that there was

no application by any operator for the grant of an additional permit but that the Regional Transport Authority itself under section 57 (2) of the Act invited applications for the grant of an additional permit and appointed dates for reception of applications in that behalf. This invitation of applications indicates in the facts and circumstances of the case that there was a valid determination under section 47 (3) of the Act for an additional permit on the route. Therefore, this appeal is allowed and the matter is remitted to the State Transport Appellate Tribunal for hearing on merits of the appeals before the said Authority.

Civil Appeal No. 2323 of 1969

22. The State Transport Appellate Tribunal found that there was no valid order under S. 47 (3) of the Act before considering applications for grant of permits. The High Court also upheld the view. This was a case of a new route. In this case there was a notification under section 57 (2) of the Act asking for applications for the grant of a permit on the new route. This will, in our opinion, indicate that there was a determination of the limit of number of stage carriage permits under section 47 (3) of the Act. The State Transport Appellate Tribunal also considered the appeals on merits and held that M/s M. K. S. & Brothers, Mettur Dam was the best suited person for the permit. In view of that decision, the appeal is allowed and the matter is remitted to the High Court to deal with the application on merits on the basis that there is a valid order under section 47 (3) of the Act.

Civil Appeal No. 2324 of 1969

23. The State Transport Appellate Tribunal held that there was no valid order under section 47 (3) of the Act. The High Court was of the same view. This appeal relates to a new town route No. 2 Nagapatinam. The records indicate that the Regional Transport Authority first limited the number of buses to be put on the route to one. We are of opinion that having done so, the Regional Transport Authority thereafter dealt with applications for grant of permit. The State Transport Appellate Tribunal did not deal with the merits of the case. The appeal is therefore allowed and the matter is remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeal No. 2326 of 1969

24. The High Court was of opinion that there was no valid order under section 47 (3) of the Act and allowed the petition. The State Transport Appellate Tribunal found that there was in fact a valid order under section 47 (3) of the Act. An application for permit was made by the appellant suo motu and representations in connection therewith were submitted. Before the Regional Transport Authority the serious contest was as to whether there was a need for an additional bus. The other contention was that the permit should not have been granted to the appellant on his application which was made suo motu. The State Transport Appellate Tribunal found that there was a need for a bus and that the Regional Transport Authority after receipt of the appellant's application had notified the same and asked for representations in connection therewith. The State Transport Appellate Tribunal found that there was in fact a determination for the grant of an additional bus and upheld the grant. In the facts and circumstances of the case it would be proper to hold that there was a valid order under Section 47(3) of the Act. The Regional Transport Authority decided upon the introduction of a new bus on the route and then dealt with the grant. The High Court was in error in holding that there was no valid order under Section 47(3) of the Act. The appeal is therefore allowed.

Civil Appeal No. 2327 of 1969

25. The State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. The High Court upheld that view. This was opening of a new route. The Regional Transport Authority under Section 57(2) of the Act invited applications for a bus to be put on the route for the first time. We hold that this will amount to a valid order under Section 47(3) of the Act for introduction of one permit. We are also of opinion that applications for "a bus permit" would amount to one permit. The State Transport Appellate Tribunal set aside the permit of the appellant and did not deal with the merits. The appeal is allowed and the case is remitted to the State Transport Appellate Tribunal to be decided on merits.

Civil Appeal No. 2328 of 1969

26. This appeal relates to permits on inter-regional route. We have already

held earlier that in the case of inter-regional permit Section 47(3) of the Act will not apply. If however effect can be given to the concept inherent in Section 47(3) of the Act by having agreement between the regions as to permits, it will appear that in the present case there was a notification under Section 57(2) of the Act asking for applications for one vehicle as "an additional bus on the route Coimbatore to Ootacamund via Mettupalayam". The State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. In our opinion, in the facts and circumstances of the case and in particular it being a case of an additional bus a notification under Section 57 (2) of the Act for the grant of an additional bus on the route will amount to a valid order. The appeal is therefore allowed and the case is remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2332-2337 and 2343 to 2352 of 1969

27. These appeals relate in some cases to a permit on a new route and in other cases an additional permit on an existing route. Civil Appeals Nos. 2335, 2336, 2344, 2350 and 2351 of 1969 relate to permits on new routes. The other appeals relate to one additional permit on existing route in each case. The State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. The High Court upheld that view. The facts establish that intensive traffic survey was conducted on the routes. Thereafter, the Secretary Regional Transport Authority recommended an additional bus on the route. This recommendation was approved by the Regional Transport Authority. Thereupon notification under Section 57(2) of the Act was made asking for applications for the grant of stage carriage permit. The combination of circumstances, namely, the approval by the Regional Transport Authority of the recommendation of the Secretary for the introduction of an additional bus on the existing route and the consequent notification under Section 57(2) of the Act asking for applications for grant of an additional permit on the said route in each case in our opinion establishes a valid order under Section 47(3) of the Act in each case.

28. In Civil Appeal No. 2335 of 1969 there was a proposal for the opening of a new town service route. Ap-

plications under Section 57(2) of the Act were invited for the new town route No. 3. Furthermore, the minutes of the Regional Transport Authority indicate that the Regional Transport Authority limited the number of stage carriage permits to "one for the present" before the said Authority proceeded to consider the applications for grant of permit. The invitation of applications under Section 57(2) of the Act for a permit on a new route in the context of facts and circumstances of the case establishes that there was a valid order under Section 47(3) of the Act.

29. In Civil Appeal No. 2336 of 1969 the minutes of the Regional Transport Authority indicate that the Authority limited the number of stage carriage permits to one and thereafter the Authority considered the applications for grant of permits. The other features are similar to those of Civil Appeal No. 2335 of 1969.

30. In Civil Appeal No. 2337 of 1969 there was first a sitting of the Regional Transport Authority on 9th March, 1968 to consider the proposal to introduce an additional service on the route. The Regional Transport Authority decided to introduce two additional buses on the route. On the same day at a separate sitting the applications for grant of permits were considered. The State Transport Appellate Tribunal held that since an order under Section 47(3) of the Act was appealable sufficient time should have elapsed between the order under Section 47(3) of the Act and the consideration of applications for the grant of permit in order to enable an aggrieved person to prefer an appeal. This question is of no importance in the present case because parties were allowed to challenge the entire proceeding. Ordinarily, both orders are appealable and an order under Section 47(3) of the Act is made prior to notification under Section 57(2) of the Act or of publication of applications under Section 57(3) of the Act. We, therefore, hold that there was a valid order under Section 47(3) of the Act in this appeal.

31. In Civil Appeal No. 2343 of 1969 there was traffic survey on the existing route. There was a proposal based on statistics for the need of an additional bus. Applications were invited under Section 57(2) of the Act for an additional bus. The Regional Trans-

port Authority also decided upon the need for an additional bus prior to consideration of the applications for the grant of permit. Therefore, in the facts and circumstances of this case it can be held that there was a valid order under Section 47(3) of the Act.

32. In Civil Appeals Nos. 2345, 2346, 2347, 2348, 2349 and 2352 of 1969 the facts are similar to those discussed in Civil Appeals Nos. 2337 and 2343 of 1969 and we are of opinion that in each case there was a valid order under Section 47(3) of the Act. Civil Appeals Nos. 2350 and 2351 of 1969 relate to a bus on new routes and the facts are similar to those in Civil Appeals Nos. 2335 and 2336 of 1969 and we are of opinion that there was in each case a valid order under Section 47(3) of the Act.

33. These appeals are allowed and the cases are remitted to the State Transport Appellate Tribunal to be dealt with on merits.

Civil Appeals Nos. 2338-2342, 2353-2362 and 2368 of 1969

34. In these appeals the State Transport Appellate Tribunal held that there was no valid order under Section 47(3) of the Act. The High Court was also of the same view. Civil Appeals Nos. 2338, 2340, 2341, 2342, 2355, 2359 to 2362 of 1969 relate to a bus on a new route in each case. The other appeals relate to additional bus on an existing route in each case.

35. In Civil Appeals Nos. 2338, 2340, 2341 and 2342 of 1969 the Regional Transport Authority issued notifications under Section 57(2) of the Act inviting applications for grant of stage carriage permit on the routes. Thereafter notifications were issued under Section 57(3) of the Act. These appeals relate to a new route in each case. Civil Appeals Nos. 2355, 2359-2362 of 1969 also relate to a bus on a new route in each case. In these appeals new routes were opened by the Regional Transport Authority after examining public representations and notifications under Section 57(2) of the Act were also issued. The notification under Section 57(2) of the Act inviting applications for new routes establish that there was a valid order under Section 47(3) of the Act in each case.

36. Civil Appeals Nos. 2339, 2353, 2354, 2356, 2357, 2358 and 2368 of 1969 relate in each case to an additional bus on existing route. An additional bus

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(1969-23 L Ed. 2d 707)*

MARSHALL, WHITE, HARLAN AND
STEWART, JJ.John Dalmer Benton, Petitioner v.
State of Maryland, Respondent.
(No. 201) Decided on 23-6-1969.

†Constitution of India, Art. 20 (2) —
Double jeopardy — Accused convicted of
larceny and burglary charges and award-
ed five and fifteen years sentence on res-
pective counts — Sentences to run con-
currently — Charge and conviction for
larceny set aside on grounds of double
jeopardy — Reversal does not require
change in terms of confinement — (Con-
stitution of United States of America,
Fifth Amendment). (Para 5)

Cases Referred: Chronological Paras.

(1968) 390 US 629 = n2, 20 L Ed 2d 195, Ginsberg v. New York	2
(1968) 391 US 54 = 20 L Ed 2d 426 = 88 S Ct 1549, Peyton v. Rowe	2
(1968) 391 US 145 = 20 L Ed 2d 491, Duncan v. Louisiana	14, 15, 43
(1968) 391 US 234 = 20 L Ed 2d 554, Carafas v. LaVallee	2
(1968) 392 US 83 = 20 L Ed 2d 947 = 88 S Ct 1942, Flast v. Cohen	5
(1968) 392 US 925 = 20 L Ed 2d 1384 = 88 S Ct 2297, Richard M. Smith v. Fred M. Hooey	2
(1968) 392 US 40 = 20 L Ed 2d 917, Sibron v. New York	2, 12
(1968) 392 US 40 = 20 L Ed 2d 917 = 88 S Ct 1889, Sibron v. New York	9
(1968) 393 US 994 = 21 L Ed 2d 460 = 89 S Ct 481	2
(1967) 386 US 213 = 18 L Ed 2d 1 = 87 S Ct 988, Klopfer v. North Carolina	43
(1967) 388 US 14 = 18 L Ed 2d 1019, Washington v. Texas	14
(1967) 1 Md App 647 = 232 A2d 541	1, 12
(1965) 380 US 400 = 13 L Ed 2d 923 = 85 S Ct 1065, Pointer v. Texas	43
(1965) 380 US 63 = 13 L Ed 2d 658, United States v. Gainey	7
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(1965) 240 Md 121, 213 A2d 475, Schowgurow v. State	11
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†Reference is given to a parallel Indian
provision for the convenience of Indian
Lawyers.

(1963) 372 US 335 = 9 L Ed 2d 799 = 83 S Ct 792 = 93 ALR 2d 733, Gideon v. Wainwright	115
(1963) 374 US 23 = 10 L Ed 2d 726 = 83 S Ct 1623, Ker v. California	43
(1963) 231 Md 190 = 189 A2d 641, Fletcher v. State	32
(1961) 367 US 643 = 6 L Ed 2d 1081 = 81 S Ct 1684 = 84 ALR 2d 933, Mapp v. Ohio	43
(1959) 359 US 121 = 3 L Ed 2d 684, Bartkus v. Illinois	16
(1959) 360 US 109 = 3 L Ed 2d 1115 = 79 S Ct 1081, Barenblatt v. United States	7
(1958) 256 F2d 561 (CA2d Cir 1958), United States v. Hines	8
(1957) 353 US 53 = n6, 1 L Ed 2d 639 = 77 S Ct 623, Roviario v. United States	7
(1957) 355 US 66 = 2 L Ed 2d 95 = 78 S Ct 128, Yates v. United States	8
(1957) 355 US 184 = 2 L Ed 2d 199 = 78 S Ct 221 = 61 ALR2d 1119, Green v. United States	16, 17
(1953) 344 US 424 = 97 L Ed 456 = 73 S Ct 349, Brock v. North Carolina	113
(1943) 320 US 81 = 87 L Ed 1774 = 63 S Ct 1375, Hirabayashi v. United States	2, 6, 10
(1942) 316 US 455 = 86 L Ed 1595 = 62 S Ct 1252, Betts v. Brady	15
(1937) 302 US 319 = 82 L Ed 288 = 58 S Ct 149, Palko v. Connecticut	13, 43, 47, 51
(1936) 297 US 288 = 80 L Ed 688 = 56 S Ct 466, Ashwander v. T.V.A.	39
(1911) 219 US 346 = 55 L Ed 246 = 31 S Ct 250, Muskrat v. United States	5
(1910) 217 US 284 = 54 L Ed 768 = 30 S Ct 514, Brantley v. Georgia	50
(1909) 213 US 175 = 53 L Ed 753 = 29 S Ct 451, Siler v. Louisville & N. R. Co.	39
(1908) 211 US 78 = 53 L Ed 97 = 29 S Ct 14, Twining v. New Jersey	15
(1905) 199 US 521 = 50 L Ed 292 = 26 S Ct 121, Trono v. United States	50
(1896) 163 US 662 = 41 L Ed 300 = 16 S Ct 1192, United States v. Ball	18, 50
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(1891) 142 US 140 = 35 L Ed 966 = 12 S Ct 169, Claassen v. United States	6
(1877) 94 US 351 = 24 L Ed 195, Cromwell v. County	33
(1813) 7 Cranch 339 = 3 L Ed 364, Locke v. United States	6

M. Michel Cramer, for Petitioner; Peter
L. Strauss, for the United States, amicus
curiae, at the invitation of the court.
Francis B. Burch, for Respondent.

SUMMARY

In a Maryland state court trial on charges of burglary and larceny, the jury found the defendant not guilty of larceny, but convicted him on the burglary count, for which he was sentenced to 10 years in prison. Because both the grand and petit juries in the case had been unconstitutionally selected, the Maryland Court of Appeals remanded the case to the trial court, where the defendant was given the option of demanding reindictment and retrial, which he did. At the second trial, again for both larceny and burglary, the defendant's motion to dismiss the larceny charge as subjecting him to double jeopardy was denied, he was found guilty of both offences and he was given concurrent sentences of 15 years on the burglary count and 5 years for larceny. The newly created Maryland Court of Special Appeals rejected the defendant's double jeopardy claim on the merits (1 Md App 647, 232 A2d 541), and the Maryland Court of Appeals denied discretionary review.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., expressing the view of six members of the court, it was held, overruling *Palko v. Connecticut*, 302 US 319, 82 L Ed 288, 58 S Ct 149, that the double jeopardy clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, and that, under that standard, the defendant's larceny conviction could not stand.

WHITE, J., concurring, stated that the concurrent sentence rule, while not of jurisdictional dimensions, should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack.

HARLAN, J., joined by STEWART, J., dissented on the grounds that the double jeopardy issue should not have been reached, and that the court's "selective incorporation" doctrine was unsupported either in history or in reason and was subtly, yet profoundly, eroding many of the basics of our federal system.

OPINION OF THE COURT

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

In August 1965, petitioner was tried in a Maryland state court on charges of burglary and larceny. The jury found petitioner not guilty of larceny but convicted him on the burglary count. He was sentenced to 10 years in prison. Shortly after his notice of appeal was filed in the Maryland Court of Appeals, that court handed down its decision in the case of *Schowgurow v. State*, (1965) 240 Md 121, 213 A2d 475. In *Schowgurow* the Maryland Court of Appeals struck down a sec-

tion of the state constitution which required jurors to swear their belief in the existence of God. As a result of this decision, petitioner's case was remanded to the trial court. Because both the grand and petit juries in petitioner's case had been selected under the invalid constitutional provision petitioner was given the option of demanding reindictment and retrial. He chose to have his conviction set aside, and a new indictment and new trial followed. At this second trial, petitioner was again charged with both larceny and burglary. Petitioner objected to retrial on the larceny count, arguing that because the first jury had found him not guilty of larceny, retrial would violate the constitutional prohibition against subjecting persons to double jeopardy for the same offence. The trial judge denied petitioner's motion to dismiss the larceny charge, and petitioner was tried for both larceny and burglary. This time the jury found petitioner guilty of both offences, and the judge sentenced him to 15 years on the burglary count (1) and 5 years for larceny, the sentences to run concurrently. On appeal to the newly created Maryland Court of Special Appeals, petitioner's double jeopardy claim was rejected on the merits. (1967) 1 Md App 647 = 232 A2d 541. The Court of Appeals denied discretionary review.

2. On the last day of last Term, we granted certiorari. (1968) 392 US 925-926 = 20 L Ed 2d 1384 = 88 S Ct 2297, but limited the writ to the consideration of two issues:

"(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

"(2) If so, was the petitioner 'twice put in jeopardy' in this case?"

After oral argument, it became clear that the existence of a concurrent sentence on the burglary count might prevent the Court from reaching the double jeopardy issue, at least if we found that any error affected only petitioner's larceny conviction. Therefore, we scheduled the case for reargument, (1968) 393 US 994 = 21 L Ed 2d 460 = 89 S Ct 481, limited to the following additional question not included in the original writ:

"Does the 'concurrent sentence doctrine,' enunciated in *Hirabayashi v. United States*, 320 US 81, 105, [87 L Ed 1774, 1788,

1. The increase in petitioner's sentence on the burglary count from 10 to 15 years is presently the subject of litigation on federal habeas corpus in the lower federal courts. A federal district court ordered the State to resentence petitioner, *Benton v. Copinger*, 291 F Supp 141 (DCD Md 1968), and an appeal brought by the State is presently pending in the United States Court of Appeals for the Fourth Circuit.

63 S Ct 1375], and subsequent cases, have continuing validity in light of such decisions as *Ginsberg v. New York*, 390 US 629, 633, n 2 [20 L Ed 2d 195, 200, 88 S Ct 1274]; *Peyton v. Rowe*, 391 US 54 [20 L Ed 2d 426, 88 S Ct 1549]; *Carafas v. LaVallee*, 391 US 234, 237-238 [20 L Ed 2d 554, 558, 88 S Ct 1556]; and *Sibron v. New York*, 392 US 40, 50-58 [20 L Ed 2d 917, 927-932, 88 S Ct 1889]?"

3. The Solicitor-General was invited to file a brief expressing the views of the United States and to participate in oral argument.

4. After consideration of all the questions before us, we find no bar to our decision of the double jeopardy issue. On the merits, we hold that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment and we reverse petitioner's conviction for larceny.

I

5. At the outset of this case we are confronted with a jurisdictional problem. If the error specified in the original writ of certiorari were found to affect only petitioner's larceny conviction(2) reversal of that conviction would not require the State to change the terms of petitioner's confinement. Whatever the status of his sentence on the larceny conviction, petitioner would probably stay in prison until he had served out his sentence for burglary.(3) Is there, in these circumstances, a live "case" or "controversy" suitable for resolution by this Court, or is the issue moot? Is petitioner asking for an advisory opinion on an abstract or hypothetical question? The answer to these questions is crucial, for it is well settled that federal courts may only act in the context of a justiciable case or controversy. *Muskrat v. United States*, (1911) 219 US 346, 55 L Ed 246, 31 S Ct 250; see *Flast v. Cohen*, (1968) 392 US 83, 94-97, 20 L Ed 2d 947, 958-960, 88 S Ct 1942.

6. The language used in a number of this Court's opinions might be read to indicate that the existence of a valid concurrent sentence removes the necessary elements of a justiciable controversy. The "concurrent sentence doctrine" took root in this Country quite early, although its earliest manifestations occurred in slightly different contexts. In *Locke v. United States*, (1813) 7 Cranch 339, 3 L Ed 364 a cargo belonging to the plaintiff in error

2. See Part V, *infra*. Of course, if the error infected both counts upon which petitioner was convicted, there would be no concurrent sentence problem at all. We do not, however, resolve the question of whether the burglary conviction was "tainted."

3. The length of that sentence is presently a matter in dispute, see n. 1, *supra*.

had been condemned under a libel containing 11 counts. Chief Justice John Marshall, speaking for the Court, found it unnecessary to consider Locke's challenges to all 11 counts. He declared, simply enough, "The Court however, is of the opinion, that the 4th count is good, and this renders it unnecessary to decide on the others." *Id.*, at 344, 3 L Ed at 366. Similar reasoning was later applied in a case where a single general sentence rested on convictions under several counts of an indictment. Drawing upon some English cases and some dicta from Lord Mansfield,(4) the Court in *Claassen v. United States*, (1891) 142 US 140, 146, 35 L Ed 966, 968, 12 S Ct 169, held that if the defendant had validly been convicted on any one count "the other counts need not be considered." The most widely cited application of this approach to cases where concurrent sentences, rather than a single general sentence, have been imposed is *Hirabayashi v. United States*, (1943) 320 US 81, 87 L Ed 1774, 63 S Ct 1375. In that case the defendant had been found guilty of two different offences and had received concurrent three-month sentences. He challenged the constitutionality of both convictions, but this Court affirmed the lower court's judgment after considering and rejecting only one of his challenges. Since the conviction on the second count was valid, the Court found it "unnecessary" to consider the challenge to the first count. *Id.*, at 85, 105, 87 L Ed at 1778, 1788.

7. The concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions. At times the Court has seemed to say that the doctrine raises a jurisdictional bar to the consideration of counts under concurrent sentences. Some opinions have baldly declared that judgments of conviction "must be upheld" if any one count was good. *Barenblatt v. United States*, (1959) 360 US 109, 115, 3 L Ed 2d 1115, 1122, 79 S Ct 1081; see *United States v. Gainey*, (1965) 380 US 63, 65, 13 L Ed 2d 658, 661, 85 S Ct 754. In other cases the Court has chosen somewhat weaker language, indicating only that a judgment "may be affirmed if the conviction on either count is valid". *Roviaro v. United States*, (1957) 353 US 53, 59, n 6, 1 L Ed 2d 639, 644, 77 S Ct 623. And on at least one occasion, the Court has ignored the rule entirely and decided an issue that affected only one count, even though there were concurrent sentences. *Putnam v. United States*, (1896) 162 US 687, 40 L Ed 1118, 16 S Ct 923.

4. *Grant v. Astle*, 2 Doug 722, 99 Eng Rep 459 (1781); *Peake v. Oldham*, 1 Cowper 275, 98 Eng Rep 1083 (1775); *Rex v. Benfield*, 2 Burr 980, 97 Eng Rep 664 (1760).

8. One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine. See *United States v. Hines*, 256 F2d 561, 562-563 (CA2d Cir 1958). But whatever the underlying justifications for the doctrine, it seems clear to us that it cannot be taken to state a jurisdictional rule. See *Yates v. United States*, (1957) 355 US 66, 75-76, 2 L Ed 2d 95, 102, 103, 78 S Ct 128; (1896) 162 US 687 = 40 L Ed 1118; *Putnam v. United States*, supra. Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy.

9. In *Sibron v. New York*, (1968) 392 US 40, 20 L Ed 2d 917, 88 S Ct 1889, we held that a criminal case did not become moot upon the expiration of the sentence imposed. We noted "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.*, at 55, 20 L Ed 2d at 930. We concluded that the mere possibility of such collateral consequences was enough to give the case the "impact of actuality" which was necessary to make it a justiciable case or controversy. *Sibron* and a number of other recent cases have canvassed the possible adverse collateral effects of criminal convictions,⁽⁵⁾ and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. (6) Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable. Moreover, as in *Sibron*, both of petitioner's convictions might some day be used

5. *Street v. New York*, 394 US n3, 22 L Ed 2d 572, 578, 89 S Ct 1354 (1969); *Carafas v. LaVallee*, 391 US 234, 237-238, 20 L Ed 2d 554, 558, 88 S Ct 1556 (1968); *Ginsberg v. New York*, 390 US 629, 633-634, n. 2, 20 L Ed 2d 195, 200, 88 S Ct 1274 (1968).

6. The majority rule is, apparently, that all convictions handed down at the same time count as a single conviction for the purpose of habitual offender statutes, but a few States follow the stricter rule described in the text. The relevant cases are collected at 24 ALR2d 1262-1267 (1952), and in the accompanying supplements.

to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety.

10. We cannot, therefore, say that this Court lacks jurisdiction to decide petitioner's challenge to his larceny conviction. It may be that in certain circumstances a federal appellate court, as a matter of discretion, might decide (as in *Hirabayashi*) that it is "unnecessary" to consider all the allegations made by a particular party.⁽⁷⁾ The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today; however, it is sufficient for present purposes to hold that there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed.

II

11. While Maryland apparently agrees that there is no jurisdictional bar to consideration of petitioner's larceny conviction, it argues that the possibility of collateral consequences is so remote in this case that any double jeopardy violation should be treated as a species of "harmless error." The Solicitor-General, while not commenting at length on the facts of this particular case, suggests that we treat the concurrent sentence doctrine as a principle of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the rights of any party. Both Maryland and the Solicitor-General argue that the defendant should bear the burden of convincing the appellate court of the need to review all his concurrent sentences. Petitioner, on the other hand, sees in *Sibron* a command that federal appellate courts treat all errors which may possibly affect a defendant's rights, and he argues that the concurrent sentence rule therefore has no continuing validity, even as a rule of convenience.

12. Because of the special circumstances in this case, we find it unnecessary to resolve this dispute. For even if the concurrent sentence doctrine survives as a rule of judicial convenience, we find

7. In *Sibron* we noted the inadequacies of a procedure which postpones appellate review until it is proposed to subject the convicted person to collateral consequences. 392 US, at 56-57, 20 L Ed 2d at 930, 931. For the reasons there stated, an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems. That issue is not, however, presented by this case, and accordingly we express no opinion on it.

good reason not to apply it here. On direct appeal from petitioner's conviction, the Maryland Court of Special Appeals did in fact rule on his double jeopardy challenge to the larceny count. (1967) 1 Md App, 647 at 650-651, 232 A2d, 541 at 542-543. It is unclear whether Maryland courts always consider all challenges raised on direct appeal, notwithstanding the existence of concurrent sentences,(8) but at least in this case the State decided not to apply the concurrent sentence rule. This may well indicate that the State has some interest in keeping the larceny conviction alive;(9) if, as Maryland argues here, the larceny conviction is of no importance to either party, one wonders why the state courts found it necessary to pass on it. Since the future importance of the conviction may well turn on issues of state law about which we are not well informed, we propose, on direct appeal from the Maryland courts, to accept their judgment on this question. Since they decided this federal constitutional question, we see no reason why we should not do so as well. Moreover, the status of petitioner's burglary conviction and the eventual length of his sentence are both still in some doubt.(10) Should any attack on the burglary conviction be successful, or should the length of the burglary sentence be reduced to less than five years, petitioner would then clearly have a right to have his larceny conviction reviewed. As we said in *supra*, 392 US 40 at 56-57, 20 L Ed 2d at 930, 931, it is certainly preferable to have that review now on direct appeal, rather than later.(11) For these reasons, and because there is no jurisdictional bar, we find it appropriate to reach the questions specified in our original writ of certiorari.

III

13. In 1937, this Court decided the landmark case of *Palko v. Connecticut*, (1937) 302 US 319, 82 L Ed 288, 85 S Ct 149. *Palko*, although indicted for first-degree murder, had been convicted of murder in the second degree after a jury trial in a Connecticut state court. The State appealed and won a new trial. *Palko* argued that the Fourteenth Amendment incorporated, as against the States, the Fifth Amendment requirement that no person "be subject for the same offence to be twice put in jeopardy of life or limb."

8. Compare *Meade v. State*, 198 Md 489, 84 A2d 892 (1951), with *Marks v. State*, 230 Md 108, 185 A2d 909 (1962).

9. See n. 7, *supra*.

10. See n. 1, *supra*, and Part V, *infra*.

11. A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked, collaterally by suits for postconviction relief. Because of our disposition of this case, we need not reach this question.

The Court disagreed. Federal double jeopardy standards were not applicable against the States. Only when a kind of jeopardy subjected a defendant to "a hardship so acute and shocking that our polity will not endure it," *id.*, at 328, 82 L Ed at 293, did the Fourteenth Amendment apply. The order for a new trial was affirmed. In subsequent appeals from state courts, the Court continued to apply this lesser *Palko* standard. See e. g., *Brock v. North Carolina*, (1953) 344 US 424=97 L Ed 456=73 S Ct 349.

14. Recently, however, this Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." *Washington v. Texas*, (1967) 388 US 14=18, 18 L Ed 2d 1019 = 1022, 87 S Ct 1920. In an increasing number of cases, the Court "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down, subjective version of the individual guarantees of the Bill of Rights'" *Malloy v. Hogan*, (1964) 378 US 1 10-11, 12 L Ed 2d 653, 661, 84 S Ct 1489.(12) Only last Term we found that the right to trial by jury in criminal cases was "fundamental to the American scheme of justice," *Duncan v. Louisiana*, (1968) 391 US 145, 149, 20 L Ed 2d 491, 496, 88 S Ct 1444, and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment.(13) For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

15. *Palko* represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as *Betts v. Brady*, (1942) 316 US 455, 86 L Ed 1595, 62 S Ct 1252, the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." *Id.*, at 462, 86 L Ed at 1602. It relied upon *Twining v. New Jersey*, (1908) 211 US 78=53 L Ed 97=29 S Ct 14, which held that the right against compulsory self-incrimination was not an element

12. Quoting from *Ohio ex rel. Eaton v. Price*, 364 US 263, 275, 4 L Ed 2d 1708, 1716, 80 S Ct 1463 (1960) (Brennan, J., dissenting).

13. A list of those Bill of Rights guarantees which have been held "incorporated" in the Fourteenth Amendment can be found in *Duncan*, *supra*, at 148, 20 L Ed 2d at 495.

of Fourteenth Amendment due process. Betts was overruled by *Gideon v. Wainwright*, (1963) 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR 2d 733, *Twinning*, by *Malloy v. Hogan*, (1964) 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489. Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances do not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," *supra*, (1968) 391 US 145 at 149, 20 L Ed 2d 491 at 496, the same constitutional standards apply against both the State and Federal Government. Palko's roots had thus been cut away years ago. We today only recognize the inevitable.

16. The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. (14) See *Bartkus v. Illinois*, (1959) 359 US 121, 151-155, 3 L Ed 2d 684, 705-707, 79 S Ct 676 (Black, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of *autrefois acquit*, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." (15) Today, every State incorporates some form of the prohibition in its constitution or common law. (16) As this Court put it in *Green v. United States*, (1957) 355 US 184, 187-188, 2 L Ed 2d 199, 204, 78 S Ct 221, 61 ALR2d 1119, "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of

justice." The validity of petitioner's larceny conviction must be judged not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision.

IV

17. It is clear that petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied. Petitioner was acquitted of larceny in his first trial. Because he decided to appeal his burglary conviction, he is forced to suffer retrial on the larceny count as well. As this Court held in *Green v. United States*, *supra*, (1957) 355 US 184 at 193-194, 2 L Ed 2d 199 at 208, 61 ALR2d 1119 "[c]onditioning an appeal on one offense on a coerced surrender of a valid plea of former jeopardy on another offence exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy."

18. Maryland argues that *Green* does not apply to this case because petitioner's original indictment was absolutely void. One cannot be placed in "jeopardy" by a void indictment, the State argues. This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this "void" indictment had he not appealed his burglary conviction. Only by accepting the option of a new trial could the indictment be set aside; at worst the indictment would seem only voidable at defendant's option, not absolutely void. In any case, this argument was answered here over 70 years ago in *United States v. Ball*, (1896) 163 US 662, 41 L Ed 300, 16 S Ct 1192. In that case Millard Fillmore Ball was indicted, together with two other men, for the murder of one William T. Box in the Indian Territory. He was acquitted and his co-defendants were convicted. They appealed and won a reversal on the ground that the indictment erroneously failed to aver the time or place of Box's death. All three defendants were retried, and this time Ball was convicted. This Court sustained his double jeopardy claim, notwithstanding the technical invalidity of the indictment upon which he was first tried. The Court refused to allow the Government to allege its own error to deprive the defendant of the benefit of an acquittal by a jury. *Id.* at 667-668, 41 L Ed at 302. "[A]lthough the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error" and the Government could not have the acquittal set aside over the defendant's objections. *Id.*, at 669-670, 41 L Ed at 303. This case is totally indistinguishable. Petitioner was acquitted of larceny. He has, under *Green*, a valid double jeopardy plea which he cannot be forced to waive. Yet Maryland wants the earlier acquittal set aside,

14. J. Singler, *Double Jeopardy* 1-37 (1969).

15. 4 Blackstone, Commentaries *334.

16. J. Sigler, *supra*, n. 14, at 78-79; *Brock v. North Carolina*, 344 US 424, 435, n. 6, 97 L Ed 456, 463, 73 S Ct 349 (1953) (Vinson, C. J., dissenting).

over petitioner's objections, because of a defect in the indictment. This it cannot do. Petitioner's larceny conviction cannot stand.

V.

19. Petitioner argues that his burglary conviction should be set aside as well. He contends that some evidence, inadmissible under state law in a trial for burglary alone, was introduced in the joint trial for both burglary and larceny, and that the jury was prejudiced by this evidence.(17) This question was not decided by the Maryland Court of Special Appeals because it found no double jeopardy violation at all. It is not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation. To determine whether there is in fact any such evidentiary error, we would have to explore the Maryland law of evidence and the Maryland definition of larceny and burglary, and then examine the record in detail. We do not think that this is the kind of determination we should make unaided by prior consideration by the state courts.(18) Accordingly, we think it "just under the circumstances," 28 USC S. 2106, to vacate the judgment below and remand for consideration of this question. The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

20. It is so ordered.

SEPARATE OPINIONS.

Mr. Justice WHITE, concurring.

21. While I agree with the Court's extension of the prohibition against double jeopardy to the States, and with the Court's conclusion that the concurrent sentence rule constitutes no jurisdictional bar, additional comment on the wisdom and effects of applying a concurrent sentence rule seems appropriate.

22. In a time of increasingly congested judicial dockets, often requiring long delays before trial and upon appeal, judicial resources have become scarce. Where a man has been convicted on several counts and sentenced concurrently upon each, and where judicial review of one count sustains its validity, the need for review of the other counts is not a pressing one since, regardless of the outcome, the prisoner will remain in jail for the same length of time under the first count.

17. There is no danger here that the jury might have been tempted to compromise on a lesser charge because of an erroneous retrial on a greater charge. See *United States ex rel. Hetenyi v. Wilkins*, 384 F2d 844, 886 (CA2d Cir 1965), cert denied, 383 US 913, 15 L Ed 2d 667 86 S Ct 896 (1966). Larceny is a lesser offense than burglary.

18. See Note, *Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decisional Making*, 81 Harv L Rev 1260, 1272-1273 (1968).

Rather than permit other cases to languish while careful review of these redundant counts is carried to its futile conclusion, judicial resources might be better employed by moving on to more pressing business. This is not a rule of convenience to the judge, but rather of fairness to other litigants.

23. This is not to say, however, that the fact of conviction under the unreviewed counts could never be of importance to the prisoner. After his release it is possible they might be used against him in a recidivism prosecution, or used to impeach his testimony in a trial for another offence, to pick two obvious examples. Nevertheless, the unreviewed counts are, by hypothesis, not of immediate importance to his confinement, and our experience gives us no indication that they are frequently of such importance later that the concurrent sentence rule should not be applied.

24. The unreviewed count is often one of which, but for the concurrent sentence rule, the prisoner would have a right to review, either directly or on collateral attack. Arguably, to deny him that right when another man, convicted after a separate trial on each count, or sentenced consecutively, could not be denied that right under the applicable state or federal law, raises an equal protection question. But clearly so long as the denied review is of no significance to the prisoner the denial of equal protection is not invidious but only theoretical.

25. But should a situation arise in which the convict can demonstrate that the unreviewed count is being used against him, so as to work some harm to him additional to that stemming from the reviewed count, his grievance becomes real. At that point it may be that the unreviewed count may not be used against him, unless it is determined that the lack of earlier review can be cured by then supplying the convict the review to which he would earlier have been entitled but for his concurrent sentence on another count. For myself, postponed review, a question which the Court reserves (n. 7, supra), presents no insuperable difficulties. Appellate review is always conducted on a cold record, and collateral proceedings frequently deal with a stale record and stale facts. There is nothing inherently unfair in permitting the record to become colder while it is irrelevant to any human need, and other litigants' demands are more pressing. Whether reversal on such a record, after delayed review, would permit retrial or a hearing on a claim involving, for example, a coerced confession, is yet a further question which there is no present need to address. Should a satisfactory hearing or retrial prove impossible this would be an unfortunate byproduct of an initially crowded docket.

26. For the foregoing reasons, I agree with the Court that the concurrent sentence rule, while not of jurisdictional dimensions, should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack, although at least in theory it raises a number of questions concerning the subsequent effects of the unreviewed counts. It may be that where it can be reliably predicted in a particular case that each count would entail concrete prejudicial consequences at a later date, the appellate Court at the time of initial review would prefer to deal with all counts rather than to apply the concurrent sentence rule.

Mr. Justice HARLAN, whom Mr. Justice STEWART joins, dissenting.

27. One of the bedrock rules that has governed, and should continue to govern, the adjudicative processes of this Court is that the decision of constitutional questions in the disposition of cases should be avoided whenever fairly possible. Today the Court turns its back on that sound principle by refusing, for the flimsiest of reasons, to apply the "concurrent sentence doctrine" so as not to be required to decide the far-reaching question whether the Double Jeopardy Clause of the Fifth Amendment is "incorporated" into the Due Process Clause of the Fourteenth, thereby making the former applicable lock, stock, and barrel to the States. Indeed, it is quite manifest that the Court has actually been at pains to "reach out" to decide that very important constitutional issue.

28. I consider that the concurrent sentence doctrine is applicable here, and that dismissal of the writ is accordingly called for. Despite that, I feel constrained also to express my views on the merits because of what I conceive to be the importance of the constitutional approach at stake.

I

29. The Court decides, and I agree, that petitioner's larceny conviction is not moot, and that the concurrent sentence doctrine is not a jurisdictional bar to entertainment of challenges to multiple convictions, so long as the convictions sought to be reviewed are not moot. However, I would also emphasize, in agreement with the position of the Government as amicus curiae, that the concurrent sentence rule does have continuing vitality as an element of judicial discretion, and that appellate courts may decline to review a conviction carrying a concurrent sentence when another "concurrent" conviction has been reviewed and found valid and the unreviewed conviction foreseeably will have no significant adverse consequences for the appellant. As the Solicitor-General has pointed out, the concurrent sentence doctrine plays a significant role in conserving the time and energy of appellate

courts.(1) To require that these already overworked court(2) invariably review in full detail each of several convictions carrying concurrent sentences seems to me senselessly doctrinaire.(3)

A

30. As has been noted, the concurrent sentence doctrine is applicable only if there exists a valid concurrent conviction. In this instance, petitioner's double jeopardy argument is directed to his larceny conviction, but he claims that the concurrent sentence doctrine is no impediment to reaching that question because his concurrent, and otherwise valid, burglary conviction was tainted by having been tried together with the larceny count. It is therefore, necessary to consider whether this claim of taint has merit.

31. The Court finds that resolution of the taint issue is likely to involve such difficult points of Maryland law as to make a remand to the Maryland courts the soundest course. See ante, at —, 23 L Ed 2d at 718. However, my examination of the question convinces me that the pertinent Maryland law is quite elementary. And, unlike the Court, I am not deterred by the prospect of having to "examine in detail," ante, at —, 23 L Ed 2d at 718=AIR 1970 USSC at p. 71 the 42-page record of petitioner's second trial.

32. I conclude that there was no real possibility of taint. Burglary in Maryland consists to breaking and entering any dwelling house in the night time with intent to steal, take, or carry away the personal goods of another. See (1967) Md Code, Art. 27, S. 30(a). Larceny in Maryland is a common-law crime, consisting of the taking and carrying away of the personal property of another with intent to deprive the owner of the property permanently. See, e.g., *Fletcher v. State*, (1963) 231 Md 190, 189 A2d 641. Evidence was introduced at petitioner's second trial to show that he not only entered a locked house at night but also made off with several household appliances. The latter evidence was, of course, pertinent to the larceny count. However, it was also

1. See Memorandum for the United States as Amicus Curiae 20-23. Counsel for the Government estimated during oral argument that the concurrent sentence doctrine is employed in the disposition of about 10% of all federal criminal appeals.

2. See, e.g., Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv L Rev 542 (1969).

3. Like the Court, see ante, n. 7, I express no view on the question whether collateral consequences may constitutionally be imposed on account of a conviction which was denied review on direct appeal because of the concurrent sentence doctrine.

plainly relevant to the burglary count, since it tended to show intent to steal.

33. Petitioner bases his taint argument primarily on the proposition that he was entitled to have the evidence concerning the missing appliances excluded from his second trial under the doctrine of "collateral estoppel," he having been acquitted of larceny at the first trial. However, even if it is assumed that the conviction on the larceny count was bad on double jeopardy or due process grounds and that the principle of collateral estoppel has some application to state criminal trials through the Due Process Clause of the Fourteenth Amendment,(4), I think that the doctrine would not prevent admission of the evidence on the issue of burglary. The principle of collateral estoppel makes conclusive, in collateral proceedings, only those matters which were "actually litigated and determined in the original action". *Cromwell v. County of Sac*, (1877) 94 US 351, 353, 24 L Ed 195, 198.(5) The Maryland Constitution provides:

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Md. Const. Art. 15, S. 5.

Hence, petitioner's acquittal of larceny at his first trial may have rested solely upon that jury's unique view of the law concerning that offence, and cannot be taken as having necessarily "determined" any particular question of fact.

34. It follows from what has been said in this section that there can be no estoppel effect in a collateral proceedings, such as petitioner's second trial for burglary, and that petitioner's taint argument must fail.(6)

4. This Court said in dictum in *Hoag v. New Jersey*, 356 US 464, 471, 2 L Ed 2d 913, 919, 78 S Ct 829 (1958): "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held." See also *id.*, at 470-471, 2 L Ed 2d at 919; *Sealfon v. United States*, 332 US 575, 92 L Ed 180, 68 S Ct 237 (1948); *United States v. Oppenheimer*, 242 US 85, 88, 61 L Ed 161, 164, 37 S Ct 68, 3 ALR 516 (1916).

5. See also *Restatement, Judgments* S. 68(1).

6. The Court also suggests that the concurrent sentence doctrine should not be applied for the additional reasons that the eventual length of petitioner's burglary sentence is "still in some doubt." See *ante*, at —, 23 L Ed 2d at 715. Petitioner received a 10-year sentence following his first burglary conviction and a 15-year sentence after his second conviction. The latter sentence was subsequently vacated and resentencing ordered by a federal dis-

B

35. Since petitioner's second burglary conviction was not tainted by his simultaneous trial for larceny, it is necessary to consider whether the concurrent sentence doctrine is inapplicable for the other possible reason: that petitioner foreseeably will suffer significant adverse consequences on account of his larceny conviction.(7).

36. No such consequences can reasonably be predicted. The Court itself notes that only a "few States" would allow petitioner's larceny conviction to be used against him for purposes of sentencing as a habitual offender, and concedes that "this possibility may well be a remote one." *Ante*, at —, 23 L Ed 2d at 714= (AIR 1970 USSC at 68). When it is recalled that petitioner had been convicted of three felonies even prior to his present burglary conviction,(8) this possibility is reduced to the vanishing point.(9)

37. There remain the possibilities that petitioner's larceny conviction might be considered generally by a judge if and when petitioner is sentenced following some future conviction, and that the conviction might be used to impeach him in future judicial proceedings. In the circumstances of this case, these potential consequences are plainly insignificant. Petitioner's burglary and larceny convictions were based upon the very same series of acts on his part. This fact could readily be brought to the attention either of a sentencing judge or of a trier of fact before whom petitioner was sought to be impeached. Predictably, knowledge of the identical origin of the two convictions would reduce the extra impact of the larceny conviction to negligible proportions. Thus, it would be difficult to imagine a case in which a "concurrent" conviction would be likely to entail fewer adverse consequences.

C

38. The Court nonetheless holds that "[b]ecause of special circumstances in this case" it will not apply the concurrent sentence doctrine, and that it is unnecessary even to decide whether the doctrine has

strict Court. See *Benton v. Copinger*, 291 F Supp 141 (1968). The State has appealed. Whatever the outcome of that appeal, I consider that the probability of petitioner's burglary sentence being reduced below five years, so as to make the concurrent sentence doctrine inoperative, is manifestly negligible.

7. Cf. e.g., *Sibron v. New York*, 392 US 40, 55-56, 20 L Ed 2d 917, 930, 88 S Ct 1889 (1968).

8. See Supplementary Brief for Respondent 20, n 6.

9. So far as I have been able to discover, there is no State in which petitioner's larceny conviction could have habitual offender consequences.

"continuing validity, even as a rule of judicial convenience." See ante at —, 23 L. Ed 2d at 714=(AIR 1970 USSC at 68). One of the "special circumstances" cited by the Court is the existence of the "taint" issue, which the Court finds it desirable to remand to the state courts. As has been noted, I can perceive no difficulties which would justify a remand.

39. The second of the "special circumstances" relied on by the Court is that "in this case the [state courts] decided not to apply the concurrent sentence rule" and reached the "double jeopardy" issue themselves. See ante, at —, 23 L. Ed 2d at 714=(AIR 1970 USSC at 68). The Court concludes that "[s]ince [the Maryland courts] decided the federal constitutional question, we see no reason why we should not do so as well." Ibid. This reasoning baffles me. In determining whether or not to reach a constitutional issue the decision of which is not absolutely necessary to the disposition of a case, this Court has long been guided by the rule that "[w]here a case can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler v. Louisville & N. R. Co.*, (1909) 213 US 175, 191-193, 53 L. Ed 753, 758, 29 S. Ct 451; see *Ashwander v. TVA*, (1936) 297 US 288, 345, 80 L. Ed 688, 709, 56 S. Ct 466 (Brandeis, J., concurring). In deciding whether such "important reasons" exist, this Court has never regarded itself as bound to reach the constitutional issue merely because the court below did so, and has often declined to pass upon constitutional questions even though fully canvassed by the lower court.(10) On some of these occasions, the Court has relied in justification upon the concurrent sentence doctrine.(11)

40. Since I cannot believe that the Court wishes as a general matter to abandon the salutary and well-established principle of declining to rule on constitutional questions in advance of necessity, and since I find the "taint" issue entirely free of the complexities which the Court claims to perceive, I cannot help but conclude that the real reason for reaching the "double jeopardy" issue in this case is

10. See, e.g., *Cichos v. Indiana*, 385 US 76, 17 L. Ed 2d 175, 87 S. Ct 271 (1966); *Hamm v. City of Rock Hill*, 379 US 306, 13 L. Ed 2d 300, 85 S. Ct 284 (1964); *Bell v. Maryland*, 378 US 226, 12 L. Ed 2d 822, 84 S. Ct 1814 (1964); *Machinists v. Street*, 367 US 740, 6 L. Ed 2d 1141, 81 S. Ct 1784 (1961); *Rice v. Sioux City Cemetery*, 349 US 70, 99 L. Ed 897, 75 S. Ct 614 (1955).

11. See, e.g., *United States v. Gainey*, 380 US 63, 13 L. Ed 2d 658, 85 S. Ct 754 (1965); *Barenblatt v. United States*, 360 US 109, 3 L. Ed 2d 1115, 79 S. Ct 1081 (1959).

the Court's eagerness to see that provision "incorporated" into the Fourteenth Amendment and thus made applicable against the States.

D

41. As has been shown, this case satisfies both preconditions to application of the concurrent sentence doctrine. Reliance upon that doctrine would enable the Court to avoid decision of a substantial constitutional question. Accordingly, I would apply the concurrent sentence rule and decline to review petitioner's larceny conviction. Since the case was brought here on a writ of certiorari limited to the "double jeopardy" question, decision of which would affect only the larceny conviction, I would dismiss the writ as improvidently granted.

II

42. Having concluded that the writ should be dismissed, I would ordinarily not go further. However, as indicated at the outset, I feel impelled to continue with some observations respecting what can only be regarded as a complete overruling of one of this Court's truly great decisions, and with an expression of my views as to how petitioner's claim respecting his retrial for larceny should fare under the traditional due process approach.

A

43. I would hold, in accordance with (1937) 302 US 319, 82 L. Ed 288, 58 S. Ct 149, that the Due Process Clause of the Fourteenth Amendment does not take over the Double Jeopardy Clause of the Fifth, as such. Today *Palko* becomes another casualty in the so far unchecked march towards "incorporating" much, if not all, of the Federal Bill of Rights into the Due Process Clause. This march began, with a Court majority, in 1961 when *Mapp v. Ohio*, (1961) 367 US 643, 6 L. Ed 2d 1081, 81 S. Ct 1684, 84 ALR2d 933, was decided and, before the present decision, found its last stopping point in (1968) 391 US 145, 20 L. Ed 2d 491, 88 S. Ct 1444, decided at the end of last Term. I have at each step in the march expressed my opposition, see, e.g., my opinions in *Mapp v. Ohio*, supra, (1961) 367 US 643 at 672, 6 L. Ed 2d 1081 at 1100, 84 ALR2d 933 (dissenting); *Ker v. California*, (1963) 374 US 23, 44, 10 L. Ed 2d 726, 744, 83 S. Ct 1623 (concurring); *Malloy v. Hogan*, (1964) 378 US 1, 14, 12 L. Ed 2d 653, 663, 84 S. Ct 1489 (dissenting); *Pointer v. Texas*, (1965) 380 US 400, 408, 13 L. Ed 2d 923, 928, 85 S. Ct 1065 (concurring); *Griffin v. California*, (1965) 380 US 609, 615, 14 L. Ed 2d 106, 110, 85 S. Ct 1229 (concurring); *Klopfer v. North Carolina*, (1967) 386 US 213, 226, 18 L. Ed 2d 1, 10, 87 S. Ct 988 (concurring); *Duncan v. Louisiana*, supra, at 171, 20 L. Ed 2d at 508 (dissenting), and more particularly in the *Duncan* case undertook to show that the "selective incorporation" doctrine finds no support either in history or in

reason.(12) Under the pressures of the closing days of the Term, I am content to rest on what I have written in prior opinions, save to raise my voice again in protest against a doctrine which so subtly, yet profoundly, is eroding many of the basics of our federal system.

44. More broadly, that this Court should have apparently become so impervious to the pervasive wisdom of the constitutional philosophy embodied in *Palko*, and that it should have felt itself able to attribute to the perceptive and timeless words of Mr. Justice Cardozo nothing more than a "watering down" of constitutional rights, are indeed revealing symbols of the extent to which we are weighing anchors from the fundamentals of our constitutional system.

B

45. Finally, how should the validity of petitioner's larceny conviction be judged under *Palko*, that is, under due process standards?

46. A brief recapitulation of the facts first seems advisable. Petitioner was indicted and tried simultaneously for burglary and larceny. He was acquitted of larceny but convicted of burglary. Petitioner appealed, and the Maryland courts remanded in light of earlier Maryland decisions holding invalid a provision of the Maryland Constitution requiring that grand and petit jurors declare their belief in God. Petitioner was given the option either of accepting the result of his trial or of demanding reindictment and retrial. He chose to attack the indictment was reindicted and retried for both larceny and burglary, and was convicted of both offenses.

47. The principle that an accused should not be tried twice for the same offense is deeply rooted in Anglo-American law.(13) In this country, it is presently

12. In the interest of strict accuracy, it should be pointed out that Mr. Justice Stewart cannot and does not fully join in the above sentence of this opinion. He joined my dissenting opinion in *Duncan v. Louisiana*, supra, but wrote a separate memorandum in *Mapp v. Ohio*, supra, at 672, 6 L Ed 2d at 1100, 84 ALR2d 933; joined the opinion of Mr. Justice Clark in *Ker v. California*, supra; joined Mr. Justice White's dissenting opinion in *Malloy v. Hogan*, supra, at 33, 12 L Ed 2d at 674; wrote an opinion concurring in the result in *Pointer v. Texas*, supra, at 409, 13 L Ed 2d at 929; wrote a dissenting opinion in *Graffin v. California*, supra, at 617, 14 L Ed 2d at 111; and separately concurred in the result in *Klopper v. North Carolina*, supra, at 226, 18 L Ed 2d at 10.

13. The "double jeopardy" concept has been an established part of the English common law since at least 1700, and was contained in the constitutions or common law of many American jurisdictions prior

embodied in the Fifth Amendment to the Federal Constitution and in the constitution or common law of every State.(14) The *Palko* Court found it unnecessary to decide "[w]hat the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him " (1937) 302 US 319 at 328, 82 L Ed 288 at 293. However, I have no hesitation in stating that it would be a denial of due process at least for a State to retry one previously acquitted following an errorless trial. The idea that the State's interest in convicting wrongdoers is entirely satisfied by one fair trial ending in an acquittal, and that the accused's interest in repose must thereafter be given precedence, is indubitably a "principle so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id., at 325, 82 L Ed at 292.

48. The situation in this case is not quite so simple. Had petitioner not appealed his burglary conviction, the State would surely have allowed him to rest on his larceny acquittal and merely serve out his burglary sentence. However, the State argues that the burglary and larceny counts were originally contained in a single indictment; that upon petitioner's appeal the indictment was declared totally void and the trial court found to have lacked jurisdiction, and that the State could then proceed as if there had never been a previous indictment or trial.

49. The State's contention that petitioner's first trial was a complete nullity because the trial court "lacked jurisdiction" is unconvincing. As has been noted, it appears that the State would willingly have seen petitioner serve out the burglary sentence imposed in consequence of that trial. Under state procedure, petitioner could avail himself of the "jurisdictional" defect only by appealing his conviction. The crucial issue, therefore, is what legitimate interest had the State in compelling petitioner to jeopardize his larceny acquittal as a condition of appealing his burglary conviction?

50. I can perceive no legitimate state interest. Certainly it is the purest fiction to say that by appealing his burglary conviction petitioner "waived" his right not to be retried for larceny or "consented" to retrial on that charge. The notion of "waiver" was first employed in (1896) 163 US 662, 41 L Ed 300, 16 S Ct 1192, to justify retrial of an accused for the same offense following reversal of a conviction on appeal. The "waiver" doctrine was

to 1787. See J. Sigler, *Double Jeopardy* 1-37 (1969); *Bartkus v. Illinois*, 359 US 121, 151-155, 3 L Ed 2d 684, 705-707, 79 S Ct 676 (1959) (Black, J. dissenting).

14. See J. Sigler, supra, at 77-117.

more fully articulated in *Trono v. United States*, (1905) 199 US 521, 50 L Ed 292, 26 S Ct 121, where it was held that retrial and conviction for murder following a successful appeal from a manslaughter conviction did not violate the Double Jeopardy Clause.⁽¹⁵⁾ *Trono* apparently dictated the result in *Brantley v. Georgia*, (1910) 217 US 284, 54 L Ed 768, 30 S Ct 514, in which the Court held in a brief per curiam, without citing any authority, that a Georgia retrial and conviction for murder following the reversal on appeal of an earlier manslaughter conviction did not amount to "a case of twice in jeopardy under any view of the Constitution of the United States." *Id.*, at 285, 54 L Ed 769.⁽¹⁶⁾ We have since recognized that the "waiver" rationale is a "conceptual abstraction" which obscures rather than illuminates the underlying clash of societal and individual interests. See *United States v. Tateo*, (1964) 377 US 463, 466, 12 L Ed 2d 448, 450, 84 S Ct 1587. Accordingly, I do not think that the reasoning in *Trono* or the apparent holding in *Brantley*, insofar as they would require affirmance of petitioner's larceny conviction, can any longer be regarded as good law.

51. Nor did the State in the present case have the sorts of interests which have been held to justify retrial for the same offense after a conviction has been reversed on appeal by the accused and in the more unusual case when an acquittal has been set aside following an appeal by the State.⁽¹⁷⁾ When the accused has obtained a reversal on appeal, the societal interest in convicting the guilty has been deemed too weighty to permit every such accused to be "granted immunity from punishment because of any defect sufficient to constitute reversible error in the

15. In the federal realm, the *Trono* decision was, of course, limited to its "peculiar factual setting" by *Green v. United States*, 355 US 184, 197, 2 L Ed 2d 199, 209, 78 S Ct 221, 61 ALR2d 1119 (1957), in which I joined the dissenting opinion of Mr. Justice Frankfurter, *id.*, at 198, 2 L Ed 2d 210, 61 ALR2d 1119. Mr. Justice Stewart was not a member of the Court at the time *Green* was decided.

16. *Trono* was the only federal decision cited by the State of Georgia in its brief in *Brantley*.

17. For more detailed analyses of these interests, see generally *Mayers & Yarbrough Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv L Rev 11 (1960); *Vari Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale LJ 606 (1965); *Comment, Twice in Jeopardy*, 75 Yale LJ 262 (1965); *Note Double Jeopardy: The Reprosecution Problem*, 77 Harv L Rev 1272 (1964).

proceedings leading to conviction." *supra*, (1964) 377 US 463 at 466, 12 L Ed 2d 448 at 451. The rationale for allowing the State to appeal an acquittal has been that the State, like the accused, is entitled to assure itself of a trial "free from the corrosion of substantial legal error" which might have produced an adverse verdict. See *supra*, (1937) 302 US 319 at 328, 82 L Ed 288 at 293.⁽¹⁸⁾

52. In the present case, the State did not appeal, and the defect in the composition of the grand jury could not have affected petitioner's subsequent acquittal at trial. Society's legitimate interest in punishing wrongdoers could have been fully vindicated by retrying petitioner on the burglary count alone, that being the offense of which he was previously convicted. The State had no more interest in compelling petitioner to stand trial again for larceny, of which he had been acquitted, than in retrying any other person declared innocent after an error-free trial. His retrial on the larceny count therefore, in my opinion, denied due process, and on that ground reversal would be called for under *Palko*.

18. However, in the federal system it has been held that the Government may not appeal from an acquittal without placing the accused "a second time in jeopardy for the same offence." *Kepner v. United States*, 195 US 100, 133, 49 L Ed 114, 126, 24 S Ct 797 (1904). See also *id.*, at 134-137, 49 L Ed 126, 127 (Holmes, J. dissenting).

AIR 1970 USSC 76 (V 57 C 10)

[1969-24 Law Ed. 2d. 53]*

MARSHALL, J.

Karl Brussel, Appellant v. United States, Respondent.

Decided on 10-10-1969.

†(A) Constitution of India, Art. 20(3)—Privilege against self-incrimination by production of corporate records applies only against the records themselves and all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of the privilege — (Constitution of United States of America, Fifth Amendment). (Para 3)

†(B) Constitution of India, Art. 20(3)—Privilege against self-incrimination—Rule

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DN/DN/B860/70/RGD/E

permitting compelled production of corporate records by their custodian may be invoked only against a party who is in fact the custodian of the records in question — (Constitution of United States of America, Fifth Amendment). (Para 4)

Cases Referred: Chronological Paras

- (1960) 362 US 199 = 4 Law Ed 2d 654 = 80 S Ct 624, Cf. Thompson v. Louisville 4
(1957) 354 US 118 = 1 Law Ed 2d 1225 = 77 S Ct 1145, Curcio v. United States 3
(1948) 335 US 1 = 92 Law Ed 1787 = 68 S Ct 1375, Shapiro v. United States 3
(1911) 221 US 361 = 55 Law Ed 771 = 31 S Ct 538, Wilson v. United States 2

SUMMARY

An application was made to the Circuit Justice for bail pending appeal to the United States Court of Appeals for the Seventh Circuit from an order of the United States District Court for the Northern District of Illinois, under which order the applicant was jailed for civil contempt for refusal to produce corporate records and to testify before a federal grand jury after he had been denied immunity from prosecution. The applicant's claim of the privilege against self-incrimination before the grand jury had been overruled by the District Court, apparently on the ground of the corporate records doctrine, and an emergency application for bail to the Court of Appeals had not yet been determined.

Marshall, J., as Circuit Justice, ordered that the applicant be released on his own recognizance pending disposition of his appeal to the Court of Appeals, stating that although the usual practice was to deny requests for bail when the Courts of Appeals had not yet ruled on applications for the same relief, such practice would be departed from where the case presented unusual circumstances, and relief would be granted in the instant case since (1) serious questions were presented concerning the validity of the contempt order, (2) with regard to the corporate records doctrine, there was no evidence that the applicant was the custodian of the documents subpoenaed or that he had any connection with the corporations, (3) there was no suggestion of any substantial risk that the applicant would not appear at further proceedings, and (4) according to the applicant's affidavit, he had no criminal record.

OPINION

Mr. JUSTICE MARSHALL, Circuit Justice.

1. Applicant was held in civil contempt by the United States District Court for the Northern District of Illinois on

October 7, 1969, and was immediately confined to the Cook County jail. On the same day, the District Court denied him bail pending appeal. On October 8, applicant filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from the contempt order, and made an emergency application for bail. The Court of Appeals ordered the United States Attorney to respond to that application by October 13, next Monday. On October 9, the present application was made to me in my capacity as Circuit Justice. Though it is our usual practice to deny such requests when the courts of appeals have not yet ruled on an application for the same relief, I am constrained by the unusual circumstances of this case to depart from that practice.

2. Applicant was subpoenaed to appear before a federal grand jury in Chicago and to bring with him certain corporate records. Prior to his appearance before the grand jury, applicant requested, but was denied, immunity from prosecution. Before the grand jury he was asked if he was an officer of the corporations involved. To this and other questions applicant declined to answer, invoking his privilege against self-incrimination. He was taken before the district judge, who overruled his claim of Fifth Amendment privilege, apparently on the grounds of the corporate records doctrine, *Wilson v. United States*, (1911) 221 US 361=55 L Ed 771=31 S Ct 538. When applicant persisted in refusing to answer, the court ordered him jailed for civil contempt.

3. *Curcio v. United States*, (1957) 354 US 118=1 L Ed 2d 1225=77 S Ct 1145, raises serious questions concerning the validity of the contempt order. In that case, a union official, admittedly the custodian of the union's records, refused on Fifth Amendment grounds to reveal their whereabouts to the grand jury. This Court upheld the assertion of the privilege, holding that the corporate records exception applied only to the records themselves, not to testimony concerning them, and reiterating the established principle that "all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." *Id.*, (1957) 354 US 118 at p. 124=1 L Ed 2d 1225 at p. 1230, citing *Shapiro v. United States*, (1948) 335 US 1, 27=92 L Ed 1787, 1804=68 S Ct 1375.

4. It is true that applicant here, unlike Curcio, was cited for failure to produce the subpoenaed records, as well as for failure to testify. But the rule permitting compelled production of corporate records by their custodian may be invoked only against a party who is in fact the custodian of the records in question. Yet there appears no evidence in

the record of this case that applicant is the custodian of the documents subpoenaed, or indeed that he has any connection with the corporations. Applicant thus argues that he has been jailed in the absence of any evidence supporting an essential element of the finding that he is in contempt. Cf. *Thompson v. Louisville*, (1960) 362 US 199=4 L Ed 2d 654=80 S Ct 624, 80 ALR2d 1355.

5. Nothing in the record suggests any substantial risk that applicant will not appear at further proceedings in his case. As far as appears, he has complied with previous orders to appear; indeed, he interrupted his honeymoon in Mexico to be present at the grand jury hearing. According to his affidavit, he has no criminal record. Given the imposition of a contempt order for an explicit assertion of the Fifth Amendment privilege, and the other circumstances of the case, I am ordering applicant released on his own recognizance pending disposition of his appeal to the Court of Appeals.

AIR 1970 U. S. S. C. 78 (V 57 C 11)

(1969-24 Law Ed 2d 275)*

HARLAN, DOUGLAS AND BLACK, JJ.

United States, Appellant v. James D. Knox, Respondent.

(No. 17) Decided on 8-12-1969.

†(A) Evidence Act (1872), S. 115 — Case from U.S.A. — Estoppel and waiver — Fraud — Challenging validity of statute.

A person who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself. (Para 3)

†(B) Constitution of India, Art. 20 (2) — Case from U. S. A. — Testimonial compulsion — Filing of returns by tax payer — Constitution of U. S. A., Fifth Amendment.

A tax payer has no privilege under his constitutional right against self-incrimination, to file a false return when faced with the choice of prosecution for failure to file a return or for incriminating statements in a truthful return; the resulting pressure is not "testimonial compulsion." (Para 5)

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†Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

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Cases	Referred to	Chronological	Paras
(1969) 395 US 6 = 23 L Ed 2d 57 = 89 S Ct 1532, <i>Leavy v. United States</i>			11
(1969) 24 Law Ed 2d 264, <i>Bryson v. United States</i>			3, 9, 10, 12
(1969) 394 US 971 = 22 Law Ed 2d 751 = 89 S Ct 1452			2
(1968) 390 US 62 = 19 Law Ed 2d 906 = 88 S Ct 709, <i>Grosso v. United States</i>			2, 9, 11
(1968) 390 US 338 = 19 Law Ed 2d 1219 = 88 S Ct 1097, <i>John Lookretis v. United States</i>			5
(1968) 390 US 39 = 19 Law Ed 2d 889 = 88 S Ct 697, <i>Marchetti v. United States</i>			2, 9
(1966) 384 US 855 = 16 Law Ed 2d 973 = 86 S Ct 1840, <i>Dennis v. United States</i>			3, 12
(1965) 382 US 70 = 15 Law Ed 2d 165 = 86 S Ct 194, <i>Albertson v. S. A. C. B.</i>			11
(1955) 348 US 419 = 99 Law Ed 475 = 75 S Ct 415, <i>Lewis v. United States</i>			6, 10
(1953) 345 US 22 = 97 Law Ed 754 = 73 S Ct 510, <i>United States v. Kahriger</i>			6, 10
(1938) 303 US 1 = 82 Law Ed 607 = 58 S Ct 468, <i>Kay v. United States</i>			6
(1937) 302 US 214 = 82 Law Ed 205 = 58 S Ct 182, <i>United States v. Kapp</i>			6
Mervyn Hamburg, for Appellant; J. Edwin Smith, for Respondent.			

SUMMARY

An indictment charged the defendant with engaging in the business of accepting wagers without first filing Internal Revenue Service Form 11-C, the special return and registration application required by §4412 of the Internal Revenue Code of 1954, and without first paying the occupational tax imposed by §4411 of the Code. The indictment further charged that when the defendant did file such a form, he knowingly and wilfully understated the number of employees accepting wagers on his behalf — in violation of 18 USC §1001, the general criminal provision punishing the making of fraudulent statements to the government. In the United States District Court for the Western District of Texas, the defendant moved to dismiss the indictment, asserting that the wagering tax laws that required him to file the special return had been held invalid by the United States Supreme Court. The government did not pursue the charges under §§4411 and 4412, but argued that the alleged invalidity of the wagering tax laws was "largely irrelevant" to the §1001 charge. The District Court dismissed the indictment, reasoning that the defendant could not be prosecuted for his "failure to answer the wagering form correctly," since his Fifth Amend-

ment privilege against self-incrimination would have prevented prosecution for "failure to answer the form in any respect" (unreported memorandum).

On direct appeal, the United States Supreme Court reversed. In an opinion by Harlan, J., expressing the view of six members of the court, it was held that the Fifth Amendment gave the defendant no privilege to file a false return when faced with the choice of prosecution for failure to file a return or for incriminating statements in a truthful return.

Douglas, J., joined by Black, J., dissented, reasoning that if the Internal Revenue Service had no constitutional authority to require the defendant to file any wagering form at all, his filing of a form which included false information in no way prejudiced the government and was not a matter "within the jurisdiction" of the Internal Revenue Service, as required by 18 USC § 1001.

OPINION OF THE COURT

Mr. JUSTICE HARLAN delivered the opinion of the Court.

Appellee Knox has been charged with six counts of violation of federal law in connection with his wagering activities. The first four counts of the indictment charge that between July 1964 and October 1965 he engaged in the business of accepting wagers without first filing Internal Revenue Service Form 11-C, the special return and registration application required by § 4412 of the Internal Revenue Code of 1954, and without first paying the occupational tax imposed by § 4411 of the Code. Counts Five and Six charge that when Knox did file such a form on October 14, 1965, and when he filed a supplemental form the next day, he knowingly and wilfully understated the number of employees accepting wagers on his behalf—in violation of 18 USC S. 1001, a general criminal provision punishing fraudulent statements made to any federal agency.

2. Knox moved to dismiss the indictment, asserting that this Court's decisions in *Marchetti v. United States*, (1968) 390 US 39=19 L Ed 2d 889=88 S Ct 697, and *Grosso v. United States*, (1968) 390 US 62=19 L Ed 2d 906=88 S Ct 709, had held invalid(1) the provisions of the wagering tax laws that required him to file the special return. The Government in response stated that it would not pursue the first four counts but argued that Knox's objections based on the *Marchetti* and *Grosso* decisions were "largely irrelevant" to Counts Five and Six. The District Court disagreed. It dismissed all six counts, reasoning that Knox could not be prosecuted for his "failure to answer

the wagering form correctly" since his Fifth Amendment privilege against self-incrimination would have prevented prosecution for "failure to answer the form in any respect." (Unreported memorandum.) The United States filed a direct appeal to this Court from the dismissal of the two counts charging violations of S. 1001, and we noted probable jurisdiction, (1969) 394 US 971=22 L Ed 2d 751=89 S Ct 1452.(2)

3. In *Bryson v. United States*, (1969) 24 L Ed 2d 264, we reaffirmed the holding of *Dennis v. United States*, (1966) 384 US 855=16 L Ed 2d 973=86 S Ct 1840, that one who furnishes false information to the Government in feigned compliance

2. Such a direct appeal is authorized by the Criminal Appeals Act, 18 USC § 3731, which provides: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances: From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . . From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. . . ." The District Court sustained the claim of privilege not on the basis of facts peculiar to this case but on the basis of its conclusion that the Fifth Amendment provides a defense to any prosecution under § 1001 based on misstatements on a Form 11-C. This amounts to a holding that § 1001, as applied to this class of cases, is constitutionally invalid. The generality of the impact of the District Court's holding appears to us to render our jurisdictional holding a fortiori to analogous jurisdictional holdings in such cases as *Dehnke-Walker Milling Co. v. Bondurant*, 257 US 282, 66 L Ed 239, 42 S Ct 106 (1921); *Fleming v. Rhodes*, 331 US 100, 102-104, 91 L Ed 1368, 1370-1372, 67 S Ct 1140 (1947); *Wissner v. Wissner*, 338 US 655, 94 L Ed 424, 70 S Ct 398 (1950); *Department of Employment v. United States*, 385 US 355, 356-357, 17 L Ed 2d 414, 416, 417, 87 S Ct 464 (1966). We prefer to rest our jurisdiction on this aspect of § 3731 rather than, as advocated by the Government, the statute's "motion in bar" provision, in light of the fact that the scope of the latter provision will be the subject of full-dress consideration, as will certain problems under the "dismissing any indictment" provision not present in this case, in *United States v. Sisson*, consideration of jurisdiction postponed, — US —, 24 L Ed 2d 65, — S Ct — (1969) (No. 305).

1. But see nn. 3, 6, *infra*.

with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself. Bryson, like Dennis, involved S. 9(h) of the Taft-Hartley Act, which was attacked as an abridgment of First Amendment freedoms and as a bill of attainder forbidden by Art. I, S. 9, of the Constitution. In contrast, Knox alleges infringement of his Fifth Amendment privilege against self-incrimination. We do not think that the different constitutional source for Knox's claim removes his case from the ambit of the principle laid down in those decisions. The validity of the Government's demand for information is no more an element of a violation of S. 1001 here than it was in Bryson.(3)

4. The indictment charges that the forms Knox filed with his District Director contained false, material information,(4) an accusation that concededly

3. Knox argues that his false Forms 11-C were not filed "in any matter within the jurisdiction of any department or agency of the United States," a necessary element of a violation of S. 1001, because Marchetti and Grosso held that the Internal Revenue Service was not authorized to require the filing of the forms. Even if his reading of those decisions were correct, his argument would fail for the reasons explained in Bryson. The Internal Revenue Service has express statutory authority to require the filing, and when Knox submitted his forms this Court had held that such a requirement raised no self-incrimination problem. *United States v. Kahriger*, 345 US 22, 97 L Ed 754, 73 S Ct 510 (1953); *Lewis v. United States*, 348 US 419, 99 L Ed 475, 75 S Ct 415 (1955). Further, in *Marchetti* we did not hold that the Government is constitutionally forbidden to direct the filing of the form, but only that a proper assertion of the constitutional privilege bars prosecution for failure to comply with the direction. See n. 6, *infra*; see also *Grosso v. United States*, *supra*, 390 US, at 69-70, n. 7, 19 L Ed 2d at 913.

4. Knox claims on appeal that neither Count Five nor Count Six charges any affirmative misstatements, but only omissions. Count Five charges that the statements on the form filed on October 14, 1965, "were not true, correct and complete, in that the number of employees and/or agents engaged in receiving wagers in his behalf were misrepresented and understated, in that the number, name, special stamp number, street address, and city and State of employees and/or agents engaged in receiving wagers in the said James D. Knox's behalf had been omitted. . . ." Count Six contains language identical except for an apparently inadvertent difference in punc-

falls within the terms of S. 1001. However, Knox claims that the Fifth Amendment bars punishing him for the filings because they were not voluntary but were compelled by Ss. 4412 and 7203 of the Internal Revenue Code. He points out that if he had filed truthful and complete forms as required by § 4412, he would have incriminated himself under Texas wagering laws. On the other hand, if he had filed no forms at all, he would have subjected himself to criminal prosecution under § 7203(5). In choosing the third alternative, submission of a fraudulent form, he merely opted for the least of three evils, under a form of duress that allegedly makes his choice involuntary for purposes of the Fifth Amendment.

5. For this proposition Knox relies on *United States v. Lookretis*, 398 F.2d 64 (CA7th Cir 1968), where, after this Court had remanded for reconsideration in light of *Marchetti*, see (1968) 390 US 338=19 L Ed 2d 1219=88 S Ct 1097, the Court of Appeals ruled that truthful disclosures made under the compulsion of S. 4412 could not be introduced against their maker in a criminal proceeding. How-

tuition. Although the wording is not entirely clear, we need not decide whether on a fair reading the indictment encompasses affirmative misstatements. The District Court read the indictment as alleging that Knox violated § 1001 "by willfully and knowingly making a false statement" on the forms, and it was on the basis of this construction that the court dismissed Counts Five and Six. We have no jurisdiction on this direct appeal to review the construction of the indictment. E.g., *United States v. Harriss*, 347 US 612, 98 L Ed 989, 74 S Ct 808 (1954); *United States v. Petrillo*, 332 US 1, 91 L Ed 1877, 67 S Ct 1538 (1947); *United States v. Borden Co.*, 308 US 188, 193, 84 L Ed 181, 188, 60 S Ct 182 (1939). But see *United States v. CIO*, 335 US 106, 92 L Ed 1849, 68 S Ct 1349 (1948). See also n. 2, *supra*.

5. Title 26 USC § 7203 provides: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

not ordinarily be a ground for a winding up order unless it has produced insolvency (Re Anglo Egyptian Navigation Co., (1869) LR 8 Eq 660). In R. E. S. Corporation Ltd. case, AIR 1956 SC 213 (supra), it was held by the Supreme Court that the fact that the directors had misappropriated the funds of the company may not be sufficient to make it just or equitable to wind up the company.

39. Further details of the alleged mismanagement and dishonesty of the Gupta group, which is said to be thoroughly unreliable, given by the petitioner are: (1) Transfer of personal properties to the company without executing a proper conveyance and in order to "fritter away" the funds of the company. On behalf of the company, it was explained that, as disputes are still pending about these properties, a deed could not be executed for the sale of the properties of Gupta family to the company. But, it is asserted that it is an advantageous transaction from which the company benefits. Reliance is placed on Section 53-A of the Transfer of Property Act to show that the right and title of the vendee cannot be questioned by the vendors. It is too early to say that the transaction must necessarily injure and not benefit the company.

(2) Purchases of overwhelmingly large quantities of cotton by the company from particular sources of supply under the control of the Gupta group. It is difficult to conceive how this could be mismanagement. It is, however, alleged that this is a device for enabling the Guptas to take advantage of fall in the prices of cotton and enabling the Guptas to pocket the funds of the company. The correctness of such an inference is strongly denied on behalf of the company. No loss to the company or its shareholders has been proved from the investment of funds in other concerns in which the Guptas are interested.

(3) The control of the investment of funds in other concerns in which the Guptas are interested. In reply, it is urged that investment in particular concerns could not constitute mismanagement unless loss to the company from it is shown. No loss attributable to it was proved.

(4) Payment of brokerage to the firm of sole selling agents, B. R. & Sons, in which the Guptas are interested. This was alleged to be a device for misappropriating the funds of the company. In reply, the company asserts that B. R. & Sons of Bombay, were properly appointed selling agents of the company who passed on the commission to the brokers so that the insinuations against the Gupta family personally were baseless.

(5) Payment by the company of sums upto Rs. 25,000: "being arbitration fee and other expenses of arbitration proceed-

ings which should have been paid by Messrs. B. R. & Sons Limited." The company justified the payment as one made under the terms of a properly made award. Nothing illegal or improper was proved about it.

(6) Indulgence in speculative transactions which had resulted in losses amounting to Rs. 35,00,000 to the company. In reply, the company asserts that the transactions were within the purview of the authorised objects of the company and it was contended that losses are part of the ordinary risks and incidents of business.

40. None of the above-mentioned grounds, taken either separately or together, appears to me to make a winding up order imperative in the interests of the creditors. Several of the allegations made look like attempts at mud-slinging in the hope that some of it would stick. The equities which the petitioner can properly invoke as a creditor must relate to the interests of the creditors which a petitioning creditor represents in a winding up proceedings. The test in such a case should be: Will the interests of creditors be better served by a winding up order? If the debts of the creditors can be liquidated more easily by taking proceedings other than those for the liquidation of the company itself, I do not think that a winding up order could be said to be absolutely necessary.

41. The question of insolvency was raised again under the just and equitable clause. I do not think that this can be done when there is a separate provision in S. 434(1) (c) of the Act for it now. Even if it could be considered here, I have already dealt with both types of alleged insolvency. Learned counsel for the company has rightly contended that only commercial insolvency was, according to paragraph 49 of the petition itself, the real ground of the claim for a winding up order even under the just and equitable clause.

42. The last issue arising out of allegations of mala fides made by the company against the petitioner may be briefly dealt with before making an order on the basis of equities as they stand today. The company has alleged that "there is a long standing dispute and enmity between Guptas and Singhanias since the partition" between the two groups. It is alleged that the company having come to the share of the Guptas, the Singhanias are interested in getting it closed or wound up somehow and have been fomenting labour trouble and putting other obstacles in its way. It is also alleged that the company has secured very profitable contracts and has been supplying 90 per cent of the needs of the Defence Department in canvas so that the Singhanias, as rivals in this business, are anxious to secure a monopoly

in this line by getting the company wound up. These allegations are strongly denied on behalf of the petitioner. The rejoinder affidavit tries to make out that the Singhania have been trying to help the Guptas in industry and trade.

43. Allegations of mala fides can generally be substantiated by circumstantial evidence only. One of the circumstances certainly is that the petitioner has made allegations in the petition itself disclosing hostility to the Guptas and the manner in which they conduct any business. Another circumstance is that the petitioners filed an application for an injunction soon after making the winding up petition so as to prevent the company from taking a loan of Rs. 40,00,000 which the company was alleged to be negotiating for enabling the company to restart its mills which are now, according to the company, running profitably. If the company could obtain such loans from the Government, there seemed no need for a winding up petition to obtain payment.

44. Learned counsel for the petitioner tried to mitigate the effect of some of the circumstances indicated above, which make the motives behind the petition suspect, and of the weakness in the equitable position of a petitioner starting as a debtor of the company originally but turned into a creditor only due to the setting aside of a decree against the debtor solely on the ground of a bar of limitation operating against the company, when the correctness of the decree of the appellate Court was questioned on substantial grounds in another pending appeal, by submitting that all he wanted was adequate security for the payment of the debt. Apparently, the petitioner was willing that the petition be dismissed if acceptable security for the amount due was forthcoming. At first, the petitioner's counsel suggested that proper security was a bank guarantee, but, afterwards, seemed willing to accept other security of any suitable property free from any prior charge. The security of some shares, offered by the company was unacceptable to the petitioner. The parties, therefore, prayed that the question of adequate security may be decided by the Court. I do not, however, think that winding up proceedings should be used in such a case, as a means of merely obtaining indirectly an order which has the effect of stay of execution of a decree on furnishing security. Such an order can be more appropriately sought from the Court in which an appeal against the decree to be executed is still pending.

45. If the, petitioner's debt, about which I have found that a bona fide dispute exists between the parties, was the only claim against the company, I may have followed the line indicated by a recent English case (not cited by the par-

ties) Mann v. Goldstein, (1969) 39 Com Cas 353. There, it was held that to invoke the winding up jurisdiction, after it had become clear that the petitioner's debt was disputed on substantial grounds, so that the petitioners' locus standi was questionable, was an abuse of the process of the Court. In the instant case, a judgment in favour of the petitioner entitles the petitioner to claim the benefit of the presumption that the judgment in its favour is correct so that the petitioner has a locus standi or right to petition until it could be shown that the decree in its favour has been actually set aside in appeal. This distinction, on facts, is there. Nevertheless, if the correctness of the judgment has been questioned on substantial grounds by a pending appeal, the debt is still disputed. The proper order to pass, if the petitioner was the sole creditor, would, in my opinion, have been to postpone a decision on this petition until the appeal against the petitioner was decided. In this case, however, the existence of a large amount of other indebtedness has also been proved. The circumstances alleged by the petitioner, relating to the management of the company, and the inquiry by the Government, said to be pending against the company, could not be altogether ignored.

46. Upon a consideration of the totality of facts and circumstances in this case, it seems to me that a long adjournment of the hearing of this petition or postponement of the final order for one year will serve the interests of justice. This period can be utilised by the parties in obtaining, if possible, a decision of the pending appeal in the Supreme Court which will finally decide the question whether the disputed debt has to be discharged or not. In this period, the petitioners can also take further steps to execute the restitution order of 15-4-1967, passed by the Court of the First Additional Civil Judge, Kanpur. If steps taken to enforce that order are unsuccessful, as seems unlikely in view of the proved ability of the company to wipe off or reduce such heavier liabilities within not too long a period, the petitioner will become entitled to equitable execution. On the other hand, if the company is able to obtain a stay order from the Supreme Court within this period of one year, staying the operation or the execution of the restitution order, the company will be in a position to urge that, there being no neglect on its part in discharging the particular obligation to pay the petitioner, this petition be dismissed. In this period, the company or the petitioner or some other creditor or creditors can also take appropriate steps, if so advised, to hold a meeting of the creditors as contemplated by S. 391 of the Act or otherwise to protect their interests if this is necessary under the provisions of the Act.

47. The result is that, in exercise of the powers of this Court under Section 443 (1) (b) of the Act, I postpone the final decision on this petition for one year on condition that the parties will take such steps to assert their claims within this period as to establish a clear balance of equities either in favour of or against a winding up order. An order as to costs of this petition will also be passed after one year from today when the petition will be listed for further hearing before the Company Judge of this Court at that time. Parties may, after one year, file applications supported by affidavits to show the steps taken by them, and the results, and other facts which have a bearing on the equities of the case as they stand then.

Order accordingly.

**AIR 1970 ALLAHABAD 467 (V 57 C 73)
FULL BENCH**

**JAGDISH SAHAI, K. B. ASTHANA
AND R. S. PATHAK, JJ.**

Haji Manzoor Ahmed and another, Petitioners v. State of U. P. and others, Opposite Parties.

Civil Misc. Writ No. 4636 of 1966 connected with Writ Petns. Nos. 179, 3389 and 4644 of 1966, D/- 24-5-1968.

Houses and Rents— U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 7-F, 3 — Jurisdiction of State Government under S. 7-F is quasi-judicial — State Government acting under S. 7-F is tribunal within Art. 136 — AIR 1965 All 465 (FB) & AIR 1964 All 148. No longer good law in view of AIR 1965 SC 1767 — Recording of reasons — Necessity of — Order refusing to interfere under S. 7-F with order of Commissioner under S. 3(3) — State Government must state reasons — 1965 All LJ 740 & 1965 All LJ 961, Overruled — Constitution of India, Arts. 136, 226.

Per Majority (Jagdish Sahai, J. contra): The jurisdiction exercised by the State Government under S. 7-F U.P. Act (3 of 1947) is quasi-judicial. AIR 1965 All 465 (FB) & AIR 1964 All 148 No longer good law in view of AIR 1965 SC 1767.

(Paras 54, 57, 58, 41, 42)

An order made by the State Government under S. 7-F affects the rights of the landlord and the tenant. S. 3(1) confers upon the tenant a statutory immunity against eviction in the absence of the grounds specified in the sub-section and of permission from the District Magistrate to sue for ejectment. The right of the tenant to that statutory immunity is the subject of proceedings before the District Magistrate and the Commissioner under S. 3 and before the

State Government under S. 7-F. The jurisdiction exercised by each of these authorities partakes of the same nature. There is a lis between the landlord and the tenant in those proceedings. The order of the State Government under S. 7-F is binding between the parties and finally adjudicates upon the right of the tenant to statutory immunity against eviction. Moreover, the jurisdiction of the State Government is of a revisional character. The State Government acting under S. 7-F is a tribunal within the meaning of Art. 136(1). AIR 1965 SC 1595, Applied. (Para 71)

The necessity for disclosing the reasons for a quasi-judicial order has been made to rest on broadly two grounds. One is the need to guard against arbitrariness on the part of the authority making the order. The other is the need to ensure an effective judicial scrutiny of the order. AIR 1966 SC 671, Rel. on.

(Paras 62, 67, 48)

Where an order of an inferior authority is carried in appeal or revision before a superior authority, and in disposing of the appeal or revision the superior authority makes an order in the exercise of quasi-judicial jurisdiction: (1) In all cases where the superior authority interferes with the order of the inferior authority, the order of the superior authority must set out its reasons. (2) In cases where the superior authority merely affirms the order of the inferior authority and,

(a) where the order of the inferior authority does not set out its reasons, the superior authority must disclose its reasons in its order;

(b) where the order of the inferior authority sets out the reasons;

(i) where the superior authority finds the reasons of the inferior authority acceptable to it, it need not specify the reasons in its order but may merely refer to the reasons given by the inferior authority or give an outline of the process of reasoning by which it finds itself in agreement with the inferior authority;

(ii) where the superior authority does not find the reasons of the inferior authority acceptable to it the superior authority must set out its own reasons in its order. (Paras 72, 74, 53)

Hence, the State Government is in law bound to state the reasons for an order refusing to interfere under S. 7-F with an order of Commissioner passed under S. 3(3). 1965 All LJ 740 & 1965 All LJ 961, Overruled; AIR 1965 SC 1767 & 1967 MPLJ 868 (SC), Rel. on. Case law discussed. (Paras 53, 73, 75)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 1606 (V 54) =

Civil Appeals Nos. 2596 and 2597

- of 1966, D/- 29-3-1967. Bhagat Raja v. Union of India 37, 38, 62, 67
- (1967) C. A. No. 657 of 1967, D/- 17-8-1967=1967 MPLJ 868 (SC), Pragdas Umar Vaishya v. Union of India 38, 43, 63
- (1966) AIR 1966 SC 671 (V 53) = 1966-1 SCR 466, Madhya Pradesh Industries Ltd. v. Union of India 37, 38, 62, 67
- (1966) AIR 1966 SC 1824 (V 53) = (1966) 3 SCR 868, Padmanabha Setty v. K. P. Papiiah Setty 22
- (1966) AIR 1966 SC 1827 (V 53) = (1966) 2 SCWR 524, State of Madras v. A. R. Srinivasan 31, 62
- (1966) AIR 1966 SC 1922 (V 53) = (1966) SCR (Supp) 104, Nandram Hunram, Calcutta v. Union of India 52
- (1966) AIR 1966 All 57 (V 53) = 1965 All LJ 924 (FB), Gyan Chand Bhatia v. Rent Control and Eviction Officer 12
- (1965) AIR 1965 SC 1222 (V 52) = (1965) 1 SCR 678, Govind Rao v. State of Madhya Pradesh 36, 61
- (1965) AIR 1965 SC 1595 (V 52) = (1965) 2 SCR 366, Associated Cement Companies Ltd. v. P. N. Sharma 25, 56, 70, 71
- (1965) AIR 1965 SC 1767 (V 52) = 1965 All LJ 353, Bhagwan v. Ramchand 18, 19, 41, 42, 49, 54, 55, 58, 71
- (1965) AIR 1965 All 465 (V 52) = 1965 All WR (HC) 185 (FB), Mrs. K. L. Seghal v. State of U.P. 54
- (1965) 1965 All LJ 740, Vinod Chandra Maheshwari v. State of Uttar Pradesh 64
- (1965) 1965 All LJ 961=ILR (1966) II All 148, Bhagwat Prasad v. State of Uttar Pradesh 64
- (1964) AIR 1964 All 148 (V 51) = ILR (1964) 1 All 716, Murlidhar v. State of U. P. 58
- (1964) 1964 AC 40 = 1963-2 All ER 66, Ridge v. Baldwin 56
- (1963) AIR 1963 SC 677 (V 50) = (1963) Supp 1 SCR 242, Jaswant Sugar Mills Ltd. v. Lakshmi Chand 21, 69, 70
- (1961) AIR 1961 SC 1669 (V 48) = (1962) 2 SCR 339, Harinagar Sugar Mills Ltd v. Shyam Sunder 35, 61, 62
- (1959) AIR 1959 All 463 (V 46) = 1959 All LJ 536, Sheo Kumar Dwivedi v. Thakurji Maharaj Brijman 110
- (1958) AIR 1958 SC 578 (V 45) = 1958 SCJ 1113, Express Newspaper (Private) Ltd. v. Union of India 32
- (1957) AIR 1957 All 825 (V 44) = 1957 All LJ 644, Sita Ram Sahu v. Kedar Nath Sahu 110
- (1957) 1957-1 All ER 796, Re: Gilmore's Application 44, 65
- (1956) 1956 All LJ 104 = 1956 All WR HC 831, Radhakant v. State of Uttar Pradesh 47
- (1954) AIR 1954 SC 520 (V 41) = 1955 SCR 267, Durga Shankar Mehta v. Raghuraj Singh 69
- (1954) AIR 1954 All 428 (V 41) = 1954 All LJ 172, Brij Kishore v. Rent Control and Eviction Officer 12
- (1950) AIR 1950 SC 188 (V 37) = 1950 SCR 459, Bharat Bank Ltd. v. Employees of Bharat Bank Ltd. 69
- (1949) AIR 1949 FC 124 (V 36) = 1949 FCR 262, Kai Khurshroo Bozonjee v. Jerbai 22
- (1825) 5 Dow & Ry KB 489, R. v. Warnford 66
- (1824) 4 Dow & Ry KB 315 = 2 LJOSKB 162, Williams v. Lord Bagot 65
- S. N. Kacker, B. P. Srivastava and Sridhar (in C.M.W. No. 4636); Gopal Behari (in W.P. No. 3389); K. C. Saxena (in W.P. No. 4644) and S. N. Kacker (in W.P. No. 179), for Petitioners; Ambika Prasad, for Opposite Parties.
- JAGDISH SAHAI, J.:** The question referred to us reads:
- "Whether the State Government is in law liable to state the reasons for an order refusing to interfere under Section 7-F of the Rent Control and Eviction Act with an order of the Commissioner passed under Section 3(3) of the Act?"
2. The relevant and necessary facts of the case are:—
- The petitioners, Haji Manzoor Ahmad and Dr. Maqbool Ahmad, are the landlords of premises No. CK 66/3 situate in Mohalla Benia Bagh, in the city of Varanasi. The respondents Nos. 4 to 7, that is, Sarvasri Sher Andil Khan, Moghal Khan, Abdullah Khan and Mannan Khan, are the tenants in possession of the premises aforesaid (hereinafter referred to as the premises). The respondents Nos. 1 to 3 are the State of Uttar Pradesh, the Commissioner, Varanasi Division, Varanasi and the Rent Control and Eviction Officer, Varanasi.
3. The petitioners made an application under Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act (hereinafter referred to as the Act) for permission to eject the respondents Nos. 4 to 7 from the premises. The respondents Nos. 4 to 7 filed an objection and on 10-7-1964 the Area Rationing Officer, Rent Control, Varanasi, dismissed the petitioners' application. The petitioners filed a revision application before the Commissioner, Varanasi Division, who by his order dated 31-7-1964 remanded the case back to the Rent Control and Eviction Officer, Varanasi. After remand the Rent Control and Eviction Officer by his

order dated 21-5-1966 granted permission to the petitioners to file a suit for the ejectment of the respondents from the ground floor only, but rejected the application with regard to the upper storey. The petitioners filed a revision application against the aforesaid order of the Rent Control and Eviction Officer before the Commissioner, Varanasi Division and so did the respondents Nos. 4 to 7.

The learned Commissioner heard both the revision applications together and by an order dated 18-7-1966 dismissed the petitioners' revision application and allowed that of the respondents Nos. 4 to 7, thus revoking the permission granted by the Rent Control and Eviction Officer. The petitioners then filed a revision application under Section 7-F of the Act before the State Government. That revision application was rejected by the State Government, according to the petitioners, on 3-10-1966. The petitioners have filed Annexure 'G' to the Writ Petition treating it as an order passed by the State Government rejecting their revision application. It reads:—

“कार्यालय स्मृतिपत्र

विषय:—हाजी मन्जूर अहमद व अन्य बनाम श्री शेख

इन्दल खां व अन्य मकान नं. सी. के. ६६/३

को नियम वाराणसी.

हाजी मन्जूर अहमद व अन्य को उनके उपरोक्त विषयक प्रार्थना पत्र दिनांक १२ सितम्बर १९६६ के संदर्भ में सूचित किया जाता है कि राज्य सरकार इस मामले में हस्तक्षेप अपेक्षित नहीं समझती है।

द. बी. एन.—चतुर्वेदी. अनु. सचिव”

4. The petitioners have approached this Court under Article 226 of the Constitution of India and have prayed that the order of the State Government be quashed. The main ground that was urged before the learned single Judge at the time of the hearing of the instant writ petition was that the State Government was bound to pass a reasoned order and inasmuch as annexure 'G' to the writ petition does not contain the reasons, the order of the State Government is liable to be quashed.

5. The only question which we are called upon to consider is whether the State Government while exercising its power under Section 7-F of the Act is required to pass a speaking and reasoned order.

6. Section 3 of the Act is headed as restrictions on eviction and provides that no suit shall, without the permission of the District Magistrate, be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the grounds contained in clauses (a) to (g) of that section. From

that it follows that if the cause of action for the suit is founded on any of the grounds contained in clauses (a) to (g) of Section 3 of the Act, no permission of the District Magistrate is necessary and the landlord can go to a Civil Court without the permission of the District Magistrate, but if the proposed civil suit is based on any other ground, the landlord must first obtain the permission of the District Magistrate. The order of the District Magistrate is revisable by the Commissioner. The power of the District Magistrate and the Commissioner and the procedure to be followed by them are contained in the same provision i.e., Section 3 of the Act.

7. Sub-section (2) of Section 3 of the Act reads:—

“Where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses to grant the permission, the party aggrieved by his order may, within 30 days from the date on which the order is communicated to him, apply to the Commissioner to revise the order.” Sub-sections (3) and (4) of Section 3 of the Act provides:—

“(3) The Commissioner, shall hear the application made under sub-section (2), as far as may be, within six weeks from the date of making it, and he may, if he is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of the proceedings held before him alter or reverse his order, or make such other order as may be just and proper.

(4) The order of the Commissioner under sub-section (3), shall, subject to any order passed by the State Government under Section 7-F, be final.”

Sub-section (4) of Section 3 of the Act makes the order passed by the Commissioner under sub-section (3) final though subject to any order passed by the State Government under Section 7-F of the Act. This would show that the proceedings which emanate with an application before the District Magistrate for permission to sue become final or close with the passing of the order by the Commissioner. Those proceedings are not continued before the State Government when it is seized of the matter. It is significant that the powers of the State Government are not contained in the same provision in which those of the District Magistrate and the Commissioner are contained but in a separate provision, i.e., Section 7-F of the Act which is headed as “Revision to State Government” reads:

“The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in Section 3 or requiring any accommodation to

be let or not to be let to any person under Section 7 or directing a person to vacate any accommodation under Section 7-F and may make such order as appears to it necessary for the ends of justice."

8. It would be noticed that sub-sections (2), (3) and (4) of Section 3 of the Act, which deal with the revision application before the Commissioner and his powers in respect thereof are couched in very different words from Section 7-F of the Act which deals with the revision proceedings before the State Government and its powers to deal with the matter. Whereas sub-section (2) of Section 3 of the Act confers on "the party aggrieved" the right to file a revision application before the Commissioner within thirty days from the date on which the order is communicated to him, no such right is conferred upon a party by Section 7-F of the Act. Again, whereas the Commissioner is bound to hear revision application filed before him and cannot decline to decide it on merits, the State Government is not bound to send for the record of the case even though moved by a party and may refuse to interfere. It would be noticed that it is not stated in any statutory provision that from the order of the Commissioner a revision would lie to the State Government. In fact, there is no reference to the Commissioner's order in Section 7-F of the Act. The language of Section 7-F of the Act permits the State Government to send for the record of the case and pass an order itself no sooner the matter is decided by the District Magistrate and without waiting for the Commissioner's order. The word "may call for the record of any case granting or refusing to grant permission" comprehend such a course.

9. It would be noticed that neither the District Magistrate nor the Commissioner can pass an order suo motu. The District Magistrate can grant permission or refuse to grant one only when an application is made to him. This is apparent from the words "where any application has been made to the District Magistrate for permission to sue a tenant" occurring in Section 3(2) of the Act. The Commissioner cannot send for the record of the case suo motu and can exercise his jurisdiction only when a competent revision application is filed before him. Both Sections 3 and 7-F occur in the same Act and have been framed by the same legislature and yet their language is so different from each other. Section 7-F of the Act does not confer on a party the right to file a revision application. It only confers on the State Government the jurisdiction to call for the record of any case; clearly, therefore, a party has no right as such to invoke the jurisdiction

of the State Government under Sec. 7-F of the Act. No doubt, the State Government often acts on being moved by a party. The law does not preclude it from receiving a request from a party that it may send for the record of the case and examine it itself. The circumstance that it can act even when a party moves it does not mean that the party has a right to file a revision application. All that it means is that the party brings to the notice of the State Government the facts of the case and the State Government suo motu takes action.

10. The power of the State Government is discretionary. Section 115, C.P.C. is couched in language very similar to the one used in Section 7-F of the Act. The words used there are: "the High Court may call for the record of any case" and "..... may make such order in the case as it thinks fit." But it is settled law that the exercise of the powers under Section 115, C.P.C., is discretionary with the High Court. (See Sita Ram Sahu v. Kedar Nath Sahu, AIR 1957 All 825 and Sheo Kumar Dwivedi v. Thakurji Maharaj Brijman, AIR 1959 All 463).

11. Usually whenever the U.P. Legislature has given the right to a party to apply in revision, it has said so in clear words. For example Section 10(3) of the U.P. Sales Tax Act, Section 12 of the U.P. Vrihat Jot Kar Adhiniyam, 1963 and Section 46 of the U.P. Encumbered Estates Act, which read:—

"10(3) (i), Sales Tax Act — The revising Authority or any additional revising Authority may, for the purposes of satisfying itself as to the legality or propriety of any order made by any appellate or assessing authority under this Act, in its discretion, call for and examine either on its own motion or on the application of the Commissioner of Sales Tax or the person aggrieved, the record of such order and pass such order as it may think fit:"

"12(1). U. P. Vrihat Jot Kar Adhiniyam, 1963. — The Board of Revenue may, on their own motion or on application, call for the record of any proceeding by whom the case or appeal was decided if it appears to have exercised jurisdiction not vested in it by law or to have acted in the exercise of its jurisdiction illegally or with substantial irregularity and may pass such order in the case as they think fit:"

"46(1). U. P. Encumbered Estates Act.— Any court empowered under sub-sections (1), (2) and (2-A) of Section 45 to hear an appeal under this Act "may of its own motion, or on the application of any person concerned, call for the record of proceedings"

12. I am satisfied that the powers exercised by the State Government under

Section 7-F of the Act are discretionary and no party can invoke them as of right. I find support from *Brij Kishore v. Rent Control and Eviction Officer*, 1954 All LJ 172=(AIR 1954 All 428) and *Gyan Chand Bhatia v. Rent Control and Eviction Officer*, 1965 All LJ 924=(AIR 1966 All 57) (FB).

13. It would be noticed that the Commissioner is required by Section 3(3) of the Act to satisfy himself as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him. His approach, therefore, is purely objective and that of a Judicial Tribunal or of an authority which has to bring a judicial approach to the matter before it. It is clear from the use of the words "if he is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him" that he can interfere with the order of the District Magistrate either granting the permission or refusing to grant it only if he is satisfied that the order of the District Magistrate is not correct or not legal or not proper or that the proceedings before him are not regular. His jurisdiction, therefore, though called revisional by law, is almost appellate.

The Commissioner has to satisfy himself that the District Magistrate has properly dealt with the case and his jurisdiction is confined to the examination of the record and the proceedings before the District Magistrate. There are, however, no such restrictions on the power of the State Government. Section 7-F of the Act does not confine the State Government to the examination of the record and the order passed by the District Magistrate or the Commissioner nor is its jurisdiction confined to the examination of the regularity or otherwise of the proceedings before the District Magistrate and the Commissioner. All that Section 7-F requires the State Government to do is to send for the record of the case and make such order as appears to it necessary for the ends of justice. Even the restrictions imposed on the powers of the High Courts under Section 115, C.P.C., are absent in Section 7-F of the Act. It cannot, therefore, be doubted that the powers conferred upon the State Government by Section 7-F are of the widest amplitude and are not hedged in by any conditions or restrictions. It is free to pass any order which appears to it necessary in the interest of justice on any ground relevant for the decision of the case.

14. It may again be pointed out that whereas the Commissioner's powers are confined only to altering or revising the

order of the District Magistrate or passing such other order "as may be just and proper", the State Government's powers are not confined only to altering or revising the order of the District Magistrate or of the Commissioner. It is significant that whereas, while dealing with the powers of the Commissioner, the words used are "making such other order as may be just and proper", while dealing with the powers of the State Government the expression used is "make such order as appears to it necessary for the ends of justice." The use of the words "may be just and proper" clearly indicates that the approach must be objective.

In the words "may make such order as appears to it necessary for the ends of justice" occurring in Section 7-F of the Act, one clearly finds an element of subjectivity, a wider sweep and a freedom not found in the powers of the Commissioner. The legislature deliberately did not use the words "such other order as may appear to him necessary for the ends of justice" while dealing with the Commissioner's powers. The Commissioner's order has to take its roots in the record and the case of the parties. I have already said earlier that both Sections 3 and 7-F fall in the same Act and have been framed by the same legislature and yet the legislature has in its wisdom adopted different language in the two provisions. The only conclusion from this can be that the scope of the two provisions is not identical.

15. It has been contended that inasmuch as the State Government Acts in respect of a matter decided under Section 3 of the Act by the District Magistrate and the Commissioner, the nature of the jurisdiction of the State Government cannot be different from that of the District Magistrate and the Commissioner. I have already held earlier that the process before the State Government is a different one from the one before the District Magistrate and the Commissioner and the two jurisdictions are not identical. The legislature in its wisdom could make the powers of the State Government and its jurisdiction different from those of the District Magistrate and the Commissioner and this is what it has done by using different language in the two provisions.

16. For the reasons given above, I am satisfied that the powers of the State Government under Section 7-F of the Act are different in their magnitude and contents from the powers of the Commissioner exercised under Section 3 of the Act. The mere fact that the powers of the Commissioner and those of the State Government have been described as revisional by the Act would not make the

scope and the contents of the two powers the same.

17. Again, the circumstance that Section 3(4) of the Act makes the order of the Commissioner final and further circumstances that even though the powers of the District Magistrate and the Commissioner are contained in Section 3 of the Act, the powers of the State Government have been provided for in a separate provision, i.e., Section 7-F of the Act, lead to the conclusion that the process started before the State Government is a completely different process from the one started before the District Magistrate and concluded before the Commissioner.

18. In *Bhagwan v. Ram Chand*, 1965 All LJ 353=(AIR 1965 SC 1767) the Supreme Court had to consider the provisions of Sections 3 and 7-F of the Act. It was held by the Court that the State Government while exercising powers under Section 7-F of the Act must act according to the principles of natural justice. As to whether or not the proceedings before the State Government are purely quasi-judicial, *Lala Shri Bhagwan's case*, 1965 All LJ 353=(AIR 1965 SC 1767) (supra) appears to be silent. It is true that with regard to the powers of the District Magistrate and the Commissioner, the Supreme Court has clearly said that they exercise quasi-judicial functions. This is apparent from the following passages falling in the judgment of *Lala Shri Bhagwan's case*, 1965 All LJ 353=(AIR 1965 SC 1767):

1. "In our opinion, it is impossible to escape the conclusion that these provisions unambiguously suggest that the proceedings before the District Magistrate as well as before the Commissioner are quasi-judicial in character."

2. "That is why we think the Act must be taken to require that in exercising their respective powers under Section 3(2) and Section 3(3), the appropriate authorities have to consider the matter in a quasi-judicial manner, and are expected to follow the principles of natural justice before reaching their conclusions."

It is significant that the aforesaid observations are confined to the District Magistrate and the Commissioner and do not extend to the State Government. It was contended before us that the following passage occurring in that judgment indicates that the State Government also performs purely quasi-judicial functions:—

"Thus we are satisfied that when the District Magistrate exercises his authority under Section 3(2) and the Commissioner exercises his revisional power under Section 3(3), they must act according to the principles of natural justice. They are dealing with the question of the rights of

the landlord and the tenant and they are required to adopt a judicial approach.

If that be the true position in regard to the proceedings contemplated by sub-section 3(2) and sub-section 3(3), it is not difficult to hold that the revisional proceedings which go before the State Government under Section 7-F must partake of the same character. It is true that the State Government is authorised to call for the record suo motu, but that cannot alter the fact that the State Government would not be in a position to decide the matter entrusted to its jurisdiction under Section 7-F, unless it gives an opportunity to both the parties to place their respective points of view before it. It is the ends of justice which determine the nature of the order which the State Government would pass under Section 7-F, and it seems to us plain that in securing the ends of justice, the State Government cannot but apply principles of natural justice and offer a reasonable opportunity to both the parties while it exercises its jurisdiction under Section 7-F." In this passage their Lordships have only held that the State Government must hear the parties. As far as my understanding of this passage or of *Lala Shri Bhagwan's case*, 1965 All LJ 353=(AIR 1965 SC 1767) (supra) as a whole goes it was not held by the Supreme Court that the powers exercised by the State Government are purely quasi-judicial. In any case, I am unable to find any declaration of law in this judgment to the effect that the functions of the State Government under Section 7-F of the Act are purely curial or quasi-judicial and not a hybrid mixture of quasi-judicial and administrative.

19. The Supreme Court has not in *Lala Shri Bhagwan's case*, 1965 All LJ 353=(AIR 1965 SC 1767) (supra), or any other case that has been brought to our notice, said anything with regard to the State Government being required to record a speaking and reasoned order while taking action under Section 7-F of the Act.

20. It has been contended that the State Government is a Tribunal and inasmuch as against its order an appeal may be filed before the Supreme Court of India under Article 136 of the Constitution of India, it is absolutely necessary that the State Government must pass a speaking and reasoned order so that the same may be examined by the Supreme Court. Before Article 136 can apply, the decision must be a judgment or a decree or a determination or sentence or an order within the meaning of Art. 136(1) of the Constitution of India and must have been passed or made by a court or a Tribunal having judicial functions.

21. In *Jaswant Sugar Mills Ltd. v. Lakshmi Chand*, AIR 1963 SC 677, their

Lordships laid down that to make a decision or an act judicial, the following criteria must be satisfied:—

"(1) It is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules;

(2) It declares rights or imposes upon parties obligations affecting their civil rights; and

(3) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on question of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and facts."

22. In my opinion the State Government is not required to record evidence. It does not declare rights. It has only to see that the eviction of the tenant is not unreasonable. (See *Padmanabha Setty v. K. P. Papiiah Setty*, AIR 1966 SC 1824). It has also to take into consideration larger public interest; for instance even though the need of the landlord may be greater than that of the tenant, the State Government may cancel an order granting permission to the landlord to sue on the ground that the alternative accommodation for the tenant would not be possible to be provided for. The State Government may be pressed with the problem of rehabilitating a large number of refugees in a particular town, of setting persons uprooted due to defence or war measures or epidemic or other calamities. In that case it may like to reserve all the available accommodation for the use of the persons to be rehabilitated or those uprooted and may for that reason think it proper that a particular landlord or landlords in general should not be allowed to eject a particular tenant or tenants in general and thus create the difficulty for the administration to find out suitable accommodation for the tenant or tenants who may have very good grounds for being provided with an accommodation.

It may like to encourage landlords to rebuild houses by demolishing old though tenanted ones so that more commodious and modern flats capable of accommodating a large number of houseless persons be constructed. That is a matter of policy and the State Government would be within its powers in permitting a suit for ejectment even though the Commissioner and the District Magistrate had good reasons to hold that the needs of the tenant were such that he should not be evicted. That is why the powers given under Section 7-F are of the widest

amplitude and are unhedged by any conditions or restrictions. Like the Commissioner the State Government is not confined to the examination of the findings and the orders passed by the District Magistrate and the Commissioner and enquiring whether those orders are legal and proper and whether the proceedings before the District Magistrate or the Commissioner were regular. The language of Section 7-F is so wide that even in a case where the orders of the Commissioner and the District Magistrate may be legal and just, the State Government may interfere in larger public interest or on matters of policy. The legislature could not have used language of the widest amplitude unhedged by any restrictions or conditions while dealing with the powers of the State Government under Section 7-F of the Act unless it clearly intended to confer wide and vast powers on the State Government.

The language of Section 3(2) and (3) is very different from that of Section 7-F of the Act though the two provisions have been framed by the same legislature and fall in the same Act. It is, therefore, not possible to hold that they provide for exactly the same thing. The State Government, in my opinion, can and some times has to take into consideration matters of policy and expediency as also of administrative convenience while passing orders under Sec. 7-F of the Act. It is difficult to say that it is bound to act only by applying objective standards to facts found in the light of pre-existing legal rules and in view of the case set up by the landlord and tenant and that considerations of policy or expediency or administrative convenience are beyond the scope of Section 7-F of the Act. The tenant under the Act has no right to possession. He has only a statutory immunity from eviction under certain circumstances. (See AIR 1966 SC 1824 (supra) and *Kai Khurshroo Bozonjee Capadia v. Bai Jerbai*, AIR 1949 FC 124 (128)). All that the State Government has to decide is whether or not permission should be granted to the landlord for filing a suit for ejectment on grounds other than those contained in clauses (a) to (g) of Section 3 of the Act.

The landlord retains full ownership and dominion over the premises. The decision of the State Government cannot and does not affect his right of ownership and dominion. It cannot deal with the question of rent. It cannot reduce or remit the rent. It cannot go into the question of title to the property. The landlord can terminate the tenancy under the provisions of the Transfer of Property Act. He can apply to the authorities to release the accommodation in his favour. It would be noticed as is evidenced from

clauses (a) to (g) of Section 3(1) of the Act that in cases where the right of the landlord is invaded, the State Government has no jurisdiction, and permission to sue is not required. The landlord can file a suit in a civil Court without a permission. Again, it is only with regard to a suit for eviction of a tenant that permission is required. In respect of all other suits against the tenant no permission is necessary and the State Government has no jurisdiction in such matters. The State Government has only to see whether permission should be accorded for the eviction of a tenant in cases not covered by clauses (a) to (g) of Section 3(1) of the Act.

Therefore, the State Government deals with the rights of the landlord and the tenant only in the limited sense of permitting or refusing to permit the filing of a suit on grounds other than those contained in clauses (a) to (g). As the preamble and the enacting clauses of the Act would show, it is a temporary measure and was enacted to meet the challenge thrown by shortage of accommodation and the abnormal conditions created by the World War II, and not to adjudicate upon the respective rights of the landlord and the tenant. The functions of the State Government are limited to permit or not to permit eviction under certain circumstances. It cannot ignore the practical exigencies prevailing in the town in which permission to evict is sought. It has to keep in view practical arrangements so that society as such and individuals do not suffer due to shortage of accommodation and unforeseen conditions that have temporarily come into existence. The Act is in the nature of a temporary expedient for a passing phase and for such time till we recover ourselves from the after-effects of the war and return to normal times.

23. There may be occasions where landlords may make out, on the ground of their needs and legal rights, as unanswerable case for the eviction of their tenants and yet the State Government may, as a policy, refuse permission because that may result in acute shortage of accommodation.

24. It is, therefore, obvious that in dealing with a matter under Section 7-F of the Act the State Government cannot completely ignore considerations of policy, expediency and convenience and its approach cannot be purely judicial. It has also to be administrative.

25. Again, it was pointed out by the Supreme Court in *Associated Cement Companies Ltd. v. P. N. Sharma*, (AIR 1965 SC 1595) at p. 1606 (paragraph 33) that "the main and the basic test however, is whether the adjudicating power

which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function." Considering the scheme of the Act and the statutory provisions contained in it, it appears to me that while exercising powers under Section 7-F of the Act the State Government does not discharge judicial functions nor does it exercise State's inherent power of administering justice between man and man. The State Government is not governed by any rules of limitation as the Commissioner is. The revision application before the Commissioner must be filed within 30 days from the date on which the order of the District Magistrate is communicated to the revisionist and he must dispose of that application within six weeks of its being filed. There is no time limit fixed for the State Government either to take seisin of a matter or to dispose of it. This complete freedom from rules of limitation usually applicable to judicial proceedings also suggests that the State Government does not perform judicial functions of the State and has not the trappings of a Court or a judicial tribunal.

I have already said earlier that no party has a right as such to invoke the jurisdiction of the State Government under Section 7-F of the Act. This would again show that it is not a Court or a Tribunal exercising judicial functions. If it were a judicial Tribunal or a Court, an aggrieved party would have a right to approach it. The State Government can, by statute, be made a Tribunal exercising judicial functions, but for that there must be either express provision or that must be the result by necessary implication. The normal functions of the State Government are not judicial. In my opinion the scheme of the Act, as disclosed by its preamble and various provisions, is not to make the State Government a Court or judicial Tribunal to adjudicate upon rights of the parties. It does not find a place in the normal hierarchy of authorities set up by the Act to decide the question whether or not to accord permission to a landlord to sue a tenant. As said earlier, that hierarchy ends with the Commissioner, proceedings before whom become final. It has only been given an overall control or a power similar to veto. No doubt it must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But clearly the State Government is not bound to treat the question relating to grant or refusal to grant permission as though it were a trial. The process before it is a different one from that before the District Magistrate and the Commissioner.

26. Under these circumstances I am unable to hold that the State Government

Is a Court or a Tribunal within the meaning of Art. 136 of the Constitution of India, nor can I persuade myself that the orders which it passes under Section 7-F are decrees or orders or determinations or sentences within the meaning of that provision.

27. I am not called upon to decide in this case whether the Commissioner and the District Magistrate are Tribunals within the meaning of Art. 136 of the Constitution and I express no opinion in respect of it.

28. The question, however, requiring consideration is as to what exactly is the nature of the functions of the State Government under Section 7-F of the Act. I have said above that it does not exercise purely judicial functions nor is it a Court. In my opinion the State Government exercises a hybrid mixture of administrative and quasi-judicial functions. There is no doubt that it has to consider a proposal and an objection in the sense of there being a request by the landlord for permission to sue a tenant and an objection by the tenant that he should not be permitted to be sued. It is also true that in that sense there is a *lis*. But it has also to consider the question relating to grant or not to grant permission from the point of view of policy and expediency. The law does not provide the grounds of interference by the State Government. The matter coming for determination before it is to be settled by discretion involving no law. It has not to settle any legal issues nor has it to ascertain any law. The considerations of abstract law are foreign to its jurisdiction. It is not constrained to view the matter as merely a contest between the landlord and the tenant to be decided solely on considerations personal to them.

The legislature has clothed it with the power to view the matter in a larger context and to determine it on considerations of wider range which may in no sense be called judicial. It has to keep in mind as to what would be the result of its decision on the housing problem in the town in which permission is sought. Under the normal law of the land the landlord has the undisputed right of evicting his tenant. Therefore, if the State Government were to be governed only by the law or by legal principles, the provision for the landlord to seek permission would not have been framed. The State Government has to consider whether in the circumstances prevailing in a particular town it would permit the landlord to sue the tenant. It may also have to consider on occasions whether in view of shortage of accommodation and the difficulty for the tenant to find another accommodation it would be proper or not to permit the landlord to assert his legal rights by filing

a suit for the ejection of the tenant. It has to balance the need of the landlord and the tenant not on the scales of absolute legal rights, but on that of expediency, policy and exigencies prevailing in the town in which permission is sought.

Properly analysed, the consideration of needs has its roots in convenience and not law and has to be determined on practical considerations. The State Government may have to consider whether the landlord is interested in seeking permission to eject the tenant with a view to let out the premises on a higher rent and thus exploit the unfortunate situation of house shortage resulting from the World War II and rise to prices. But in deciding all these matters it is not so much the right of the parties that has to be taken into consideration as considerations of policy and expediency. The legal position is well settled. A landlord has a right to eject a tenant and a tenant cannot dispute that right, but the Act has imposed restrictions on the right due to the extraordinary situation that has arisen. It has conferred on the State Government powers of the widest amplitude. Therefore, in granting permission or in refusing to do so, considerations of policy may in certain cases prevail over considerations of pure legal rights of the parties.

29. The decision of the State Government is not appealable or revisable by any other authority. It has to act on considerations of policy, administrative convenience and expediency as also on practical exigencies prevailing in the town in which the permission is sought. I have already held that it is not a Court or a Tribunal within the meaning of Art. 136 of the Constitution. The exercise of its functions is discretionary and no party as of right can approach it. It does not decide any question of title or rights. The law does not require it to record reasons or to pass a speaking order. That being the position, I am unable to hold that it is required to pass a speaking and reasoned order.

30. Perhaps it would be proper if the State Government did so, so that the party who has lost before it knows the reason for its decision. A speaking and reasoned order would also dispel any suspicion of arbitrariness in the order of the State Government. But it is quite a different thing to lay down that the law requires its orders to be speaking and reasoned ones.

31. In *State of Madras v. A. R. Sriniwasan*, AIR 1966 SC 1827 the Supreme Court observed as follows:—

"The proceedings are, no doubt quasi-judicial; but having regard to the manner in which these enquiries are conducted we do not think an obligation can be impos-

ed on the State Government to record reasons in every case."

32. In *Express Newspaper (Private) Ltd. v. The Union of India*, AIR 1958 SC 578 it was held that even if the order is not a speaking and reasoned order, it would not stand vitiated.

33. For these reasons I am of the opinion that the State Government is not bound to record a speaking and reasoned order while exercising its power under Section 7-F of the Act.

34. Learned counsel for the petitioners have placed before us several decisions of the Supreme Court and have submitted that on the basis of those authorities it must be held that the State Government must record a speaking and a reasoned order.

35. I proceed to consider these authorities one by one. The first case is *Harinagar Sugar Mills Ltd. v. Shyam Sunder*, AIR 1961 SC 1669. There a right of appeal to the Central Government had been expressly conferred by statute upon an aggrieved party. As the Supreme Court pointed out, the Central Government, which was the appellate authority, had to adjudicate upon rights of parties in a civil matter. A procedure for the manner in which the appeal was to be disposed of was also given in Section 111 of the Indian Companies Act. The jurisdiction of the Central Government was not discretionary and it could be invoked as of right by a person aggrieved and the Central Government could not refuse to interfere if a case for interference had been made out. It was a regular tribunal of appeal. There are no similar provisions in the Act. This case, to my mind is clearly distinguishable.

36. The next case relied upon is *S. Govindrao v. State of Madhya Pradesh*, AIR 1965 SC 1222. The question before their Lordships in this case was whether the provisions of Section 5(3) of the C. P. and Berar Revocation of Land Revenue Exemption Act, 1948 made it obligatory on the part of the State Government to make a suitable grant of money or pension in case it was proved that the applicant had lost the exemption under the Act and was a descendant from a former Ruling Chief. *Hidayatullah, J.* (as he then was) was of the opinion that under Section 5 (3) of the C. P. and Berar Revocation of Land Revenue Exemption Act the State Government had a mandatory duty to grant pension if and when grounds for it had been made out. His Lordship rejected the contention that the State Government had an absolute discretion in the matter. In fact it would appear from Section 5 of the C. P. and Berar Revocation of Land Revenue Exemption Act that any person adversely affected was entitled to apply to the Deputy Commissioner of the district for the award of a grant of

money or pension and the Deputy Commissioner was bound (the word used is shall) to forward the application to the Provincial Government. Therefore, the person adversely affected had a right as such to approach the Provincial Government through the Deputy Commissioner. The provisions of the Act are very different from the C. P. and Berar Revocation of Land Revenue Exemption Act and, in my opinion, this case is also distinguishable.

37. The third and fourth cases relied upon are *Madhya Pradesh Industries Ltd. v. Union of India*, AIR 1966 SC 671 and the judgment of the Supreme Court in Civil Appeals Nos. 2596 and 2597 of 1966, *Bhagat Raja v. Union of India*, decided on March 29, 1967—(AIR 1967 SC 1606). These were cases of grant of mining lease under the provisions of Mines and Minerals (Regulation and Development) Act, 1957. In these cases applications for grant of lease in mining manganese ore were rejected. Revision applications against those orders were rejected by the Central Government under Rule 55, Mineral Concession Rules, 1960. The cases went up to the Supreme Court in the form of appeals by special leave under Art. 136 of the Constitution. Their Lordships were of the opinion that the Central Government was a Tribunal within the meaning of Art. 136 of the Constitution. These cases were governed by Rule 54, Mineral Concession Rules, 1960, which provided that "any person aggrieved by any order made by the State Government may, within two months from the date of the communication of the order to him apply to the Central Government for the revision of the order." A court-fee was prescribed for the said revision. The aggrieved party had a right as such to approach the Central Government. Rule 55 expressly said that "provided that no order shall be passed against an applicant unless he has been given an opportunity to make his representations against the comments, if any received from the State Government or other authority." The Supreme Court held that the Central Government acted as a judicial Tribunal. It observed as follows in AIR 1966 SC 671 (supra):—

"A perusal of the said provisions makes it abundantly clear that the State Government exercising its powers under the Act and the Rules made thereunder deals with matters involving great stakes; presumably for the said reason, the Central Government is constituted as an authority to revise the order of the State Government. Rules 54 and 55 lay down the procedure for filing a revision against the order of the State Government and the manner of its disposal. Under R. 54, a revision application has to be filed with the prescribed court-fee; and under R. 55,

the Central Government, after calling for the records from the State Government and after considering any comments made on the petition by the State Government or other authority, as the case may be, may make an appropriate order therein. The proviso expressly says that no order shall be made unless the petitioner has been given an opportunity to make his representations against the said comments. The entire scheme of the rules posits a judicial procedure and the Central Government is constituted as a tribunal to dispose of the said revision."

In its judgment in Civil Appeals Nos. 2596 and 2597 of 1966, D/- 29-3-1967 = (AIR 1967 SC 1606) (supra) the Supreme Court observed:—

"From the above, it will be amply clear that in exercising its powers of revision under Rule 55 the Central Government must take into consideration not only the material which was before the State Government but comments and counter-comments, if any, which the parties may make regarding the order of the State Government. In other words, it is open to the parties to show how and where the State Government had gone wrong, or why the order of the State Government should be confirmed. A party whose application for a mining lease is turned down by the State Government is therefore given an opportunity of showing that the State Govt. had taken into consideration irrelevant matters or based its decision on grounds which were not justified. In an application for revision under Rule 55 it will be open to an aggrieved party to contend that the matters covered by sub-section (3) of S. 11 were not properly examined by the State Government, or that the State Government had not before it all the available materials to make up its mind with respect thereto before granting a licence."

The provisions in the Act are wholly dissimilar to those of Rules 54 and 55 aforesaid. The State Government under Section 7-F of the Act has not been constituted as a regular authority to revise. No one can approach it as of right. Its jurisdiction is discretionary and the process before it is different from the process before the District Magistrate and the Commissioner who have been appointed regular authorities under the Act to permit or not to permit the filing of a suit. The proceedings before the District Magistrate and the Commissioner become final or close after the Commissioner has disposed of the matter. Clearly the statutory provisions with which we are concerned are very different from those in the two cases mentioned above. In my opinion, therefore, these cases are clearly distinguishable.

38. The last case is the judgment of the Supreme Court in Civil Appeal No.

657 of 1967, Pragdas Umar Vaishya v. Union of India, decided on 17-8-1967 (SC). This case also deals with the same provisions as in AIR 1966 SC 671 (supra) and Civil Appeals Nos. 2596 and 2597 of 1966 = (AIR 1967 SC 1606) (supra) and for the reasons already recorded while dealing with those cases is distinguishable.

39. For the reasons mentioned above I would answer the question referred to us by saying that the State Government is not required in law to record its reasons in its order under Section 7-F of the Act in a case of grant or refusal to grant permission to a landlord to sue a tenant.

40. ASTHANA, J.:— I have had the benefit of reading the opinions of my brothers Jagdish Sahai and Pathak. I have not been able to persuade myself to agree with the views of my brother Jagdish Sahai with the greatest respect to him and am inclined to agree with the views of brother Pathak. I would, however, like to make certain observations on some aspects of the matter.

41. If ever there was any doubt as to the nature and character of the powers vesting in the State Government under Section 7-F of the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter called the Act) the matter has now been put beyond the pale of controversy by the Supreme Court by their decision in the case of 1965 All LJ 353 = (AIR 1965 SC 1767). The Supreme Court has declared that the jurisdiction exercised by the State Government under Section 7-F of the Act is quasi-judicial.

42. It is difficult to agree with the submission of the learned Senior Standing Counsel that the order passed by the State Government under Section 7-F of the Act is an administrative order because it does not involve any decision as to the rights of the parties. All the decisions of this Court which held that the power and jurisdiction conferred on the State Government under Section 7-F of the Act is administrative stand overruled and are no longer good law in view of the declaration of the Supreme Court in the case of 1965 All LJ 353 = (AIR 1965 SC 1767) (supra). Chief Justice Gajendragadkar of the Supreme Court speaking for the Court clearly and precisely laid down in Shri Bhagwan's case, 1965 All LJ 353 = (AIR 1965 SC 1767) that the revisional proceedings which go before the State Government under Section 7-F must partake of the same character as the proceedings which are held before the District Magistrate exercising his authority under Section 3 (2) and the revisional proceedings held before the Commissioner under Section 3(3) of the Act. The District Magistrate as well as the Commissioner deal with the question of the rights of the landlord and the tenant and they are re-

quired to adopt a judicial approach and while exercising their power they must act according to the principles of natural justice.

It follows, therefore, that in exercising its revisional jurisdiction under Sec. 7-F of the Act the State Government deals with the question of the rights of the landlord and the tenant and in doing so it is required to adopt a judicial approach and it must act according to the principles of natural justice. The references which have come up before us were necessitated because of the decision of the Supreme Court in *Shri Bhagwan's case* 1965 All LJ 353 = (AIR 1965 SC 1767) and all of our brothers who have sent up the references interpret the decision of the Supreme Court in *Shri Bhagwan's case* 1965 All LJ 353 = (AIR 1965 SC 1767) as overruling the view of the Division Benches of our Court that the State Government exercised administrative powers under S. 7-F of the Act. In effect the contention of the learned Senior Standing Counsel that the State Government is not required to pronounce a speaking order or give its reasons in the order itself the powers being administrative, amounts to this that the various references made which have been put before us in the Full Bench were uncalled for. The very question that has been referred to us whether the order under Section 7-F is required to be speaking order containing the reasons in support of the conclusion of the State Government arises on the basis that the State Government performs a quasi-judicial function under Section 7-F of the Act. The attempt of the Senior Standing Counsel to show that the State Government performs an administrative function under Section 7-F of the Act was, therefore, futile because of the clear declaration of the Supreme Court that the function of the State Government is quasi-judicial and also because of the reference orders passed in the various writ petitions.

43. An argument raised by the learned Senior Standing Counsel that even if the function was quasi-judicial the order passed by the State Government under Section 7-F of the Act need not *ex facie* state the reasons in support of the final conclusion and it would not be bad because of the omission to do so as the reasons therefor would be contained in the departmental file, has no legs to stand upon inasmuch as the Supreme Court in *Civil Appeal No. 657 of 1967 (SC)* has observed that it was not open to the Court to look into the records of the Government and from the notings contained in it to spell out the reasons for the order of the Government which itself did not state the reasons. Their Lordships of the Supreme Court in that case criticised the procedure followed by the High Court in summoning the Government records and

then spelling out the reasons in support of the conclusions of the Government and characterised such a procedure as irregular. The decision in that case was based on the hypothesis that the reasons in support of the order had to be recorded and disclosed to the parties concerned. The reasons could not be gathered from the notings made in the files of the Government and that the recording of the reasons and disclosure thereof is not a mere formality. As I understand the position it is incumbent upon the Government or the authority who functions quasi-judicially to pronounce a speaking order so that the party whose rights are adversely affected comes to know the basis why the Government or the authority concerned has not been able to accept its case.

44. It would be seen that under Article 226 of the Constitution the High Court has the power and jurisdiction to judicially review the orders of the State Government or the orders of any statutory authority affecting the rights of the citizen, whether fundamental or not, and if the order sought to be reviewed is not a speaking order it would create great practical difficulty to the High Court in proper performance of its constitutional duties under Art. 226 of the Constitution as the petitioner before the High Court who is aggrieved by that order would not be in a position to demonstrate the unconstitutionality of the impugned order by attacking the reasoning or the grounds on which it was founded as neither he nor the Court will know what were the basis of the impugned order. Indeed certain observations of Denning, L. J. in *re Gilmore's Application*, (1957) 1 All ER 796 are significant. The learned Law Lord was considering a petition for quashing of the order of the Medical Appellate Tribunal by a writ of certiorari. It was found that the error of the Tribunal did not appear on the face of the order, that is to say, it was not a speaking order. The writ Court thereupon had made a reference and gathered the findings of facts and the reasons for the order of the Tribunal therefrom.

On appeal Denning, L. J. in this connection observed that even if it had not been open to the Court to have recourse to that document, the Tribunal could not, by failing to find the material facts, be permitted to defeat an application for certiorari. These observations of Denning, L. J. are very apt and relevant. Such a situation as was faced by the learned Law Lord in 1957-1 All ER 796 (Supra) will always arise before this High Court in a petition under Art. 226 of the Constitution impugning the order of the State Government passed under Section 7-F of the Act wherein the Government omits to disclose *ex facie* any reasons for its conclusions, thus indirectly depriving the

citizen of his relief and preventing this Court from properly exercising its jurisdiction under Art. 226 of the Constitution unless and until this Court were to ask the Government to state its reasons, and thus complete the record. Such a procedure would be cumbersome and defeat the very purpose of the exercise of the powers under Art. 226 as there would be unnecessary delay for giving the necessary relief to the aggrieved citizen.

Moreover, such a procedure would also be fraught sometimes with dangerous consequences inasmuch as where will be the guarantee that the speaking order pronounced by the Government on the directions of the Court was not an afterthought? Faced with this situation the learned Senior Standing Counsel in the course of his argument did concede that it would be proper on the part of the State Government always to give reasons but submitted that the omission to give reasons would not vitiate the order. I am unable to appreciate this line of argument. This concession of the learned Senior Standing Counsel implies that it would be improper on the part of the State Government not to give reasons in support of its conclusions while deciding a case under Section 7-F of the Act. What is proper the law will always countenance, what is improper the law will discountenance. If that be so, an order which is not a speaking order and does not give reasons for the conclusion arrived at will be an improper order and will stand discredited in the eye of law.

45. The learned Senior Standing Counsel then fell back upon the language of Section 7-F of the Act. He submitted that in its wide sweep the provisions of that section conferred upon the State Government a power to pass any order which it thinks necessary to secure the ends of justice and there being no limitation on the power of the State Government it can pass any order it likes which in its opinion is just and proper. It may be so, but it is difficult to agree with the inference drawn by the learned Senior Standing Counsel from the above statement of law. He seemed to canvass that since it is open to the State Government to pass an order under Section 7-F of the Act without any impediment or fetter created by the limitations of the material on record in respect of the case of the parties, its conclusion must always be regarded as just and since by law such a power is vested in the highest organ of the State that by itself will be a guarantee that the order must have been passed on just considerations. Even conceding for a moment that the State Government would always pass an order which is necessary to secure the ends of justice, that would not mean that the order need not demonstratively show the considerations prevailing with

the State Government which will sustain its claim that it passed that order as that appeared to it necessary to secure the ends of justice.

46. As I read the language used in Section 7-F of the Act there is implicit in it certain amount of limitation of the exercise of the powers by the State Government under that section. After eliminating the clauses with which we are not concerned, the provisions of Section 7-F will read as follows:—

"The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in Section 3 and may make such order as appeared to it necessary for the ends of justice."

47. The phraseology at the first flush appears to be conferring upon the State Govt. an absolute power untrammelled and uncontrolled by any objective limitations and it could be argued that the exercise of the power is subjective to some extent. But on a close examination and deeper considerations it will be revealed that it is not so. This Court in the case of Radhakant v. State of Uttar Pradesh, 1956 All LJ 104 repelled the attack on the vires of this section grounded on the alleged conferment of an unguided, uncontrolled and apparently arbitrary power of interference with the orders under Sections 3, 7 and 7-F of the Act, and held that the provisions of the section were not invalid as such language was used by the legislature with a view to cover numerous circumstances and facts on which the propriety of the orders would depend, it not being possible for the legislature to lay down all of them. The argument advanced on behalf of the State that it was open to the State Government to pass any order in the exercise of its discretion and the law did not contemplate the giving of reasons by the State to justify the exercise of its discretion in a particular manner has hardly any tenability.

The section requires for the calling of record of the case granting or refusing to grant permission to the landlord to file a suit for eviction of the tenant. That would be the first step taken by the State Government. This can be done suo motu by the Government or on being invited to do so by a party interested. The submission of the learned Senior Standing Counsel that an aggrieved party has not been given a right to file a revision under the said section does not impress me, as I think it is implicit in the language used that an aggrieved party can always by an application invoke the revisional jurisdiction of the State Government. The purpose behind the calling for the record of the case obviously is that the State Government is to acquaint itself with the facts and circumstances of the case. A perusal

of the record summoned by the State Government thus is imperative. After the record has been perused and pros and cons of the case had been studied then the stage arises for formation of its opinion by the Government on the question whether to very, rescind or modify the order or leave the order as it is undisturbed. The State Government may or may not grant an oral hearing to the parties concerned, that is, the landlord and the tenant, but in accordance with the principles of natural justice it must at least invite written representations from them and consider the representation, if any, filed before it.

The opinion then has to be formed by the State Government on what appears to it on the facts and circumstances of the case to be necessary for the ends of justice. In other words the State Government in exercise of its revisional jurisdiction under Section 7-F has to find out what the justice of the case requires in the light of the facts and circumstances made out from the record. The determination necessarily would be objective being based on the materials on record and not subjective being based on some theoretical or abstract concept of justice unconnected and uninhibited by the limitations of the material on record. Viewed in this context it is not permissible to the State Government to travel outside the record of the case and base its verdict on some policy of administrative expediency as that would amount to taking recourse to extra judicial considerations which is foreign to the exercise of judicial power.

48. It has already been noticed by me above that the State Government under Section 7-F is under a duty to act judicially, therefore, it has to assess the evidence on record furnished by the parties, then by a process of reasoning arrive at its findings and base its verdict thereon. The mechanism of this process must be seen and felt. Since the State Government does not hold any hearing in the glare of publicity as is done in the law Courts where in the course of arguments and counter-arguments many a disputed points are thrashed out and the working of the mind of the Judge is revealed in the presence of the parties interested, the only way the State Government can reveal the application of its judicial mind is by pronouncing a speaking order, that is, by giving its reasons in justification of its verdict in the very order conveying that verdict. If that were not done there would be no means to know that the State Government considered the pros and cons of the case before it and brought to bear upon the controversies involved a judicial approach in recording its final conclusion. It will be true then to say that the object behind a speaking order or reasoned order is to show that there has

been no arbitrariness in the exercise of judicial function.

49. It was next suggested by the learned Senior Standing Counsel that when the language of Section 3 (3) conferring a power of revision on the Commissioner is compared with the language used in Section 7-F, the intention of the legislature becomes manifest. The learned counsel submitted that while the Commissioner's power to interfere with the order of the District Magistrate is circumscribed and he cannot interfere unless he is not satisfied with the correctness, legality or propriety of the order or as to the regularity of the proceedings held by the District Magistrate, the State Government has been vested with an absolute discretion to refuse to interfere even if all such defects are present in order impugned before it. The argument was that while the Commissioner has to record reasons for his dissatisfaction before he can interfere the State Government need not record its reasons for not interfering with the order of the Commissioner as it has an absolute discretion not to interfere. This argument of the learned Senior Standing counsel begs the question.

The State Government who forms its opinion in the secrecy of the Secretariate without holding its proceedings in an open forum in the glare of publicity and without the presence of the parties concerned, yet at the same time being under a duty to act judicially, even assuming it has a discretion in the matter, it must justify the exercise of discretion in a particular manner and pronounce a speaking order so that it can be known from the perusal of the order that the manner in which the State Government has exercised its discretion was necessary for the ends of justice. To my mind the brief discussion above brings out clearly that after all the power vesting in the Government under Section 7-F is not so wide and uncontrolled as it was made out to be. If the District Magistrate and the Commissioner in the exercise of their powers under Section 3 of the Act have to record findings and give reasons for their order which is conceded by the learned Senior Standing Counsel, it follows then according to the ratio of the decision of the Supreme Court in *Shri Bhagwan's case*, 1965 All LJ 353 = (AIR 1965 SC 1767) (supra) that the State Government is also bound to give reasons in support of its order as the nature and character of the exercise of the power under Section 7-F is similar and partakes of the same character as the exercise of power by the District Magistrate and the Commissioner under Section 3 of the Act.

50. Another contention of the learned Senior Standing Counsel was that it is only in those cases where an appeal will

lie to the Supreme Court that it has been insisted upon by the Supreme Court, that the statutory authority or the Tribunal shall state its reasons in support of its conclusions and since the State Government is not a Tribunal when deciding cases under Section 7-F of the Act, no appeal will lie to the Supreme Court under Art. 136 of the Constitution and the State Government need not then state its reasons for the order passed in exercise of its powers under Section 7-F. On the other hand the learned counsel for the petitioners urged that the State Government while exercising its jurisdiction under Section 7-F would be a Tribunal within the meaning of Art. 136 of the Constitution. A large number of cases decided by the Supreme Court were cited before us by the learned counsel for the parties. I do not think the questions involved on this part of the argument in the case necessarily call for any decision in answering the question which has been referred. But I must observe with respect to brother Pathak that his conclusion on this aspect of the matter is well reasoned and that may be the correct position in law.

51. I have already pointed out above that the requirement of pronouncing a speaking order or giving a reasoned order is inherent in the exercise of quasi-judicial power. I consider the principles of natural justice besides providing that a party whose rights are affected by the verdict of an authority under a duty to act judicially, not only should know the case against it and be afforded an opportunity to meet the case, also imply a right in such a party to know the reasons why his case has not been accepted and why the verdict has gone against him. It is the reason in support of a judicial verdict which gives a meaning and vitality to the verdict. Reason is the very soul of all judicial process. It is the reason which sustains the verdict. A judicial verdict bereft of the reason in support thereof will be not better than a mere dead letter. It will not be in conformity with the principles of natural justice and will be meaningless for the person affected. A judicial verdict without revealing the reason therefor will tend to destroy the faith and the confidence of the common man in the dignity of the rule of law on which is based the grand edifice of our Constitution.

52. On the approach which I have endeavoured to discuss above, it is not possible to make any distinction between an order passed by the State Government under Section 7-F affirming the impugned order or setting it aside or modifying it. In both the cases the requirement of the law, in my judgment, is that a speaking order has to be pronounced containing the

reasons in support of it. The learned Senior Standing Counsel in this connection tried to urge that when the superior authority affirms the order of the subordinate authority it need not state its reasons therefor. I am not aware of any such general rule of law. It all depends on the facts and circumstances of each case. The Supreme Court itself has in some of the cases observed that while affirming the order of the superior Court or authority need not give full reasons.

The Superior Court or authority may approve and adopt the reasons of the subordinate Court or authority and justify its verdict of affirmance on that basis. It is implicit in this approach of the Supreme Court that even an order of affirmance has to be supported by its own reasons given by the superior authority affirming the order. In a particular case when will an order passed by the State Government under Section 7-F of the Act fulfil the requirements of a speaking order or a reasoned order, is not the question which has been referred to us and I need not dilate upon that question. I must make it clear that I have not examined any of the orders passed by the State Government under Section 7-F in the four petitions from which references have come before us with a view to find out whether they answer the requirements of a speaking order or a reasoned order. That would be for the Bench who finally dispose of those petitions to consider.

53. My answer to the question referred is the same as the answer proposed by brother Pathak.

54. PATHAK, J.:— I deeply regret my inability to agree with my brother Jagdish Sahai. If this case had been before us some time ago I may have found myself largely in agreement with him. Indeed in *Mrs. K. L. Sehgal v. State of U. P.*, 1965 All WR (HC) 185 = (AIR 1965 All 465) (FB), I took the view, after a review of the authorities in point, that the power conferred upon the State Government under Section 7-F of the U. P. (Temporary) Control of Rent and Eviction Act (which for convenience I shall refer to as "the Act") is administrative in nature. But since then the Supreme Court has held in 1965 All LJ 353 = (AIR 1965 SC 1767) that the jurisdiction exercised by the State Government under S. 7-F of the Act is quasi-judicial. There was considerable argument before us whether that is what the Supreme Court has laid down. For my part, I find it difficult to come to any other conclusion. I shall proceed to indicate why.

55. In *Lala Shri Bhagwan*, 1965 All LJ 353 = (AIR 1965 SC 1767) (Supra) the Commissioner made an order under Section 3(3) of the Act declining permission to the appellants to sue the respondents for ejectment. The State Government

under Section 7-F of the Act directed the Commissioner to revise his order because it thought that the need of the appellants for the accommodation was genuine. On the basis of permission granted consequently the appellants filed a suit for ejectment. The suit was decreed. An appeal by the respondents was dismissed by the first appellate Court. A second appeal filed by them was allowed by Dhavan, J., on the ground that the jurisdiction exercised by the State Government was quasi-judicial in nature and the State Government should have given a hearing to the respondents before setting aside the Commissioner's order. The appellants appealed to the Supreme Court.

56. The Supreme Court proceeded to draw a distinction between bodies required to act judicially or quasi-judicially in deciding questions entrusted to them by the Statute and bodies which reached their decision in an administrative manner and were justified in taking into account considerations of policy. It observed that while administrative bodies may in acting fairly and objectively follow the principles of natural justice and did not make them tribunals and did not impose on them an obligation to follow the principles of natural justice. "On the other hand", it continued, "authorities or bodies which are given jurisdiction by statutory provisions to deal with rights of citizens, may be required by the relevant statute to act judicially in dealing with matters entrusted to them". It adverted to its decision in AIR 1966 SC 1595 and to the decision of the House of Lords in *Ridge v. Baldwin*, 1964 AC 40 and observed that the test prescribed by Lord Reid in his speech in *Ridge*, 1964 AC 40 (supra) afforded valuable assistance in dealing with the vexed question before the Supreme Court. The Court posed the following question:

"What is the nature of the proceedings taken before the State Government under Section 7-F and what is the character of the jurisdiction and power conferred on the State Government by it; are the proceedings purely administrative and can the State Government decide the question and exercise its jurisdiction without complying with the principles of natural justice."

The Supreme Court examined the provisions of the Act bearing on the grant of permission to sue for ejectment. It considered the different sub-section of Section 3 and also Section 7-F. It held that;

"the jurisdiction conferred on the District Magistrate (under Section 3(1)) to deal with the rights of the parties is of such a character that principles of natural justice cannot be excluded from the proceedings before him," and

"..... the proceedings before the Commissioner (under sub-sections (2) and (3) of Section 3) are quasi-judicial," and later reiterated:

"We are satisfied that when the District Magistrate exercises his authority under Section 3(2) and the Commissioner exercises his revisional powers under Section 3(3) they must act according to the principles of natural justice. They are dealing with the question of the rights of the landlord and the tenant and they are required to adopt 'a judicial approach'" (Emphasis (here into ' ') mine). And, immediately following this, the Supreme Court concluded:

"If that be the true position in regard to the proceedings contemplated by sub-section (2) of Section 3 and sub-section (3) of Section 3 it is not difficult to hold that the revision proceedings which go before the State Government under Section 7-F 'must partake of the same character'" (Emphasis (here into ' ') mine).

57. Thus, holding that the District Magistrate under Section 3(1), the Commissioner under Section 3(3) and the State Government under Section 7-F exercise jurisdiction of the same character, namely a quasi-judicial jurisdiction, the Supreme Court went on to hold that; "The State Government cannot but apply principles of natural justice and offer a reasonable opportunity to both the parties while it exercises its jurisdiction under Section 7-F".

58. From the question which the Supreme Court posed for decision, its observations flowing from the analysis of the statutory provisions relating to that question, and the reasoning upon which it reached its ultimate conclusion it seems inescapable that in the opinion of the Supreme Court the State Government acts quasi-judicially when exercising the jurisdiction conferred by Section 7-F. If any doubt remains, it is dispelled by the express inability of the Supreme Court to agree with the decision of this Court in *Murlidhar v. State of U.P.*, AIR 1964 All 148 where it was held that "the function of the State Government when acting under Section 7-F is administrative and not quasi-judicial". After the decision of the Supreme Court in *Lala Shri Bhagwan*, 1965 All LJ 353= (AIR 1965 SC 1767) (supra) I am bound to hold that the jurisdiction of the State Government under Section 7-F is quasi-judicial in character.

59. On the footing that the State Government acts quasi-judicially under Section 7-F the next question is whether it is bound to state its reasons for the order made by it.

60. Now, there are four petitions before us. They fall into two classes. While in one class the State Government has

reversed or varied the order of the Commissioner, in the other it has refused to interfere with the Commissioner's order. In none of the cases has the State Government stated its reasons for the order. If the State Government is bound to state its reasons, then the further question before us is whether the State Government is bound to state its reasons in all cases or only where it reverses or modifies the order of the Commissioner. Now, quite recently, the question has engaged the attention of the Supreme Court in a number of cases.

61. In AIR 1961 SC 1669, 1678 per Shah, J., the Supreme Court held that the nature of the appellate proceedings before the Central Government under Section 111 of the Companies Act, 1956 was judicial in character, and quashed the orders passed by the Central Government on the view that "there has been no proper trial of the appeals, no reasons having been given in support of the orders by the Deputy Secretary, who heard the appeals." Some pertinent observations were also made by the Supreme Court in AIR 1965 SC 1222. The Court said:

"The next question is whether Government was justified in making the order of April 26, 1955? That order gives no reasons at all. The Act lays upon the Government a duty which obviously must be performed in a judicial manner The appellants were also entitled to know the reason why their claim for the grant of money or a pension was rejected by Government and how they were considered as not falling within the class of persons who it was clearly intended by the Act to be compensated in this manner. Even in those cases where the order of the Government is based upon confidential material this Court has insisted that reason should appear when Government performs curial or quasi-judicial functions. (See (1962) 2 SCR 339=(AIR 1961 SC 1669).")

62. At this stage, I may refer to the decisions of the Supreme Court in Nandram Hunatram, Calcutta v. Union of India, AIR 1966 SC 1922 where the argument was rejected that the impugned order was bad because no reasons were stated. That decision was explained later by the Supreme Court in AIR 1967 SC 1606 in the following terms:

".....it was plain as a pike-staff that the State Government had no alternative but to cancel the lease; the absence of any reasons in the order on review could not possibly leave anybody in doubt as to whether (what the?) reasons were. As a matter of fact in the setting of facts, the reasons were so obvious that it was not necessary to set them out. There is nothing in this deci-

sion which is contrary to 1966-1 SCR 466=(AIR 1966 SC 671) (supra). What the decision says is that the reasons for the action of the State were so obvious that it was not necessary, on the facts of the case, to repeat them in the order of the Central Government."

The question converged to a sharp focus before the Supreme Court in AIR 1966 SC 671 Subba Rao, J. explained the necessity for disclosing reasons in a quasi-judicial order. In the case before it the Central Government had rejected a revision application under Rule 55 of the Mineral Concession Rules 1955. He observed:

"..... Our Constitution posits a welfare State In the context of a welfare State, in administrative tribunals have come to stay. Indeed, they are the necessary concomitants of a welfare State. But arbitrariness in their functioning destroys the concept of a welfare State itself. Self-discipline and supervision exclude or at any rate minimize arbitrariness. The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.

The conception of exercise of revisional jurisdiction and the manner of disposal provided in R. 55 of the Rules, are indicative of the scope and nature of the Government's jurisdiction. If Tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But, if reasons for an order are to be given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and its worst be at least a plausible one. The public should not be deprived of this only safeguard." Dealing with the point that the principle was not uniformly followed by the courts, where appeals and revisions were often dismissed in limine without giving any reasons, he said;

"There is an essential distinction between a Court and an administrative tribunal. A judge is trained to look at things objectively, uninfluenced by consideration of policy or expediency; but, an executive officer generally looks at things from the stand-point of policy and expediency. The habit of mind of an executive officer so formed cannot be expect-

ed to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties; and the least they should do is to give reasons for their orders. Even in the case of appellate Courts invariably reasons are given, except when they dismiss an appeal or revision in limine and that is because the appellate or revisional Court agrees with the reasoned judgment of the subordinate Court or there are no legally permissible grounds to interfere with it. But the same reasoning cannot apply to an appellate tribunal for as often, as not the order of the first tribunal is laconic and does not give any reasons. That apart, when we insist upon reasons, we do not prescribe any particular form or scale of the reasons. The extent and the nature of the reasons depend upon each case. Ordinarily, the appellate or revisional tribunal shall give its own reasons succinctly; but in a case of affirmance where the original tribunal gives adequate reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons. What is essential is that reasons shall be given by an appellate or revisional tribunal expressly or by reference to those given by the original tribunal. The nature and the elaboration of the reasons necessarily depend upon the facts of each case. In the present case, neither the State Government's nor the Central Government's order discloses the reasons for rejecting the application of the appellant. In the circumstances the Central Government's order is vitiated, as it does not disclose any reasons for rejecting the revision application of the appellant." It appears that Subba Rao, J. held (a) that a quasi-judicial order made by a tribunal must state the reasons for the order and (b) that the reasons must be stated even where it merely affirmed the order of the inferior authority. As to the latter, it seems he intended to confine the rule to those cases where the order of the inferior authority did not itself disclose any reasons. Mudholkar, J. and Bachawat, J., the other two learned Judges constituting the Bench impliedly agreed that a quasi-judicial order should disclose the reasons but held that no such disclosure was necessary where it merely affirmed the order of the inferior tribunal. They observed:

"The reason for rejecting the revision application appears on the face of the impugned order. The revision application was rejected, because the Central Government agreed with the reasons given by the State Government in its order, dated December 19, 1961, and the application did not disclose any valid ground for interference with the order of

the State Government. In our opinion, the Central Government, acting under R. 55, was not bound to give in its order, fuller reasons for rejecting the application," and further

"For the purposes of an appeal under Art. 136, orders of Courts and tribunals stand on the same footing. An order of Court dismissing a revision application often gives no reasons, but this is not a sufficient ground for quashing it. Likewise, an order or an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection."

When reliance was placed by learned counsel upon the observations of Shah J. in *Harinagar Sugar Mills Ltd.*, 1962-2 SCR 339 = (AIR 1961 SC 1669) (supra) (which I have extracted above), they said:

"..... the Central Government reversed the decision appealed from without giving any reasons; nor did the record disclose any apparent ground for reversal. In this context, Shah J. made the observation quoted above, and held that there was no proper trial of the appeals and the appellate order should be quashed. *Hidayatullah, J.* at p. 370 of the Report (SCR) = (at p. 1684 of AIR), pointed out that there was no reason for the reversal and the omission to give reasons led to the only inference that there was none to give. There is a vital difference between the order of reversal by the appellate authority in that case for no reason whatsoever and the order of affirmance by the revising authority in the present case. Having stated that there was no valid ground for interference, the revising authority was not bound to give fuller reasons. It is impossible to say that the impugned order was arbitrary, or that there was no proper trial of the revision application."

To the same effect are the observations of *Gajendragadkar, C.J.* in AIR 1966 SC 1827. Now, it will be apparent from the ratio in *M.P. Industries Ltd.*, AIR 1966 SC 671 (supra) that the necessity for disclosing the reasons for a quasi-judicial order has been made to rest on broadly two grounds. One is the need to guard against arbitrariness on the part of the authority making the order. The other is the need to ensure an effective judicial scrutiny of the order. The latter ground was considered in greater depth by the Supreme Court in the next case, AIR 1967 SC 1606. In *Bhagat Raja*, AIR 1967 SC 1606 (supra) the appellant challenged an order of the Union of India under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957, refusing to interfere with an order of the

Government of Andhra Pradesh under Section 10(2) of that Act. Examining the contention that it was incumbent on the Central Government to give reasons for its order, Mitter, J., who delivered the judgment of the court, said:

"The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word 'rejected', or 'dismissed'. In such case, this court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the other as it must, and the Central Government adopts the reasoning of the State Government, this court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this court in appeal may have to examine the case *de novo* without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this Court, in appeal, may find it difficult to ascertain which are the grounds which weighed with the Central Government. In such circumstances, what is known as a 'speaking order' is called for."

On the question whether an order of the superior authority merely affirming the order of the inferior authority must state its reasons he explained:

"As has already been said, when the authority whose decision is to be reviewed gives reasons for its conclusion and the reviewing authority affirms the decision for the reasons given by the lower authority, one can assume that the reviewing authority found the reasons given by the lower authority as acceptable to it, but, where the lower authority itself fails to give any reason other than that the successful applicant was an old lessee and the reviewing authority does not even

refer to that ground, this court has to grope in the dark for finding into reasons for upholding or rejecting the decision of the reviewing authority. After all a tribunal which exercises judicial or quasi-judicial powers can certainly indicate its mind as to why it acts in a particular way and when important rights of parties of far-reaching consequence to them are adjudicated upon in a summary fashion, without giving a personal hearing where proposals and counter-proposals are made and examined, the least that can be expected is that the tribunal should tell the party why the decision is going against him in all cases, where the law gives a further right of appeal."

Now, here therefore it was clearly laid down that no reasons need be specifically given if the order of the revising authority merely affirms the order under review. But that is subject to a proviso, and that is that the order under review sets out the reasons and the reviewing authority mentions that it is for those reasons that it affirms the order. If the order under review does not give any reasons, or if it does and that is not referred to by the reviewing authority, then the reviewing authority is bound to disclose its own reasons. That in my opinion, is what the Supreme Court held, for as it later observed in the same judgment:

"Take the case where the Central Government sets aside the order of the State Government without giving any reasons as in *Harinagar Sugar Mills' case*, AIR 1961 SC 1669. The party who loses before the Central Government cannot know why he had lost it and would be in great difficulty in pressing his appeal to the Supreme Court and this court would have to do the best it could in circumstances which are not conducive to the proper disposal of the appeal. Equally, in a case where the Central Government merely affirms the order of the State Government. 'It should make it clear in the order itself as to why it is affirming the same'. It is not suggested that the Central Government should write out a judgment as Courts of law are wont to do. But we find no merit in the contention that an authority which is called upon to determine and adjudicate upon the rights of parties subject only to a right of appeal to this court should not be expected 'to give an outline of the process or reasoning by which they find themselves in agreement with' the decision of the State Government." (Emphasis (here in ' ') mine).

63. In the next case, Civil Appeal No. 657 of 1967, D/- 17-8-1967 (SC), the Supreme Court pronounced on another aspect of the same problem. It held that it was not open to the High Court under Article 226 of the Constitution to look

into the records of the Government and from the "noting" contained in it to spell out the reasons for the order of the Government which itself did not state the reasons. It said:

"In our view the procedure followed by the High Court was irregular. It is not for the High Court to give reasons which the Government might have, but has not chosen to give, in support of its conclusion. Since no reasons were given in support of the order passed by the Central Government, the order was *ex facie* defective, and the defect could not be remedied by looking into the file maintained by the Government and constructing the reasons in support of that order. The reasons in support of the order had to be recorded and disclosed to the parties concerned by the Central Government, the reasons could not be gathered from the "notings" made in files of the Central Government. Recording of reasons and disclosure thereof is not a mere formality. The party affected by the order has a right to approach this Court in appeal, and an effective challenge against the order may be raised only if the party aggrieved is apprised of the reasons in support of the order."

64. Having regard to what the Supreme Court has laid down in the aforesaid cases I am constrained to hold that the view expressed by this court in *Vinod Chandra Maheshwari v. State of Uttar Pradesh*, 1965 All LJ 740 and *Bhagwati Prasad v. State of Uttar Pradesh*, 1965 All LJ 961 does not reflect the true position in law. In the former case it was held that although the State Government is to act quasi-judicially under Sec. 7-F it was not required to give any specific findings. Support for the conclusion was taken from the example of criminal revisions and criminal appeals heard by the High Courts and liable to summary dismissal without giving reasons. As pointed out by the Supreme Court in *M. P. Industries Ltd.*, (AIR 1966 SC 671) a Tribunal exercising quasi-judicial jurisdiction cannot be placed on the same footing as Courts exercising purely judicial powers. In *Bhagwati Prasad*, 1965 All LJ 961 (supra) the Court adopted the same reasoning as in *Vinod Chandra Maheshwari*, 1965 All LJ 740 (supra).

65. Before closing this part of the judgment, I may refer to what was said by Denning, L.J. in 1957-1 All ER 796. An order of the Medical Appellate Tribunal was brought before the Court of Appeal for quashing by certiorari. The error of the tribunal did not appear on the face of the order. The Court of Appeal was compelled to refer to a document which formed part of the record but was merely mentioned in the order. It was compelled to do so in order to gather the findings of facts and the rea-

sons for the order of the Tribunal. Denning, L.J. observed that even if it had not been open to the Court to have recourse to that document, the tribunal could not, by failing to find the material facts, be permitted to defeat an application for certiorari. He referred to the power of the Court to order an inferior tribunal to complete the record and cited the observations of Abbott C.J. in *Williams v. Lord Bagot*, (1824) 4 Dow & Ry KB 315:

"If an inferior court send up an incomplete record we may order them to complete it If we do not order or allow the officers of the court below to make a perfect record, which unquestionably they are at liberty to do, it will be in their power, by making an imperfect record, to defeat a writ of error whenever it shall be brought. The power of doing that lies in their hands, unless we prevent it."

66. He also referred to *R. v. Warnford*, (1825) 5 Dow & Ry KB 489. The courts in England appear to have taken the course that where the inferior court or tribunal does not disclose the findings and reasons for the order made by it, the superior court exercising certiorari jurisdiction, can compel it to complete the record by stating the findings and the reasons.

67. The respondents say that the aforesaid pronouncements of the Supreme Court must be confined to authorities which are tribunals within the meaning of Article 136 of the Constitution, inasmuch as the requirement that the reasons should be stated proceeds upon the consideration that the impugned order is open to appeal to the Supreme Court and that the omission to state the reasons precludes the Supreme Court from effectively exercising its jurisdiction. The contention, in my opinion, is not well founded. From *M. P. Industries Ltd.*, AIR 1966 SC 671 (supra) onward, the Supreme Court, it seems to me, placed the necessity for giving reasons on two broad grounds. The first arose out of the need to exclude or minimize arbitrariness on the part of the authority making the order, and the second arose upon the need to make the order amenable to effective judicial scrutiny by the Supreme Court. It does appear that in some of its decisions, especially *Bhagat Raja*, AIR 1967 SC 1606 (supra), the Supreme Court laid emphasis almost entirely on the second of the two grounds. The two grounds may also be said to be inter-related, in the sense that the second is intended to achieve the object underlying the first. But I am inclined to the view that even if the order is not open to appeal to the Supreme Court it is necessary that it should state its reasons.

It may be that the authority is not a tribunal within the meaning of Art. 136(1) of the Constitution. That I believe, makes little difference. What is relevant, I think, is that the order is made in the exercise of a quasi-judicial jurisdiction. As regards such an order, the party against whom it is made is entitled to know the reasons upon which it has been made. And that is apart from the consideration that it enables him to challenge the order in appeal before the Supreme Court. The need for disclosing reasons in quasi-judicial orders arises from the ancient maxim integrated into our judicial system, that justice must not only be done but must also appear to be done. It is a principle arising out of the recognition that judicial tribunals must inspire public confidence and safeguard against the suspicion of arbitrariness and partiality. That is an objective which, speaking for myself, I consider to be an essential condition to the functioning of all courts and tribunals, judicial or quasi-judicial. It is the glory of the rule of law that it is founded upon reasons. And reasons as opposed to arbitrary whim distinguishes the rule of law from the rule of men.

68. But even if, as the respondents contend, the pronouncements of the Supreme Court mentioned above must be confined to tribunals within the meaning of Article 136(1) of the Constitution I have no hesitation in holding that the State Government exercising jurisdiction under Section 7-F of the Act is such a tribunal.

69. It was at one time recognised as settled law that a tribunal falls within the ambit of Article 136(1) if it derives authority from the sovereign power of the State and if it is invested with any part of the judicial functions of the State as distinct from purely administrative or executive functions if it further enjoys the "trappings of a Court." That was the view expressed in *Bharat Bank Ltd. v. Employees of Bharat Bank Ltd.*, AIR 1950 SC 188 and later in *Durga Shankar Mehta v. Raghuraj Singh*, AIR 1954 SC 520. It was reiterated in AIR 1963 SC 677.

70. In *Jaswant Sugar Mills*, AIR 1963 SC 677 (supra) the Supreme Court examined the question whether a Conciliation Officer, who was empowered under clause 29 of a Government Order under the U.P. Industrial Disputes Act to grant permission to an employer to alter the conditions of service to the prejudice of the workmen during a pending dispute or to discharge or punish them during such dispute, was a tribunal for the purposes of Article 136(1). The Supreme Court referred to the absence of "the trappings of a court" in the Conciliation

Officer. It pointed out that he was not required to sit in public, no formal pleadings were contemplated before him, and he was not empowered to compel the attendance of witnesses nor restricted in making an enquiry to evidence which the parties brought before him. He was not capable of delivering an effective judgment or an award affecting the rights of the parties. He was not invested with powers similar to those of the civil courts under the Code of Civil Procedure for enforcing the attendance of any person and examining him on oath, compelling production of documents, issuing commissions for the examination of the witnesses and other matters. These considerations prevailed with the Supreme Court in holding that the Conciliation Officer was not a tribunal. But since then the law declared by the Supreme Court has taken a wider sweep. In *Associated Cement Companies Ltd.*, AIR 1965 SC 1595 (supra) the Supreme Court explained that the presence of all or some of the trappings of a court is really not a decisive consideration, that the main and the basic test was

"whether the adjudicating power, which a particular authority is empowered to exercise, has been conferred upon it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function." It held that the applying this test, the State Government, deciding an appeal under sub-rules (5) and (6) of R. 6 of the Punjab Welfare Officers Recruitment and Conditions of Service Rules (1952) was a tribunal. It pointed out that the judicial power of the State

"..... has been conferred on the State Government by a statutory Rule and it can be exercised in respect of disputes between the management and its Welfare Officers. There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding. Besides, it is an order passed on appeal."

71. Now, an order made by the State Government under Section 7-F of the Act has been held by the Supreme Court in *Lala Shri Bhagwan*, 1965 All LJ 353 = (AIR 1965 SC 1767) (supra), to affect the rights of the landlord and the tenant. Section 3(1) confers upon the tenant a statutory immunity against eviction in the absence of the grounds specified in the sub-section and of permission from the District Magistrate to sue for ejectment. The right of the tenant to that statutory immunity is the subject of proceedings before the District Magistrate

and the Commissioner under Section 3 of the Act and before the State Government under Section 7-F of the Act. The jurisdiction exercised by each of these authorities partakes of the same nature. It was pointed out in *Lala Shri Bhagwan*, 1965 All LJ 353 = (AIR 1965 SC 1767) (supra) that there was a lis between the landlord and the tenant in those proceedings, and there can be little doubt that the order of the State Government under Section 7-F is binding between the parties and finally adjudicates upon the right of the tenant to statutory immunity against eviction. Moreover, the jurisdiction of the State Government is of a revisional character. It may be mentioned that when considering the relevant provisions of Section 3 and Section 7-F of the Act in *Lala Shri Bhagwan*, 1965 All LJ 353 = (AIR 1965 SC 1767) (supra) the Supreme Court expressly referred to its decision in the *Associated Cement Companies*, AIR 1965 SC 1595 (supra). I am of opinion that the test laid down in the latter case for determining whether a body is a tribunal within the meaning of Article 136(1) of the Constitution is fully satisfied by the State Government acting under Section 7-F of the Act.

72. In my judgment, from the pronouncements of the Supreme Court, the following rules emerge:

"Where an order of an inferior authority is carried in appeal or revision before a superior authority, and in disposing of the appeal or revision the superior authority makes an order in the exercise of quasi-judicial jurisdiction:

(1) In all cases where the superior authority interferes with the order of the inferior authority, the order of the superior authority must set out its reasons.

(2) In cases where the superior authority merely affirms the order of the inferior authority and,

(a) where the order of the inferior authority does not set out its reasons, the superior authority must disclose its reasons in its order;

(b) Where the order of the inferior authority sets out the reasons;

(i) Where the superior authority finds the reasons of the inferior authority acceptable to it it need not specify the reasons in its order but may merely refer to the reasons given by the inferior authority or give an outline of the process of reasoning by which it finds itself in agreement with the inferior authority;

(ii) Where the superior authority does not find the reasons of the inferior authority acceptable to it the superior authority must set out its own reasons in its order.

73. I would answer the question referred to the Full Bench in the different cases accordingly.

74. BY THE COURT: In the opinion of the majority, where an order of an inferior authority is carried in appeal or revision before a superior authority, and the superior authority in disposing of the appeal or revision makes an order in the exercise of quasi-judicial jurisdiction:

(1) In all cases where the superior authority interferes with the order of the inferior authority the order of the superior authority must set out its reasons.

(2) In cases where the superior authority merely affirms the order of the inferior authority, and

(a) where the order of the inferior authority does not set out its reasons, the superior authority must disclose its reasons in its order;

(b) where the order of the inferior authority sets out the reasons, and

(i) where the superior authority finds the reasons of the inferior authority acceptable to it, it need not specify the reasons in its order but may merely refer to the reasons given by the inferior authority or give an outline of the process of reasoning by which it finds itself in agreement with the inferior authority;

(ii) where the superior authority does not find the reasons of the inferior authority acceptable to it the superior authority must set out its own reasons in its order.

75. The questions referred to the Full Bench in these cases are answered accordingly.

76. The cases will now be listed before a learned Single Judge for decision. Answered accordingly.

AIR 1970 ALLAHABAD 488 (V 57 C 74) FULL BENCH

S. N. DWIVEDI, S. D. KHARE, G. C. MATHUR, S. N. SINGH, J. S. TRIVEDI, H. N. SETH AND HAMID HUSSAIN, JJ.

Chief Inspector of Stamps, U. P. Allahabad, Applicant v. Mahanth Laxmi Narain and others, Opposite Parties.

Civil Revn. No. 526 of 1963, connected with Spl. Appeals Nos. 27, 33, and 34 of 1961, D/- 29-10-1969 from judgment and decree passed by Dist. J., Ballia, in Civil Appeal No. 8 of 1961.

(A) Court-fees and Suits Valuations — Court-fees Act (1870), Section 7(iv) (a) (as amended in U. P.) — Real nature of relief can be gathered by looking to the substance of the plaint — Court cannot add any relief.

For purposes of court-fee, the Court must look at the reliefs as prayed for in the plaint. In order to ascertain the real nature of the reliefs claimed, the substance of the plaint has to be considered. If a

declaratory relief alone has been prayed for the Court cannot superadd consequential relief which it thinks the plaintiff ought to have prayed for and treat it as a consequential relief. Likewise, if only a substantive relief is prayed for, it is not open to a Court to add or read a declaratory relief also into it and treat it as a declaratory relief with a consequential relief. The question of the applicability of Section 7(iv) (c) of the original Act or of Section 7(iv) (a) of the amended Act arises only when a declaratory relief and another relief have been asked for either as one composite relief or as two distinct reliefs. AIR 1935 All 817 (FB) and AIR 1968 SC 102, Rel. on. (Para 8)

(B) Court-fees and Suits Valuations — Court-fees Act (1870), Section 7(iv) (a) (as amended in U. P.) — Words "Consequential Relief" — Meaning — Valuation of reliefs—Mode of. AIR 1932 All 485 (FB), Overruled — (Per Mathur, Singh, Trivedi, Seth and Hamid Hussain JJ.; Dwivedi & Khare, JJ. Contra).

The words 'consequential relief' have not been defined in the Court-fees Act. The meaning, which should be given to a word or expression not defined in an enactment, should be its ordinary dictionary meaning or a meaning which is necessarily inferred by the context in which it is used or by the object of the provisions or by the scheme of the enactment. The ordinary dictionary meaning of the word 'consequential' is 'following as a result or inference.' The tests laid down in AIR 1932 All 485 (FB) namely that (1) The relief flows directly from the declaration given. (2) The valuation of the relief is not capable of being definitely ascertained. (3) The relief is not specifically provided for anywhere in the Act. (4) The relief is one which cannot be claimed independently of the declaration as a substantive relief, are difficult to be satisfied in every case. There is nothing in the language of Section 7 or in the context in which the word 'consequential' has been used to support these tests. The objects of the Court-fees Act are to collect revenue and to prevent frivolous suits being filed. Neither from these objects nor from the scheme of the Act can these three tests be necessarily implied. Further the second, third and the fourth tests laid down in case are not justified and unnecessarily narrow down the meaning of the words 'consequential relief.' Section 7(iv) (a) applies to a suit to obtain a declaratory decree or order in which a consequential relief is prayed. The suit must principally be for a declaration and in that suit some other relief should also be claimed. The two reliefs may be asked for either as one composite relief or as two distinct reliefs. The words 'consequential relief' imply that the other relief should be one which flows directly from the declaration

which the plaintiff desires to be made. This means that the plaintiff should be entitled to the other relief only as a necessary consequence or result of the granting of the declaratory relief. The other relief must be so dependent on the declaratory relief that it cannot be allowed if the principal relief is refused. AIR 1932 All 485 (FB), Overruled; AIR 1944 All 113; AIR 1949 All 207; AIR 1949 All 560; AIR 1958 All 41; AIR 1965 All 496; AIR 1955 All 177; AIR 1963 All 86; AIR 1941 Lah 97 (FB); AIR 1961 Punj 426, Ref. (Paras 7, 18, 22)

Further as regards the mode of valuation under Section 7(iv) (a) the sub-section (iv)(a) treats a suit for a declaratory decree or order, in which a consequential relief is prayed, as one for a single relief. It provides that the court-fee payable in such suits shall be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. This gives the plaintiff a right to put any valuation, which he considers proper, on the combined declaratory and consequential reliefs. This right of the plaintiff is subject to two restrictions imposed by the first and the second provisions. Second proviso makes it incumbent on the plaintiff to value the relief at an amount not less than Rs. 300/-. It is applicable only to suits falling under sub-section (iv) (a) in which the relief sought is with reference to immovable property. It provides for the following three things:—

(i) That the plaintiff shall value the relief according to the value of the consequential relief. This means that the declaratory relief and the consequential relief have to be treated as one relief and the value of such relief has to be the value of the consequential relief;

(ii) that, if the consequential relief is capable of valuation, then the plaintiff shall value the relief at an amount according to this valuation; and

(iii) that, if the consequential relief is incapable of valuation, then the plaintiff shall value the relief at an amount which is the value of the immovable property computed in accordance with sub-s. (v), (v-A) or (v-B) as the case may be. If the relief, which is prayed for as a consequential relief, is specifically provided for in the Act, then it is capable of valuation and must be valued according to the provision made in respect of it; but, if the relief is one which is not specifically provided for in the Act, then it is not capable of valuation under the Act and must be valued according to the value of the immovable property in respect of which it has been prayed. Simply because an injunction is sought in conjunction with a declaratory relief, thereby becoming a consequential relief, it does not cease to be a relief of injunction. The value of the suit is the value of the consequential

relief that is to say the value of the relief of injunction. The method for valuation of a relief of injunction is specifically provided in sub-section (iv-B). Where the relief, which is prayed for as a consequential relief, is the relief of injunction, it is capable of valuation under sub-s. (iv-B) and must be valued according to the provisions of this sub-section. (Para 23)

(C) Court-fees and Suits Valuations — Court-fees Act (1870), Preamble — Act is fiscal statute and has to be strictly construed. AIR 1933 All 488 (FB), Ref.

(Para 23)

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 (1936) AIR 1936 Mad 201 (V 23) =
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 (1935) AIR 1935 All 817 (V 22) =
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 (1935) 1935 All LJ 1319, Ram Chhabila v. Sat Narain 21
 (1933) AIR 1933 All 488 (V 20) =
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 (1932) AIR 1932 All 485 (V 19) =
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 (1927) AIR 1927 Mad 348 (V 14) =
 52 Mad LJ 121, In re Venkita-krishna Pattar 48
 (1925) AIR 1925 Pat 392 (V 12) =
 ILR 4 Pat 336 (FB), Krishna Mohan v. Raghunandan 36, 55
 (1908) ILR 35 Cal 202 = 35 Ind App 22 (PC), Phul Kumari v. Ghanshyam Misra 36, 57, 64, 70
 (1878-80) ILR 2 All 720 (FB), Ram Prasad v. Sukh Dai 35

Gopi Nath, for Applicant; C. B. Misra, for Opposite Parties.

G. C. MATHUR, J.:— The main question for determination in these cases is whether the two suits, out of which the special appeals and the civil revision arise, are covered by sub-section (iv) (a) of Section 7 of the Court-fees Act, as amended in U. P. In both the suits, reliefs for declaration and injunction have been prayed for. The contention of the Chief Inspector of Stamps is that both the suits are to obtain declaratory decrees where the consequential relief of injunction has been prayed for and are, therefore, governed by sub-section (iv) (a) of Section 7 of the Act. According to him, since the consequential relief in both the suits is with reference to immovable property, court-fee has to be paid on the full value of the immovable property. The plaintiffs in the two suits, on the other hand, say that the injunction prayed for is not a consequential relief to the declaratory relief and the suits are not governed by sub-section (iv) (a). According to them they are liable to pay a fixed court-fee under Art. 17(iii) of

Schedule II on the relief of declaration and a separate court-fee under sub-section (iv-B) (b) of the Section 7 on the relief of injunction on one-tenth of the value of the immovable property in the first suit filed in 1953 and on one-fifth of the value of the immovable property in the second suit filed in 1960.

The plaintiffs have further contended that, even if the suits are covered by sub-section (iv) (a), the relief of injunction should be valued in accordance with the provision of sub-section (iv-B) (b) which lays down how a relief for injunction has to be valued for purposes of payment of the court-fee. The question can conveniently be split up into the following two questions:—

1. Whether the relief of injunction prayed for in the two suits is a consequential relief to the relief of declaration? and

2. how is the relief in the two suits to be valued if they are governed by sub-section (iv) (a)?

2. So far as the first question is concerned, the controversy is as to what is the meaning of the expression "consequential relief" used in sub-s. (iv) (a). In *Kalu Ram v. Babu Lal*, AIR 1932 All 485 (FB), a Full Bench of five Judges of this Court has laid down certain conditions or tests which should all be satisfied before a relief can be called a consequential relief. This decision was given in respect of Section 7(iv) (c) of the Act before its amendment in the U. P. Legislature. The revision and the special appeals have been referred to this Bench to consider whether the conditions and tests laid down by the Full Bench for determining whether a relief is a consequential relief or not still hold good. The questions arise in the circumstances set out below:—

3. Suit No. 83 of 1953, out of which the special appeals arise, was filed by Sri N. A. Guzdar and 16 other Parsis against Sri S. T. Shapoorji and 24 other Parsis on the allegation that "The Barame Jashane Roze Bahram Mandali" of Allahabad was a socio-religious association of the Parsis, that it had constructed a hall known as Bazam Gandhi Hall, that a meeting was convened on February 14, 1952, for winding up the Mandali and for transferring the hall and that the meeting and the resolutions passed thereat were illegal and not binding. The relief prayed for were:

"1. That it may be declared that the entire proceedings of meeting of 14-2-1952, including the resolutions passed thereat are illegal, ultra vires and null and void as regards the Mandali which is neither bound by them nor can be wound up for any reasons whatsoever.

2. That the defendants be restrained from interfering with or obstructing in any manner whatsoever the plaintiffs in the use and enjoyment of the 'Bazam Gandhi Hall' property belonging to the Mandali, as members thereof."

The first relief of declaration was valued at Rs. 5,000/- and the fixed court-fee of Rs. 18/12/- was paid thereon. The relief of injunction was valued at Rs. 200/- and a court-fee of Rs. 50/- was paid thereon. The defendants raised an objection that the suit was one for a declaration of this consequential relief of injunction and court-fee was payable ad valorem on the value of the immovable property under sub-section (iv) (a). The Civil Judge held that the suit was for a declaration with a consequential relief of injunction, that the consequential relief was in respect of immovable property, that the relief was incapable of valuation and, therefore, the court-fee was payable on the market value of the immovable property which was Rs. 12,000/-. He accordingly directed the plaintiffs to make good the deficiency which amounted to Rs. 986/2/-. Against this order, the plaintiffs filed F.A.F.O. No. 299 of 1959. J. D. Sharma, J., who heard the appeal, affirmed the decision of the Civil Judge that the suit was for a declaration with a consequential relief but he was of the view that the relief claimed was not in respect of immovable property, and, therefore, court-fee was payable on the amount at which the two reliefs were valued in the plaint, i.e., Rs. 5,200/-. Against his judgment, three special appeals were filed, No. 27 of 1961 by the plaintiffs, No. 33 of 1961 by the defendants and No. 34 of 1961 by the Chief Inspector of Stamps. These appeals came up for hearing before a Bench which referred them to a Full Bench.

4. The civil revision arises out of suit No. 12 of 1960 which was filed by Mahant Lakshmi Narain and two others for the following reliefs:—

"1. That it be declared that plaintiff No. 1 was the Mahant of Math Khedra and Sarbarakar of Shiv Ji and of properties of the Math; and

2. That an injunction be issued restraining the defendants from interfering with the possession of plaintiff No. 1 as the Mahant and Sarbarakar over the properties, plots, crops and well in suit."

The properties in suit were valued at Rs. 7,343/11/- and the plaintiffs paid court-fee of Rs. 100/- on the first relief and a court-fee of Rs. 237/8/- on the second relief, treating the reliefs as two distinct and independent reliefs. The suit was dismissed by the Civil Judge and an appeal was filed by the plaintiffs. At

that stage, the Inspector of Stamps, reported that the court-fee paid by the plaintiffs was insufficient as the suit was governed by sub-section (iv) (a) and court-fee was liable to be paid on the full value of the property and not on one-fifth of its value. The District Judge rejected the report, holding that the second relief was not a consequential relief and the court-fee paid separately on the two reliefs was sufficient. Against his order, the Chief Inspector of Stamps filed Civil Revision No. 526 of 1963. A learned Single Judge, before whom the revision came up for hearing, referred it to a larger Bench. The Division Bench, before which it then came up, referred it to a Full Bench.

5. The special appeals and the civil revision came up for hearing before a Full Bench consisting of Jagdish Sahai, S. D. Khare and Gangeshwar Prasad JJ. The plaintiffs in the two suits relied upon Kalu Ram's case, AIR 1932 All 485 (FB) and contended that the cases did not fulfil the conditions laid down by the Full Bench for holding a relief to be a consequential relief and that, therefore, the suits were not governed by sub-section (iv) (a). Jagdish Sahai and Gangeshwar Prasad JJ. doubted the correctness of the decision of the Full Bench and suggested that the case be heard by a Full Bench of more than five Judges. Khare, J., did not doubt the correctness of the Full Bench decision and decided the case in accordance with the tests laid down therein. He held that the reliefs of injunction claimed in the two suits did not satisfy the fourth test laid down by the Full Bench and, therefore, in neither suit was the relief of injunction a consequential relief. In accordance with the view of the majority, the special appeals and the civil revision have been referred to this Bench for decision.

6. In Kalu Ram's case, AIR 1932 All 485 (FB) the plaintiffs prayed for two reliefs, i.e.:

"1. that a certain mortgage deed may be adjudged void and ineffectual against the plaintiffs and it may be cancelled; and

2. that a compromise and the decrees passed on the basis thereof may be cancelled."

The plaintiffs apparently treated both the reliefs as declaratory reliefs valued them at Rs. 5,000/- and Rs. 6,276/3/9 respectively and paid a fixed court-fee under Article 17(iii) of Schedule II of Rs. 10/- on each relief. At that time, the relief for cancellation of a deed or decree was not specifically provided for in the Court-Fees Act and such a suit was governed by the residuary Article 1 of Schedule I. Section 7(iv) (c) of the Act, under which

the decision in Kalu Ram's case, AIR 1932 All 485 (FB) was given, stood thus:

"(iv) — In suits —

- (a)
- (b)
- (c) to obtain a declaratory decree or order, where consequential relief is prayed,
- (d) to obtain an injunction
- (e)
- (f)

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

In all such suits the plaintiff shall state the amount at which he values the relief sought."

The question which arose for consideration before the Full Bench was whether the reliefs fell under Section 7(iv) (c) and were to obtain a declaratory decree with a consequential relief or under Article 17(iii), Schedule II, to obtain a declaratory decree where no consequential relief is prayed and, if not, whether under Article 1, Schedule I, as a plaint not otherwise provided for in the Court-Fees Act where the amount or value of the subject-matter in dispute can be ascertained or under Article 17(iv) of Schedule II, i.e., a suit not otherwise provided for and where it is not possible to estimate at a money value the subject-matter in dispute. It was laid down by the Full Bench that a relief must satisfy the following four conditions or tests to make it a "consequential relief" within the meaning of Section 7(iv) (c):—

1. The relief follows directly from the declaration given.
2. The valuation of the relief is not capable of being definitely ascertained.
3. The relief is not specifically provided for anywhere in the Act.
4. The relief is one which cannot be claimed independently of the declaration as a substantive relief."

The Full Bench further observed:

"If a substantive relief is claimed though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief and if satisfied that it is not a mere consequential relief but a substantive relief, it can demand the proper court-fee on that relief irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief."

The Full Bench ultimately held that neither of the two reliefs fell under Section 7(iv) (c) or under Article 17(iii) of Schedule II but they fell under the residuary Article 1 of Schedule I.

7. The Court-Fees Act has been substantially amended in U. P. The provision corresponding to original Section 7 (iv) (c) is contained in Section 7(iv) (a) of the amended Act and is in these terms: "7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

.....
.....
.....

(iv) In suits—

(a) to obtain a declaratory decree or order, where consequential relief other than reliefs specified in sub-section (iv-A) is prayed; and

(b) for accounts;

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal; Provided that in suits falling under clause (a), where the relief sought is with reference to any immovable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-sections (v), (v-A) or (v-B) of this section as the case may be;

Provided further, that in all suits falling under clause (a) such amount shall in no case be less than Rs. 300; and

Provided also, that in suits falling under clause (b), such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit."

.....
Sub-section (iv-A) deals with suits for cancellation or adjudging the instruments and decrees; sub-section (iv-B) (b) deals with suits for injunction; sub-section (v) deals with suits for possession of land, buildings or gardens and sub-section (vi-A) deals with suits for partition. Most of the reliefs that can be asked for in a suit have now been specifically provided for in the amended Act.

8. For purposes of court-fee, the court must look at the reliefs as prayed for in the plaint. In order to ascertain the real nature of the reliefs claimed, the substance of the plaint has to be considered. If a declaratory relief alone has been prayed for, the court cannot superadd a consequential relief which it thinks the plaintiff ought to have prayed for and treat it as a consequential relief. (See Bishan Sarup v. Musa Mal, AIR 1935 All 817. (FB)). Likewise, if only a substantive relief is prayed for, it is not open to a Court to add or read a declaratory relief also into it and treat it as a

declaratory relief with a consequential relief. (See the Vishnu Pratap Sugar Works (P.) Ltd. v. Chief Inspector of Stamps, U. P., AIR 1968 SC 102). Court-fee has to be determined on the relief as prayed for in the suit. At the initial stage of determining court-fee on a plaint, the question whether a declaratory suit is liable to be dismissed either because it does not fall within the purview of Section 42 of the Specific Relief Act, 1877 (now Section 34 of the 1963, Act) or because the plaintiff has failed to sue for a further relief which was open to him or for some other reason does not arise; nor does the question arise whether the suit can succeed because only a substantive relief has been prayed for. The question of the applicability of Section 7(iv) (c) of the original Act or of Section 7(iv) (a) of the amended Act arises only when a declaratory relief and another relief have been asked for either as one composite relief or as two distinct reliefs.

8-A. If the tests laid down by the Full Bench are applied to the two suits, then the relief of injunction must be held to be not consequential relief. In fact, it is difficult to conceive of any case which will satisfy all the four tests. As already observed, most of the reliefs that a plaintiff can pray for are specifically provided for in the amended Act and methods of ascertaining their valuation have been laid down. Thus most of the reliefs will fail to satisfy the second and the third tests. No case has been cited of a relief which cannot be claimed as an independent relief without claiming a relief of declaration also with it. The fourth test is also not likely to be satisfied in any case. This means that Section 7(iv) (a) will have no application, except in some rare case in which all these tests are satisfied. It has been contended on behalf of the Chief Inspector of the Stamps that only the first test is a valid test and there was no justification for prescribing the second, third and fourth tests and that these three tests should be discarded. The cases, which have arisen in this court after the Full Bench decision, do not reveal a uniform application of the tests laid down by the Full Bench. It is necessary to cite only some of these decisions.

9. In Chief Inspector of Stamps v. L. Kedarnath Murarka, AIR 1944 All 113, Yorke J. held that a suit for a declaration that certain office bearers elected at a meeting were duly elected office bearers of a committee and for an injunction restraining the defendants from acting as elected office bearers of a committee was a suit for a declaratory decree in which a consequential relief was prayed for. The case of AIR 1932 All 485 (FB) (supra) was not noticed in this case.

10. In *Sahu Madan Mohan v. Tejram George Coronation Hindu School Association*, AIR 1949 All 207, a Bench consisting of Wanchoo and Agarwalla JJ. even though the case of *Kalu Ram*, AIR 1932 All 485 (FB) was cited before them, held that the relief of injunction prayed for in the suit for a declaratory decree was a consequential relief within the meaning of sub-section (iv) (a). According to the learned Judges, a consequential relief meant a relief which necessarily flowed from the principal relief sought by and was a relief which could not be allowed if the principal relief was refused.

11. In *Chief Inspector of Stamps, U. P. v. Sewa Sunder Lal*, AIR 1949 All 560, a Division Bench of this Court consisting of Wanchoo and Bhargava JJ. held that, in a suit for a declaratory decree to the effect that an order directing the plaintiff to vacate certain rooms was ultra vires and null and void, the relief of injunction prayed for restraining the defendant from interfering with the possession of the plaintiff over the rooms was a consequential relief.

12. In *Vibhuti Narain Singh v. Municipal Board, Allahabad*, AIR 1958 All 41 a Division Bench of this Court consisting of V. Bhargava and Beg JJ. held that, where a declaration is sought for the existence of a right and a permanent injunction is sought, restraining some one from interfering with the exercise of that right, the permanent injunction would clearly be a relief consequential to the declaration. In this case, the learned Judges were of opinion that the first and the fourth tests laid down in *Kalu Ram's* case, AIR 1932 All 485 (FB) were satisfied. The second and the third tests were not referred to at all though *Kalu Ram's* case, AIR 1932 All 485 (FB) was considered by them.

13. In *Kanhiya Lal v. Satya Narain* AIR 1965 All 496, D. S. Mathur, J. held that, in a suit by the landlord for a declaration that an allotment order was void and for injunction to restrain the allottee from occupying the accommodation, the relief of injunction was a consequential relief.

14. In *Sri Krishna Chandraji v. Shyam Behari Lal*, AIR 1955 All 177 a Bench of this Court consisting of Raghubar Dayal and Roy JJ. held that, in a suit for a declaration that the plaintiff No. 2 was the Sarbarakar of the plaintiff No. 1, the relief for mandatory injunction to remove the defendant from the management of the temple of plaintiff No. 1 and for possession of the temple and the movables therein was not a consequential relief. It was held that the fourth test laid down in *Kalu Ram's* case was not satisfied.

15. In *Murli Dhar v. Bansidhar*, AIR 1963 All 86, a Bench of this Court consisting of A. P. Srivastava and Jagdish Sahai JJ. held that in a suit for a declaration that certain resolutions passed affecting the position of the plaintiff as managing partner were ultra vires and void and for an injunction restraining the defendants from interfering with the plaintiff's right in any manner, the relief of injunction was not a consequential relief. The Bench held that the relief of injunction could be sued for independently of the declaration and, therefore, did not satisfy the fourth test laid down in *Kalu Ram's* case, AIR 1932 All 485.

16. There are many cases of other High Courts where the reliefs of injunction and possession when prayed for in a suit for declaration, have been held to be consequential reliefs. It is not necessary to cite them.

17. In *Mt. Zeb-ul-Nisa v. Din Muhammad*, AIR 1941 Lah 97 (FB) a Full Bench of the Lahore High Court accepted the four tests laid down in *Kalu Ram's* case, AIR 1932 All 485 (FB) and applied them. In *Tarlok Singh v. Sardarni Daljit Kaur*, AIR 1961 Punj 426, a Division Bench of the Punjab High Court dissented from the view taken in AIR 1941 Lah 97 (FB) (supra) and held that the second, third and fourth tests laid down in *Kalu Ram's* case, AIR 1932 All 485 (FB) were not justified. In this case, the plaintiffs filed a suit for a declaration that an order granting a succession certificate in favour of defendant No. 1 was null and void and for a prayer for the issue of an injunction against the defendants not to interfere with the plaintiffs' possession over the properties. The Punjab High Court held that the relief of injunction was a consequential relief. With regard to the tests laid down in *Kalu Ram's* case, AIR 1932 All 485 (FB). Tek Chand, J. who delivered the judgment of the Bench observed:

"Barring the first element, the other ingredients do not fall within the connotation of the term. The other three requirements are otiose and I cannot persuade myself to treat them as necessary concomitants of the expression 'consequential relief'.

A relief is consequential if it follows something on which it depends. What ensues or follows must have a necessary connection with the cause. 'Cause' and 'consequence' are correlative terms, one implying the other. What the courts have to see under Section 7(iv) (c) is whether the relief of possession where a declaratory decree is prayed for follows as a natural sequence from the declaration. In a case like the present, the moment a declaration is granted avoiding or nullifying an order granting succession certificate, the result which must follow

in the course of natural event is that the possession which has been ordered by that court to be given to the applicant by the curator must be restored to the party from which it had been originally taken by the curator."

18. The words 'consequential relief' have not been defined in the Court-Fees Act. The meaning, which should be given to a word or expression not defined in an enactment, should be its ordinary dictionary meaning or a meaning which is necessarily implied by the context in which it is used or by the object of the provisions or by the scheme of the enactment. The ordinary dictionary meaning of the word 'consequential' is "following as a result or inference". This meaning justified the first test laid down in Kalu Ram's case, AIR 1932 All 485 (FB). The Judgment in that case does not disclose or indicate the basis for the second, third and fourth tests. There is nothing in the language of Section 7 or in the context in which the word 'consequential' has been used to support these tests. The objects of the Court-Fees Act are to collect revenue and to prevent frivolous suits being filed. Neither from these objects nor from the scheme of the Act can these three tests be necessarily implied.

Learned counsel for the plaintiffs in suit No. 83 of 1953, who supported these tests, was unable to suggest any good reason for imposing these three tests which considerably narrowed down the dictionary meaning of the word 'consequential'. His only contention was that this Bench should not discard the tests laid down in Kalu Ram's case, AIR 1932 All 485 (FB) which have stood for over 35 years when the Legislature, which must have been aware of the decision of the Full Bench, has not chosen to interfere either by laying down a definition of the word 'consequential' or by otherwise expressing a contrary opinion. It is not possible to accept this contention. As indicated above, the tests laid down in Kalu Ram's case, AIR 1932 All 485 (FB) have not been uniformly applied in this court and have been disapproved at least by the Punjab High Court. Besides, the U. P. amendments make the imposition of at least two of these three tests unjustifiable. It appears that the unamended Section 7(iv) (c) allowed the plaintiff to put any arbitrary low valuation on the consequential relief and to pay court-fee on this valuation, while he had to pay a higher court-fee if the same relief were claimed as a substantive relief independently of a declaratory relief. This loophole in the Act was exploited by the litigants by adding a declaratory relief when praying for a substantive relief. It was apparently to plug this loophole that a very narrow and restricted meaning was given by the Full Bench to the expres-

sion 'consequential relief'. It was for the Legislature rather than for the court to plug the loophole.

19. The second test laid down in Kalu Ram's case, AIR 1932 All 485 (FB) requires that a relief to be a consequential relief should be one "the valuation of which is not capable of being definitely ascertained." As indicated above, there appears to be no rational basis for laying down this test. It is difficult to appreciate what the relation the capability of ascertaining or non-ascertaining the value of a relief has with its being a consequential relief. Now the language of the first proviso to the amended Section 7(iv) (a) rules out the applicability of this test. The proviso reads:

"Provided that in suits falling under clause (a), where the relief sought is with reference to any immovable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-section (v), (v-A) or (v-B) of this section as the case may be." The proviso lays down that, if a consequential relief with reference to immovable property is capable of valuation, then that would be the valuation of the relief and, if it is incapable of valuation, then the valuation will be determined in accordance with the sub-section (v), (v-A) or (v-B). The proviso thus clearly envisages consequential reliefs which are capable of valuation. To apply the second test now would result in cutting down that ambit of S. 7(iv) (a).

20. The third test requires that a relief to be a consequential relief should be one "which is not specifically provided for anywhere in the Act". There appears to be no reason why a relief, which is specifically provided for in the Act, should be incapable of being a consequential relief, if prayed for a suit for a declaratory decree. In several cases of this court, some of which have been referred to above, this Court has held the reliefs of injunction and possession, which were specifically provided for in the Act, to consequential reliefs. No case has been cited by counsel where this test has been applied to hold that a relief prayed for was not a consequential relief. The language of the amended Section 7(iv) (a) clearly indicates that even reliefs specifically provided for in the Act can be consequential reliefs. The opening words of the sub-section read:

"In suits — to obtain a declaratory decree or order, where consequential relief other than reliefs specified in sub-section (iv-A) is prayed."

The words underlined (here in 'J' which were added by U.P. Act IX of 1941, indicate that, but for this exception, even the reliefs mentioned in sub-sec. (iv-A)

could be consequential reliefs. The express exclusion of the reliefs specified in sub-section (iv-A) from the purview of Section (iv) (a) necessarily implies the inclusion of other reliefs specified in other parts of the Act. The words introduced in sub-section (iv) (a) by the amendment of 1941 were noticed in the case of AIR 1955 All 177 (supra) and it was observed:

"The exception made in S. 7(iv) (a) with respect to the reliefs specified in sub-section (iv-A) may be just to make it clear beyond doubt that what has been decided in the Full Bench case did really not amount to a 'consequential relief'."

There can be little doubt that the exception also provides that a relief of cancellation or adjudging void instruments or decrees cannot be a consequential relief, as was held by the Full Bench. But that this is the only effect of the amendment cannot be accepted. In AIR 1955 All 177 (supra), the question of applicability of the third test did not arise. The reliefs prayed for in this case have already been set out above. The Bench held that the relief prayed for, in addition to the declaration, did not satisfy the fourth test and, for that reason alone, it was held not to be a consequential relief. There was no occasion to consider whether the words introduced by the amendment of 1941 affected the third test or not. There was little justification for prescribing this test in 1932 and there is none now for continuing it after the amendment.

21. The fourth test laid down in *Kaifu Ram's case*, AIR 1932 All 485 (FB) is that the relief to be a consequential relief should be one which 'cannot be claimed independently of the declaration as a substantive relief'. This test was interpreted in AIR 1949 All 207 (supra) thus:—

"It is a relief which cannot be allowed if the principal relief is refused." But it was differently interpreted in AIR 1955 All 177 (supra) where it was said:

"The ingredient that the relief cannot be claimed independently of the declaration as a substantive relief means that it is necessary for a relief to be a consequential relief that that relief be not capable of being claimed, in the absence of a claim for declaration, as a substantive relief, that is to say, no suit for that relief can lie unless the suit also contemplates a declaratory relief."

If the first interpretation is correct, there can be no objection to this test but, if the second interpretation is correct, then the fourth test cannot be accepted as a valid test. On the second interpretation, it is difficult to conceive of a case which will satisfy this test. Two cases were suggested at the Bar where a substantive relief cannot be asked for, except along

with a declaration. The first is the case of a voidable transaction where it is said that no substantive relief can be claimed without first asking for a declaration that the transaction is not binding on the plaintiff. It is true that, in such a case, the court will have to determine whether the transaction is binding on the plaintiff before the substantive relief can be granted. But no provision of law was pointed out which compels a plaintiff to seek the relief of declaration also.

There is no provision of law corresponding to the proviso to Section 42 of the Specific Relief Act, 1877 (Section 34 of the 1963 Act) saying that no court shall grant any particular substantive relief where the plaintiff, being able to seek the relief of declaration, omits to do so.

In this connection, the decision of the Supreme Court in AIR 1968 SC 102 (supra) may be referred to. In this case, the plaintiff filed a suit for an injunction restraining the State of U. P. from realising sugar-cane cess and purchase tax from it on the ground that the statutes, under which the cess and the tax were sought to be realised, were invalid and void. No relief was sought for declaring the statutes to be invalid and void. The plaintiff paid court-fee on the substantive relief of injunction under Section 7 (iv-B). It was urged on behalf of the State that the plaint read in substance rather than in form was for a declaratory decree with an injunction as the consequential relief and was covered by sub-section (iv) (a). This contention was rejected and it was observed:

"It is true that for purposes of the Court-Fees Act, it is the substance and not the form which has to be considered while deciding which particular provision of the Act applies. It cannot, however, be gainsaid that the actual relief prayed for in the plaint was an injunction restraining the State and its authorities to realize from the appellant-company the aforesaid cess and the purchase tax. It is clear from the plaint when read as a whole that though the appellant-company alleged that the Acts were void and therefore non est for the reasons set out therein, it did not seek any declaration that they were void. The plaint proceeds on the footing that the said Acts were void and that, therefore, the State of U. P. or its authorities had no power to realise the said tax and the said cess. It may be that, while deciding whether to grant the injunction or not, the court might have to consider the question as to the validity or otherwise of the said Act. But that must happen in almost every case where an injunction is prayed for. If for the mere reason that the court might have to go into such a question, a prayer for injunction were

to be treated as one for a declaratory decree of which the consequential relief is injunction, all suits where injunction is prayed for would have to be treated as falling under Cl. (a) of sub-section (iv) of S. 7 and in that view Cl. (b) of sub-section (iv-B) of S. 7 would be superfluous."

If the plaint in this case for the relief of injunction could stand without the relief of declaration being asked for, it is difficult to see how a plaint for any other substantive relief where the relief of declaration can be asked for but has not been asked will fail. The second case suggested is the one dealt with in AIR 1958 All 41 (supra). It was observed in this case:

"The relief of permanent injunction not to interfere with the exercise of a right cannot be granted in the absence of or independently of the declaration about the existence of that right. This is the view that was taken by this Court in *Ram Chhabila v. Sat Narain*, 1935 All LJ 1319." An examination of *Ram Chhabila's* case, 1935 All LJ 1319 shows that it does not support this proposition at all. In that case, two distinct reliefs were prayed for:

- (a) A declaration that the plaintiffs had exclusive right to sit at the Dadri Mela Ghat, to have 'shankalp' done and to take "dan dakshna" as their right of birth and
- (b) a perpetual injunction restraining the defendants from sitting at the Ghats and interfering with the plaintiffs' exclusive right of sitting at the same Ghats.

Holding that relief (b) was a consequential relief and that Section 7(iv) (c) applied, it was observed:

"The learned advocate for the plaintiffs-respondents contends that he is not claiming one relief of declaration coupled with a consequential relief but two separate and distinct reliefs, namely, for a declaration and, wholly apart from it, for an injunction restraining the defendants from sitting at the 'Ghat' and interfering with the plaintiffs' exclusive right of sitting at the same 'Ghat'. Two reliefs cannot be regarded as separate and distinct only because the plaintiffs say so. The nature of the two reliefs will determine the question whether they are independent relief or whether one is consequential on the other. We are clearly of opinion that the relief of injunction, so far as it aims at restraining the defendants from interfering with the plaintiffs' right to sit at the 'ghat' in respect of which a declaration is sought, is a consequential relief. The relief of injunction, in the present case, flows directly from the right which the plaintiffs desire to be declared. In this view, reliefs (a) & (b) should be considered to be but one

relief of the nature described in Section 7(iv) (c), Court-fees Act, and the suit should be treated as one to obtain a declaratory decree where consequential relief is prayed."

There is no reference in this case to *Kalu Ram's* case or to any test like the fourth test laid down therein. There is no observation even remotely supporting the proposition attributed to this case in AIR 1958 All 41 (supra). The decision rests entirely upon the satisfaction of the first test. There thus appears to be no justification for the proposition laid down in *Vibhutti Narain Singh's* case. Even if there be some rare case where the substantive relief cannot be claimed without a relief for a declaration, it cannot be accepted that sub-section (iv) (a) of Section 7 was enacted for the purpose of governing that rare case only. Acceptance of the fourth test as valid test would render sub-section (iv) (a) superfluous.

22. It thus appears that the second, third and fourth tests laid down in *Kalu Ram's* case, AIR 1932 All 485 (FB) are not justified and unnecessarily narrow down the meaning of the words 'consequential relief'. Section 7 (iv) (c) applies to a suit to obtain a declaratory decree or order in which a consequential relief is prayed. The suit must principally be for a declaration and in that suit some other relief should also be claimed. The two reliefs may be asked for either as one composite relief or as two distinct reliefs. The words 'consequential relief' imply that the other relief should be one which flows directly from the declaration which the plaintiff desires to be made. This means that the plaintiff should be entitled to the other relief only as a necessary consequence or result of the granting of the declaratory relief. The other relief must be so dependent on the declaratory relief that it cannot be allowed if the principal relief is refused. In suit No. 83 of 1953, two reliefs were prayed for which, in substance, were for a declaration that the proceedings of a meeting held on 14-2-1952 and the resolutions passed at it were illegal and not binding on the Mandali and for an injunction restraining the defendants from obstructing the plaintiffs from using the hall belonging to the Mandali. Here the relief of injunction flowed from the relief of declaration, and if the suit for declaration were dismissed, it could not be decreed for the injunction. The relief of injunction is, therefore, a consequential relief and the suit is covered by sub-section (iv) (a). In suit No. 12 of 1960, the reliefs prayed for were a declaration that the first plaintiff was the Mahant of the Math and the Sarbarakar of the deity and of the properties of the Math and an injunction restraining the defendants from interfering with the possession of

the first plaintiff over the properties as Mahant and Sarbarakar. The relief of injunction flowed directly from the right which the plaintiff desired to be declared and is a consequential relief. This suit is also, therefore, covered by sub-section (iv) (a).

23. The next question, which arises for consideration, is as to the manner in which the reliefs are to be valued under sub-section (iv) (a). Sub-section (iv) (a) treats a suit for a declaratory decree or order, in which a consequential relief is prayed, as one for a single relief. It provides that the court-fee payable in such suits shall be according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. This gives the plaintiff a right to put any valuation, which he considers proper, on the combined declaratory and consequential reliefs. This right of the plaintiff is subject to two restrictions imposed by the first and the second provisos. The second proviso makes it incumbent on the plaintiff to value the relief at an amount not less than Rs. 300/-. The first proviso has already been set out earlier. It is applicable only to suits falling under sub-section (iv) (a) in which the relief sought is with reference to immovable property. It provides for the following three things:

(i) That the plaintiff shall value the relief according to the value of the consequential relief. This means that the declaratory relief and the consequential relief have to be treated as one relief and the value of such relief has to be the value of the consequential relief:

(ii) that, if the consequential relief is capable of valuation, then the plaintiff shall value the relief at an amount according to this valuation; and

(iii) that, if the consequential relief is incapable of valuation, then the plaintiff shall value the relief at an amount which is the value of the immovable property computed in accordance with sub-section (v); (v-A) or (v-B) as the case may be. Up to this stage there is no dispute. The controversy is over the meaning of the words "relief is incapable of valuation". On the one hand, it is said that these words mean that the relief should be incapable of valuation under any provision of the Act, on the other hand, it is asserted that these words mean that the relief should be incapable of market or economic valuation. On behalf of the Chief Inspector of Stamps it is contended that the valuation of the consequential relief has to be the market value of the immovable property in respect of which the relief has been sought. Reliance for this proposition is placed, mainly, on two decisions. In AIR 1944 All 113 (supra), it was held that the consequential relief of injunction cannot be valued according to

Section 7(iv-B) as that provision applies to suits for injunction only and not to suits for declaration with a consequential relief. With respect, this does not appear to be the correct position. In a suit for declaration in which the consequential relief of injunction has been prayed for the entire relief has to be valued according to the value of the consequential relief. Therefore, the question still is as to how the consequential relief is to be valued. If the consequential relief is the relief of injunction, then what is to be seen is how the relief of injunction is to be valued.

The question as to what is the meaning of the words "incapable of valuation" was neither raised nor decided in this case. The same appears to be the position with respect to the second case of Mrs. Janet Anna Bonarjee v. United Provinces of Agra and Oudh, AIR 1940 Oudh 249. In this case, it was held by a Division Bench of the Oudh Chief Court that, in a suit for a declaratory decree where consequential relief is prayed for with reference to immovable property and this relief is incapable of valuation, the amount, at which this relief should be valued, is the value of the immovable property computed in accordance with sub-section (v). To this proposition no exception can be taken but it was further held in this case that sub-section (iv-B) applies to a suit in which the only relief claimed is one to obtain injunction and not to a suit which clearly falls under S. 7(iv) (a). Again, what is meant by the words 'incapable of valuation' was not considered in this case. Reference was also made to Vibhuti Narain Singh's case in this connection. In the penultimate paragraph of the judgment, the learned Judges agreed with the report of the Inspector of Stamps that the valuation of the suit should be Rs. 10,000/- which was apparently the value of the immovable property in respect of which the reliefs had been prayed for. But it has not been said there that the relief was incapable of valuation or why the valuation at the market price of the property was the correct valuation. If the contention of the Chief Inspector of Stamps is accepted, it would lead to this result that, if the plaintiffs in the two suits had asked only for the relief of injunction, and there appears to have been no obstacle in their way in doing so, they would have had to value the relief at one-tenth or one-fifth of the value of the immovable property; but, since they have asked for the relief of declaration also, they must value the same relief of injunction at the full value of the immovable property. Surely, the Legislature did not intend such an unreasonable result. If the further contention of the Chief Inspector of Stamps that every consequential relief in respect

of immovable property is capable of valuation according to the market value of the immovable property is accepted, the last part of the first proviso to sub-section (iv) (a) would become redundant. The other view that capability or incapability of valuation of a relief depends on whether there is or is not a specific provision in the Act relating to such relief leads to a more equitable and just result. In this view, the relief of injunction, whether prayed for as an independent substantive relief or as a consequential relief, has to be valued in the same manner.

It is well settled that the Court-fees Act is a fiscal measure and is to be strictly construed in favour of the subject. (See *Sri Krishna Chandra v. Mahabir Prasad*, AIR 1933 All 488 (FB)). If the language of the provision is capable of two interpretations, then that interpretation should be accepted which is in favour of the subject. It must be kept in mind that the declaratory relief and the consequential relief falling under Section 7(iv) (a) in respect of immovable property have to be valued as one relief and that relief is the consequential relief. What has then to be seen is whether the relief, which has been prayed for as a consequential relief, is capable of valuation or not. When the Act itself provides the manner or method of valuation of a particular relief, how can it be said that that relief is incapable of valuation? If the relief, which is prayed for as a consequential relief, is specifically provided for in the Act, then it is capable of valuation and must be valued according to the provision made in respect of it; but, if the relief is one which is not specifically provided for in the Act, then it is not capable of valuation under the Act and must be valued according to the value of the immovable property in respect of which it has been prayed. Simply because an injunction is sought in conjunction with a declaratory relief, thereby becoming a consequential relief, it does not cease to be a relief of injunction. The value of the suit is the value of the consequential relief that is to say the value of the relief of injunction. The method for valuation of a relief of injunction is specifically provided in sub-section (iv-B). Where the relief, which is prayed for as a consequential relief, is the relief of injunction, it is capable of valuation under sub-section (iv-B) and must be valued according to the provisions of this sub-section.

24. In Suit No. 83 of 1953, out of which the special appeals arise, both the Civil Judge as well as the learned Single Judge in appeal have held that the suit was for a declaratory decree in which the consequential relief of injunction was prayed for and was, therefore, governed by sub-

section (iv) (a). This finding is correct. The consequential relief sought was for an injunction, restraining the defendants from obstructing the plaintiffs from using the hall belonging to the Mandali. The Civil Judge held that the relief of injunction was in respect of immovable property, that it was incapable of valuation and, therefore, must be valued at the market value of the immovable property (hall) which was Rs. 12,000/-. The learned Single Judge held that the relief of injunction was not in respect of any immovable property and that the court-fee was payable on the amount at which the two reliefs were valued in the plaint, i.e., Rs. 5,200/-. Both these views are erroneous. The injunction is clearly in respect of immovable property, i.e., the hall, and this relief is capable of valuation. As held above, the suit has to be valued according to the value of the relief of injunction and the relief of injunction has to be valued in accordance with the provisions of sub-section (iv-B).

The special appeals are partly allowed, the orders of the learned Single Judge and of the Civil Judge, in so far as they relate to the valuation of the reliefs, are set aside and the trial Court is directed to order the plaintiffs to value the suit according to the valuation of the relief of injunction determined in accordance with sub-section (iv-B) and to pay court-fee thereon. It should be borne in mind that the suit was filed in 1953 when the valuation for the relief of injunction under sub-section (iv-B) had to be made at one-tenth of the value of the immovable property. Parties will bear their own costs throughout.

25. In Suit No. 12 of 1960, out of which Civil Revision No. 526 of 1963 arises, it was held by the District Judge that the suit was not governed by Section 7(iv) (a). This view is wrong. As already held above, the suit was for a declaratory decree with a prayer for the consequential relief of injunction. To this extent the contention of the Chief Inspector of Stamps, who is the applicant in the civil revision, succeeds. The plaintiffs paid the fixed court-fee of Rs. 100 on the relief of declaration and a separate court-fee of Rs. 237/8/- on the relief of injunction under Section 7 (iv-B). The plaintiffs ought to have valued the suit according to the value of the relief of injunction only determined under Section 7(iv-B) and to have paid the court-fee thereon. They have already paid this amount of court-fee and have, in addition, paid a court-fee of Rs. 100/- on the declaratory relief which they were not liable to pay. They have thus paid more court-fee than was required of them to pay. For this reason, the civil revision has to be dismissed and is hereby dismissed. There will be no order as to costs.

26. S. N. SINGH, J.:— I agree.

27. J. S. TRIVEDI, J.:— I agree.

28. H. N. SETH, J.:— I agree.

29. HAMID HUSAIN, J.: I agree.

30. DWIVEDI, J.:— I have read the judgments of brothers Khare and G. C. Mathur. As I do not completely agree with brother G. C. Mathur, it has become necessary for me to write a separate judgment.

31. We have to consider two broad questions: (1) whether the exposition of the meaning of the expression 'consequential relief' by the Full Bench in Kalu Ram's case still holds valid after two statutory amendments of the relevant provisions of the Court-fees Act in 1938 and 1941; (2) what is the amount of court-fee payable in the two suits?

32. Re. (1): The Full Bench exposition is this: "In our opinion, the expression 'consequential relief' in Section 7(iv) (c) means some relief (1) which would follow directly from the declaration given, (2) the valuation of which is not capable of being definitely ascertained and (3) which is not specifically provided for anywhere in the Act and (4) cannot be claimed independently of the declaration as a substantive relief." AIR 1932 All 485 at p. 487 (FB) (figures and brackets are mine).

33. The Full Bench included some very eminent judges of this Court. The Bench did not elaborate the reasons in support of their opinion. They preferred to express their opinion in the aphoristic style. The opinion points out four elements of the expression 'consequential relief' used in Section 7(iv) (c). It does not appear to give any abstract definition of the expression. Have the statutory amendments of 1938 and 1941 annihilated or attenuated anyone or more of these four elements? I shall confine myself to this narrow question.

34. I agree with brothers Khare and G. C. Mathur that the first element survives the two amendments in full strength. This element is derived from the ordinary meaning of the expression 'consequential relief'.

35. I also agree with brother G. C. Mathur that the 1938 amendment annihilates the second element. The first proviso contemplates a consequential relief which is capable of valuation. Again, Section 7(iv) as it stood in 1932 has been materially altered and reconstructed. In 1932, Section 7 (iv) consisted of six sub-clauses (a) to (f). Sub-clause (a) dealt with suits for moveable property where the subject-matter has no market value; sub-clause (b) with a suit to enforce the right to share in any property on the ground that it was joint family property; sub-clause (c) with a suit to obtain a declaratory decree where consequential relief was prayed; sub-clause (d) with a suit to

obtain an injunction; sub-clause (e) with a suit for a right to some benefit (not herein otherwise provided for) to arise out of land; and sub-clause (f) with a suit for accounts. In all these suits the plaintiff had the choice to value the relief sought. Suits mentioned in sub-clauses (a), (b), (d), (e) and (f) were then incapable of valuation. So in that context the Full Bench said: "A consideration of all the Cls. (a) to (f), sub-section (4) Court-fees Act leads to the same conclusion. AIR 1932 All 485 at p. 487 (FB)." Section 7(iv) as amended in 1938 consists of only two sub-clauses. Sub-clause (a) corresponds to sub-clause (c) of the former Section 7(iv); Sub-clause (b) corresponds to sub-clause (f) of the former Section 7(iv). The first proviso to the amended section provides for the mode of valuation where the relief sought is with reference to immoveable property. The second proviso fixes the minimum valuation in all cases at Rs. 300. The third proviso provides for the mode of valuation in the case of a suit for accounts. It is true that in a suit falling under sub-clause (a) where the relief sought is not with reference to immoveable property, the plaintiff retains the choice to put his own valuation. But having regard to the context of the three provisos it cannot now be maintained that a consequential relief is one which is incapable of valuation. The requirement of the second element also runs counter to the decision of an early five Judges Full Bench of our Court Ram Prasad v. Sukh Dai, (1878-80) ILR 2 All 720 (FB) which was not cited before the Bench in Kalu Ram's case, AIR 1932 All 485 (FB).

36. Coming to the third element, it is at first necessary to consider what the Full Bench really meant by it. In Phul Kumari v. Ghanshyam Misra, (1908) ILR 35 Cal 202 (PC), the plaintiff's property was attached and was being sold in execution of a money decree passed against a third person. Her claim was rejected by the Execution Court. She then instituted a suit for these reliefs: (1) declaration that she was the owner in possession of the property; (2) declaration that the second defendant had no right left in the property after sale to her; (3) declaration that the property was not liable to be sold in execution of the money-decree of the first defendant; and (4) permanent injunction restraining the first defendant from executing the decree by sale of the property. The Calcutta High Court went by the words of the reliefs claimed and held that the suit was for a declaratory decree where consequential relief was asked for. The plaintiff was accordingly asked to pay the court-fee under Section 7(iv) (c). The case went in appeal to the Privy Council. The Privy Council reversed the judgment of the High Court. The Privy Council held that having regard to the nature of

the suit the case was governed by Article 17(1) of Schedule II, Court-fees Act and that a fixed court-fee was payable on the plaint. Lord Robertson said, "Having thus ascertained what is the nature of the suit, their Lordships turn to the Court-fees Act to see whether such actions of appeal 'are specifically dealt with' for it is only if they 'are not specifically dealt with' that the task arises of finding to which group of cases this is to be assigned." (1908) ILR 35 Cal 202 at p. 206 (PC) (emphasis (here in single quotation marks—Ed.) mine).

37. It is clear that by the words 'specifically dealt with' in this passage Lord Robertson really meant to refer to Schedule II which provides for the payment of a fixed court-fee generally. (See Krishna Mohan v. Raghunandan, AIR 1925 Pat 392 at p. 398 (FB) and Gauri Shankar v. Mohanlal, AIR 1938 Oudh 20 at p. 21). The language in which the third element is expressed by the Full Bench seems to me to be a re-echo of the words of Lord Robertson in the foregoing passage. If that is so, as I conceive, then despite its wide language the third element really means that the relief sought should not fall under any Article in Schedule II, which prescribes a fixed court-fee. I cannot believe that the third element was intended by the Full Bench to refer to various clauses of Section 7. On this narrow construction, the third element will in my view remain intact even after the 1938 and 1941 amendments.

38. I agree with brother G. C. Mathur that the fourth element does not survive the 1941 amendment. The words "other than relief specified in sub-section (iv-A)" show that many of the reliefs mentioned in other sub-sections may be claimed as a consequential relief. Those reliefs may be substantive reliefs, as for instance, the relief of possession.

39. Re. 2: For answering this question it will be necessary to ascertain 'the object and the nature of the suit' as well as the nature of the reliefs claimed in the two suits. For this purpose it shall be necessary to look to the substance and not merely to the words of the plaints.

40. In the suit out of which the Civil Revision has arisen there are three plaintiffs. The first plaintiff is Mahant Lakshmi Narayan; the second plaintiff is the Math Khadara; the third plaintiff is the idol of Shivaji Kawaleshwar Nath installed in the Math Khadara. There are four defendants. The first defendant is the Gaon Samaj Dihwa; the second defendant is Shankaranand Jati; the third defendant is Maharaj Jati; the fourth defendant is Sita Ram Gosain. In substance the allegations are these; the plaintiffs 2 and 3 are owners of considerable moveable and immoveable properties. They

are in possession over the properties. The first plaintiff has succeeded to the office of the Mahant and Sarbarakar of the two plaintiffs on the death of Sheo Prasad Jati, the Mahant and Sarbarakar. The Mahant and Sarbarakar manages the properties and spends the income from the properties for the sole benefit of the Math and the deity. He does not get any emoluments. The defendants have filed objections in the mutation proceedings. The first defendant claims that it is entitled to the property. The other defendants claim to have succeeded to the office of the Mahant and Sarbarakar on the death of Sheo Prasad Jati. They are interfering with the first plaintiff's management and are wasting the property. Two reliefs have been claimed on these allegations; (1) a declaration that the first plaintiff is the Mahant and Sarbarakar of the property in suit of the Math and the idol; (2) the defendants may be restrained from interfering with the control of the first plaintiff over Bhog of the idol and with his managing the suit properties as Mahant and Sarbarakar.

41. It may be observed that no relief is expressly claimed with respect to any right, interest or title to the suit properties. But the plaintiff No. 1 cannot get the consequential relief against the first defendant unless it is held that the latter has no right to the properties.

42. In the other suit, there are 17 plaintiffs and 25 defendants. The plaintiff allegations are these: The Mandali is the unregistered socio-religious association at Allahabad. The parties to the suit are its members. They are also members of the Parsee Zoroastrian Anjuman. The hall known as the Bazm Gandhi Hall was built with the funds of the Mandali. The hall was handed over to the Anjuman for the use and benefit of the entire Parsee community. The defendants have unlawfully passed a resolution to wind up the Mandali. The resolution was passed in a meeting held on February 14, 1952. The resolution is null and void. Two reliefs are claimed: (1) a declaration that the aforesaid resolution is null and void; (2) the defendants may be restrained from interfering with the use and enjoyment of the hall by the plaintiffs as members of the Mandali which is the owner thereof.

43. In this suit, the plaintiffs do not claim any right, interest or title to the hall. They allege that the hall is owned by the Mandali. They only ask for a relief in respect of the use of the hall by them as members. They do not ask for recovery of possession over the hall. As the hall is dedicated to the use of the Parsee community, they seek to enforce a privilege only.

44. Brother G. C. Mathur is of opinion that the two suits are suits to obtain a declaratory decree where consequential relief is prayed. I agree with him. The second relief directly follows from the declaration asked for. It is nobody's case that these suits are specifically provided for in Schedule II. So S. 7(iv) (a) will govern these suits.

45. Brother G. C. Mathur is also of opinion that the first proviso to S. 7(iv) will apply to these suits. I find it difficult to agree with this view as regards the second suit. This difference takes me to the construction of Sec. 7(iv) (a), and, in particular, of its first proviso.

Section 7(iv) materially reads: In suits—

(a) to obtain a declaratory decree or order where consequential relief is prayed, according to the amount at which the relief sought is valued in the plaint

Provided that in suits falling under clause (a) where the relief sought is with reference to any immoveable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immoveable property computed in accordance with sub-section (v), (v-A) or (v-B) of this section, as the case may be.

Provided further that in all suits falling under clause (a) such amount shall in no case be less than Rs. 300/-.....".

46. Whether the first proviso applies to the two suits turns on the meaning of the phrase "with reference to any immoveable property". The words "with reference to" are not defined in the Court-fees Act. According to the Shorter Oxford English Dictionary the words mean "with respect or regard to". So the relief sought should be "with respect or regard to" immoveable property. The word 'property' is to be distinguished from a material thing. There is inherent in the word 'property' the idea of rights. So the phrase 'with reference to immoveable property' would mean (1) that the relief sought should be directly related to some immoveable property and (2) that it should relate to right or title to, or interest in any immoveable property. In other words, if the relief sought is granted, the right, title or interest of the parties in the said property is affected or the property is handed over to the plaintiff.

47. The language of the two Explanations to Section 7(iv-B) (b) lends support to this interpretation. Explanation I repeats the words "the relief sought is with reference to immoveable property." Explanation II speaks of "the property which is affected by the relief sought". Sub-sections (iv) (a) and (iv-B) (b) were introduced in Section 7 by the 1938 amending Act. They may accordingly be

read together to ascertain the meaning of the first proviso to Section 7(iv) (a).

48. The Madras Legislature has added a proviso of the nature of the first proviso to Section 7(iv) (c) of the Court-fees Act in 1927. The Madras proviso also uses the words "the relief sought is with reference to any immoveable property." The Madras High Court has considered the meaning of these words in several cases. In *re Venkata Krishna Pathar*, AIR 1927 Mad 348; *E. R. Gurunatha v. Secy. of State*, AIR 1936 Mad 201; In *re K. J. V. Naidu*, AIR 1946 Mad 235; *Marimuthu Nadar v. Tuticorin Municipality*, AIR 1955 Mad 212. Two of them were decided in 1927 and 1936 and the others after 1938. These decisions have construed the relevant words of the proviso in the manner I am seeking to construe them. It may safely be presumed that in 1938 the U. P. Legislature was aware of the construction put on these words by the Madras High Court. The Objects and Reasons of the Bill which consumed in the 1938 amending Act suggest such awareness. It may be recalled that the mover of the Bill was the late Dr. K. M. Katju, the then Law Minister. Keeping in mind this presumption it may be inferred that the U. P. Legislature intended to give to these words in the first proviso to Section 7(iv) (a) the meaning which the Madras High Court has given to them in the Madras Proviso. The context and object of the two provisos is similar.

49. The Andhra Pradesh and Punjab States have also a similar proviso in their Court-fees Act. The High Courts of these States have adopted the interpretation of the Madras High Court. *P. Venkatalakshmi Narayana v. Nairapaneni Venkayya*, AIR 1958 Andh Pra 106; *Pra-bhu v. Girdhari*, AIR 1965 Punj 1 (FB).

50. I have already discussed the true nature of the second suit and of the reliefs claimed therein. In this suit the title to and possession over the hall is said to be vested in the Mandali. No relief for recovery of possession is prayed for. The consequential relief in respect of the plaintiff's use of the hall if granted, will not affect the possession of the owner or the right, title or interest of the parties in the hall; AIR 1946 Mad 235. So, the first proviso will not apply to this suit. The plaintiffs have therefore to pay court-fee on the amount of the value of the relief sought. They are free to put their own valuation on the relief sought. The relief sought means the whole relief (relief of declaration and the consequential relief) according to AIR 1944 All 113, which I follow in this case without expressing my own view about the true meaning of the words "the relief sought".

51. The plaintiffs have not valued the two reliefs for purposes of court-fee. They have valued the reliefs for purposes of jurisdiction. But the value for purposes of jurisdiction is not necessarily the value for purposes of court-fees. So the plaintiffs should be asked to give the value for purposes of court-fee first, *Karam Ilahi v. Muhammad Bashir*, AIR 1949 Lah 116 (FB), and on that value the court-fee may be paid *ad valorem*.

52. In the first suit the first plaintiff cannot get the consequential relief against the first defendant until it is held that the latter has no right to the immoveable properties described in the suit. So the first proviso will apply to this suit. Brother G. C. Mathur is of opinion that as the consequential relief is the relief of injunction, it is capable of valuation in accordance with the mode of computation provided for valuing the relief of injunction in Section 7(iv-B) (b). I am unable to agree with this view.

53. The first proviso provides for two alternative modes of computation: (1) court-fee is to be paid primarily on the amount of the value of the consequential relief; (2) alternatively, if the consequential relief is incapable of valuation, on the amount of the value of the immoveable property computed according to Section 7(v), (v-A), or (v-B), which of the two modes should be adopted here will depend on the meaning of the phrase "the value of the consequential relief" in the first proviso.

54. Counsel for the plaintiffs says that the Court-fees Act is a fiscal statute. Where in such a statute a word has two meanings, the meaning which is favourable to the citizen should be preferred. This is a familiar rule of construction. But familiarity often makes dim the true import of a rule. The rule means this; if two constructions are equally possible and reasonable, the construction more favourable to the citizen ought to be preferred. (See the cases collected in *Legislation and Interpretation* by Jagdish Swarup, 1968 Edn. P. 329). And for this purpose it is essential to examine the whole context and scheme of the statute.

55. Sections 4 and 6 of the Court-fees Act are the charging provisions. They provide that no document of any kind specified in the first or second schedule shall be filed in any court unless the court-fee prescribed therefor in either Schedule has been paid. The first Schedule fixes the scale of *ad valorem* fees; the second Schedule prescribes fixed fees. Whenever there is a dispute about the quantum of court-fee, the Court should first ascertain whether the first or the second schedule applies to the plaint. If the second schedule applies, there is no further bother. But if the first Schedule

applies, then the Court has to ascertain the "value of the subject-matter in dispute". These words occur in Article I of Schedule I. For this purpose the Court should refer to Section 7 which provides for various modes of computing this value and find out the exact provision applicable to the plaint at hand, AIR 1925 Pat 392 at p. 398.

56. The phrase "value of the subject-matter in dispute" is important. In this phrase the word 'value' means the market value, *Mt. Rupa v. Bhatu Marton*, AIR 1944 Pat 17 at p. 24 (FB). Normally, this very word in the first proviso to Section 7(iv) (a) should convey the same meaning unless there is anything in the total context to give it a different meaning.

57. The word 'value' which is used in the phrase "value of the consequential relief" is also used in the main part of Section 7(iv). It is also used in the un-amended Section 7(iv) (a). It is used in both these places as a verb. It was construed by the Privy Council in *Phul Kumari's case*. There the defendants urged that the plaintiff should pay *ad valorem* court-fee under Section 7(iv) (c) on the amount of the decree for the plaintiff sought to enjoin the defendant against the execution of the decree by sale of the attached property. Rejecting this claim, Lord Robertson said: "The value of the action must mean 'the value to the plaintiff.'" But the value of the property might quite well be Rs. 10,000/-. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit, (1908) ILR 35 Cal 202 at p. 207 (PC).

58. If the value of the attached property is less than the decretal amount, the plaintiff will lose the entire sale-proceeds of the property on the denial of the consequential relief, if, on the other hand, the value of the property is more than the decretal amount, the plaintiff gets back the sale-proceeds of the property in excess of the decretal amount and suffers injury to the extent of the decretal amount. So according to the Privy Council the word 'value' in Section 7(iv) means the value of the injury resulting to the plaintiff. Injury is the subject-matter of the relief.

59. The Calcutta High Court has also taken this view. *Girish Chandra v. Secy. of State*, AIR 1928 Cal 55. The Court said: "(T)he value of the relief is its value to the plaintiff and not necessarily the value of the property involved." The Court further said: "The value of the injunction to the plaintiffs is really the value at which the injury to the plaintiffs should be assessed." AIR 1928 Cal 55 at p. 56 (emphasis (here in ' ') mine).

60. The word 'valued' in the main part of Section 7(iv) (a) should receive

the construction put upon it by the Privy Council and the Calcutta High Court. The effect of the 1938 amending Act is not to overrule this construction. In the result a conjoint reading of Article 1 of Schedule I and the main part of Section 7(iv) (a) will show that 'the value of the subject-matter in dispute' is the market value of the injury to the plaintiff.

61. I cannot comprehend why the word 'value' in the phrase 'value of the consequential relief' in the first proviso to Section 7(iv) (a) should not receive the construction which the word 'valued' has already judicially received before the 1938 amending Act. Both the words are used in the same section. A word repeated in the same section should be construed uniformly throughout unless there are cogent reasons to the contrary. I have not been shown any contrary cogent reason. The Legislature cannot be charged with either inelegance or clear sight.

62. Section 7(iv) (b) deals with a suit for accounts. In such a suit the value of the relief sought shall be the approximate sum due. The Legislature has not adopted any artificial measure. This should suggest that in clause (a) also the Legislature did not intend to adopt any artificial measure.

63. The word 'value' occurs in various sub-sections of Section 7. Sub-section (ii) (a) deals with a suit for maintenance. It uses the expression "the value of the subject-matter of the suit." Surely, the word 'value' here means the market value. Suppose the plaintiff claims a maintenance of 20 mds. of wheat per annum. The word 'value' will here mean ten times the market value of 20 mds. of wheat. Sub-section (iii) which deals with suits for moveable property, expressly uses the word 'market value'. According to the Explanation to sub-section (iv-A) the 'value of the property' shall be the market value. The Explanation then goes on to prescribe a statutory measure of the market value of immoveable property. In sub-section (iv-B) the scheme is identical. In sub-ss. (v) (i) (c) and (d) and (ii) the value is the market value. In clause (ii) the value is the real market value. Sub-section (v-A) is almost similar in design. Sub-section (v-B) adopts a statutory measure of valuation. Sub-sections (vi) and (vi-A) follow the model of sub-section (v), (v-A) or (v-B). Sub-section (vii) provides for a statutory measure. Sub-section (viii) follows the model of sub-section (v), (v-A) or (v-B). Sub-section (x) (d) follows the same model. The other sub-sections are not apparently material for our purpose.

64. From the foregoing survey of various sub-sections of Section 7 there emerge three conclusions: (1) the word 'value' is used either in the sense of real

market value or of statute-measured market value; (2) wherever the legislature selected the statute-measured market value. It has specifically said so in every sub-section; where it intended to prefer the real market value, it has merely used the word 'value' or 'market value' in the sub-section and has refrained from prescribing a statutory measure of the market value; (3) various sub-sections prescribed mutually exclusive measures for computation of value, AIR 1940 Oudh 249. These conclusions are reinforced by the decision of the Privy Council in Phul Kumari's case, (1908) ILR 35 Cal 202 (PC).

65. Having, in regard this scheme of the sub-sections, the word 'value' in the phrase 'value of the consequential relief' will mean the real market value and not the statute measured market value prescribed in sub-section (iv-B) (b).

66. Section 7(iv) (a) applies to a suit where the first two reliefs are prayed for. The first is the relief of declaration; the second is the consequential relief. Section 7(iv-B) (b) applies to a suit where only the relief of injunction is prayed for. Owing to this numerical difference in reliefs the reasonable man would expect that the court-fee payable under Section 7(iv) (a) should be larger than the court-fee payable under Section 7 (iv-B) (b). It is true that in granting injunction the Court may often find facts upon which the declaratory relief may also be granted. But that is of no moment. The fact remains that while the plaintiff asks for two reliefs in the former case, he asks for only one relief in the latter case. I put it to myself, which course is unfair and unreasonable — to pay court-fee on one relief and obtain two reliefs or to pay larger court-fee than the one payable on one relief, bearing in mind the prayer for two reliefs. The answer is verily plain and simple.

67. It is also relevant to notice certain differences between sub-sec. (iv) (a) and sub-section (iv-B) (b). The former prescribes the minimum valuation of Rs. 300/- the latter, the minimum valuation of Rs. 200/-. The former prescribes no ceiling on court-fee, the latter prescribes a ceiling of Rs. 500/-. Thirdly, where the single relief of injunction affects the properties of the plaintiff as well as the defendants, sub-sec. (iv-B) (b) asks the plaintiff to pay court-fee on the value of his own property. Sub-section (iv) (a) does not incorporate a similar provision. Lastly, where the relief sought is with reference to immoveable property, the value of the consequential relief (this would also include in injunction) may be capable of valuation as well as incapable of valuation. But under sub-section (iv-B) (b) whenever an injunction is sought with reference to im-

moveable property, the relief will always be capable of valuation and never incapable of valuation. This result clearly follows from Explanation I which prescribes a statutory measure of valuation. If the consequential relief of injunction may be valued by the measure prescribed in sub-section (iv-B) (b) there will never be a consequential relief of injunction which is incapable of valuation. The last part of the first proviso becomes redundant to that extent. Such a construction should not ordinarily be accepted.

68. This scrutiny of sub-sections (iv) (a) and (iv-B) (b) clearly shows that the scheme of the two provisions is distinct and discrete. It is accordingly not legitimate to interpolate the statutory measure of the latter provision into the former provision.

69. Counsel for the plaintiffs says that the valuation of the consequential relief in accordance with sub-section (iv-B) (b) leads to a more equitable and just result. Perhaps he means to say that the less the court-fee is payable the more equitable and just is the result to the plaintiff. It is abstract and wishful equity and justice. Indeed one may wish for the total abolition of court-fees. But there is never complete correspondence between the law and man's wishfulness. The law always lags behind in the race with wishes. And I am familiar with only one kind of equity and justice — equity and justice according to the law. If the phrase 'value of the consequential relief' were really ambivalent and reasonably susceptible of two constructions, I would have unhesitatingly preferred the one favourable to the plaintiffs. But the review of the context of the phrase and the scheme of the Act shows beyond doubt that the phrase has only one meaning and not two. I cannot accordingly bend the phrase to do equity and justice according to my humour. Nor do I perceive any pressing need for taking liberty with the language of the Act. If a plaintiff does not want to pay the larger court-fee under sub-section (iv) (a), he can very easily avoid it by omitting the relief of declaration. The payment of a larger or smaller fee depends on his own free choice. If he omits the declaratory relief, in most cases he will suffer no harm.

70. The construction which appeals to me also gets support from certain decided cases. I have already noticed two of them, (1908) ILR 35 Cal 202 (PC); AIR 1928 Cal 55. In Mrs. Janet Anna's case, AIR 1940 Oudh 249 the plaintiff claimed (1) a declaration that the U. P. Tenancy Bill is ultra vires in respect of the plaintiff's property of Rampur and (2) that all further proceedings in respect of the said Bill should be stayed qua her property. A Division Bench of the Chief

Court held that the suit fell under the first proviso to Section 7(iv) (a) and that the second relief was incapable of valuation and that accordingly it should be valued in accordance with sub-section (v) as prescribed by the latter part of the first proviso. We are not concerned with the correctness of the decision that the suit fell under the first proviso. It is however important to observe that the Bench held that the second relief was incapable of valuation. The second relief was in substance a relief of injunction. In Subedar Singh v. Durga Singh, AIR 1948 Oudh 297 the plaintiffs claimed (1) a declaration that they alone were entitled to the claims of the bazar and (2) that an injunction shall be issued restraining the defendants from interfering with their management of the bazar and realisations. A learned single Judge held that the second relief was incapable of valuation and should be valued under sub-section (v) as prescribed by the latter part of the first proviso. In both cases it was held that sub-section (iv-B) (b) would not apply. In AIR 1949 All 560, the plaintiff claimed (1) a declaration that the order of the T.R.O. requiring him to vacate rooms was null and void and (2) that the defendant should be restrained by an injunction from interfering with his possession over the rooms. This Court held that the suit fell under the first proviso to sub-section (iv) (a), that the second relief was incapable of valuation and that it should be valued in accordance with the latter part of the proviso. It was also held that it could not be valued under sub-section (iv-B) (b). In AIR 1958 All 41 the plaintiff claimed (1) a declaration that he was entitled to collect tehbazari dues and (2) that the defendant should be restrained by an injunction from interfering with his realising the tahbazari. The court held that the suit was governed by the first proviso to sub-section (iv) (a) and that the consequential relief of injunction should be valued according to the market price of the land. It is, I think, implied in this holding that the case was governed by the phrase 'value of the consequential relief' and that the word 'value' meant market value and not the value calculated in accordance with the statutory measure prescribed by sub-section (iv-B) (b).

71. To sum up, both reason and authority lend support to the construction suggested by me. The phrase 'value of the consequential relief' means market value of the injury to the plaintiff. In the first suit the first plaintiff wants the consequential relief of injunction to restrain the defendants from interfering with his management of the properties of the Math and the deity as Mahant and Sarbarakar. He gets no remuneration as Mahant and Sarbarakar. If injunction is

denied, the first plaintiff's function of managing as Mahant and Sarbarakar will suffer injury. The injury caused to this managerial function is incapable of valuation. Accordingly as regards the immoveable properties described in the plaint the suit will have to be valued in accordance with sub-section (v-B) as prescribed in the latter part of the first proviso. As regards the money with the Receiver, the plaintiff has to pay court-fee on that amount, too. The actual court-fee will be calculated accordingly.

72. The mover of the Bill which later became the 1938 amending Act had expressed the belief that the Act was being made 'more explicit in its provisions, precise in its expressions and fair and equitable in the levy of fees'. U. P. Gazette Extraordinary, dated 11-1-1938 p. 18. But the fate of the two suits demonstrates how misplaced was this belief. One of the suits was instituted in February, 1952 and the other in September, 1960. Parties are locked up in the litigation regarding court-fee and the merits of the suit are left behind far out of sight. Sub-section (iv) (a) has given rise to a lot of wasting litigation. The Madras proviso is more elegant than the first proviso to sub-section (w). It will cut short a good deal of wasting litigation and do great public good if the U. P. Legislature now amends sub-section (iv) (a) in a skilful manner. It may also consider whether it would be proper to apply the first proviso to moveable property as well.

73. S. D. KHARE, J.: This reference to a Full Bench of seven Judges became necessary because at the time the connected appeals and the revision came up for hearing before a Full Bench of three Judges the majority opinion was that the Full Bench case of AIR 1932 All 485, decided by five Judges and laying down four tests which should be satisfied before a relief can be called a consequential relief within the meaning of Section 7(iv) (a) of the Court-Fees Act (hereinafter referred to as the Act) required reconsideration.

At the time Kalu Ram's case, AIR 1932 All 485 (FB) was decided the relief of declaration where consequential relief was also prayed for was governed by Section 7(iv) (c) of the Act. The Act was substantially amended in Uttar Pradesh thereafter, and the provision corresponding to original Section 7(iv) (c) is contained in Section 7(iv) (a) of the amended Act which read as follows:

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

.....
 "(iv) In suits—

(a) to obtain a declaratory decree or order, where consequential relief

other than reliefs specified in sub-section (iv-A) is prayed; and

(b) for accounts; according to the amount at which the relief sought is valued in the plaint or memorandum of appeal; Provided that in suits falling under clause (a), where the relief sought is with reference to any immoveable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immoveable property computed in accordance with sub-section (v), (v-A) or (v-B) of the section as the case may be;

Provided further, that in all suits falling under clause (a) such amount shall in no case be less than Rs. 300; and

Provided also, that in suits falling under clause (b), such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit."

73-A. Sub-section (iv-A) of the amended Act deals with suits for cancellation or adjudging void instruments and decrees. Sub-section (iv-B) (b) deals with suits for injunction. Sub-section (v) deals with suits for possession of lands, buildings or gardens and sub-sec. (vi-A) deals with suits for partition. The manner in which the relief claimed under Section 7(iv) (a) of the amended Act has to be valued is provided for under the two provisos to that sub-section. In most of the cases ad valorem court-fee has to be paid where the relief prayed for is with reference to any immoveable property.

74. By virtue of the first Proviso to Section 7(iv) (a) of the Act in all cases where the consequential relief is of the nature of possession over immoveable property it became immaterial whether the declaratory relief and the relief for possession constituted two separate reliefs or they in fact formed part of one relief, that is to say, declaratory relief where consequential relief was also prayed for. In either case the court-fee payable would be the same. It is only where the declaration and injunction were prayed for in the plaint that the question could arise whether the relief of injunction was consequential within the meaning of Section 7(iv) (a) of the Act.

75. In cases where it is possible to claim the relief of declaration and of injunction separately and where each such relief could be claimed independently of the other, there can be no objection if the plaintiff values both the reliefs separately,

and pays court-fees on them according to the provisions of the Act. It is clear from the provisions of the Act that the relief of declaration and also the relief of injunction had been provided for under different sub-sections of the Act and if they are regarded to be separate reliefs they can easily be valued and court-fees be paid on them as separate reliefs in accordance with the provisions of the Act. In all the cases before us the plaintiffs have claimed the reliefs of declaration and injunction separately, valued them separately and paid court-fees on each of the two reliefs separately. A perusal of the plaints in all the connected cases would show that in none of them a combined relief of declaration and injunction was prayed for.

76. Normally in cases of this nature the court could have no objection to the method adopted by the plaintiffs in valuing each relief separately and paying court-fees in accordance with the provisions of the Act. The relief of declaration has been specifically provided for in the Act and could be valued in accordance with the provisions of the Act. Similarly the relief of injunction has also been specifically provided for elsewhere in the Act and could be separately valued according to the provisions of the relevant sub-section. The plaintiff could very well say that he was claiming two separate reliefs and was paying court-fee on each of them. In such a case normally there should not be any objection from any side.

77. However, it is well settled law that a plaintiff cannot, by carefully drafting his plaint, succeed in paying court-fees less than what he should have paid if the pith and substance of the plaint is examined and it becomes clear that in effect the plaintiff has claimed some other relief for which higher court-fee was payable. In the case of Vishnu Pratap Sugar Works (P.) Ltd. v. The Chief Inspector of Claims, U. P., AIR 1968 SC 102 it was held that the well-settled rule of law is that for purposes of the Act it is the substance, and not the form, of the plaint which has to be considered for deciding which particular provision of the Act should apply. In that case the argument was that although the plaintiff had prayed for the relief of injunction only, it was in effect a declaratory decree where consequential relief had been prayed for and that the pith and substance of the plaint clearly revealed that the plaintiff ought to have asked for a declaratory decree where consequential relief had also to be prayed for, and, therefore, the plaintiff should not have paid a small sum as court-fees on the substantive relief of injunction under Section 7 (iv-B) but should have paid a very large sum as court-fees for the relief of declaratory,

decree where consequential relief was prayed for as provided under S. 7(iv) (a) of the Act. Their Lordships of the Supreme Court, while rejecting that argument, observed that the substantive relief of injunction could be claimed without asking for any declaration (and in fact no declaration had been asked for) and, therefore, even after looking to the pith and substance of the claim it could not be said that the relief asked for was of declaration where consequential relief had also been claimed.

78. Two propositions of law emerge from this ruling. These are—

- (a) For the purposes of the Act it is the substance, and not the form, which has to be considered while deciding which particular provision of the Act applied; and
- (b) if the relief of injunction claimed could be claimed as a substantive relief it cannot be regarded to be a mere consequential relief.

79. The expression 'consequential relief' has nowhere been defined in the Act. Even after the case of Kalu Ram, AIR 1932 All 485 (FB) no attempt was made by the Legislature to define the expression 'consequential relief' occurring in Section 7(iv) (a) of the Act. If the Legislature was not satisfied with the interpretation of the aforesaid term by the Full Bench of five Judges of this Court, it was open to it to give a clear definition of the term. It is significant to note that no such attempt was ever made during the last thirty-five years and the case of Kalu Ram, AIR 1932 All 485 (FB) has held the field.

79-A. According to Oxford Dictionary, the word "consequential" means "following as a result or inference". It need not be confused with the word 'connected' which means 'joined in sequence' or 'coherent'.

80. The two independent reliefs of declaration and injunction where both the reliefs are independent reliefs may well be called connected reliefs. The relief of injunction can be said to be consequential to the relief of declaration only when it could not be claimed independently of the relief of declaration. In my opinion, it is in this sense that the words 'consequential relief' have been used in Section 7(iv) (a) of the Act. A bare reading of that provision of law would clearly show that the main relief must be that of declaration and the other relief must not be an independent relief but something which follows as a result of the relief of declaration. It may perhaps be inferred that the relief other than the declaratory relief must not be capable of being claimed independently of the substantive relief.

80-A. There is no force in the contention that in all conceivable cases, the

consequential relief is capable of being claimed independently as a substantive relief. The following two examples will show that there could be cases where the main relief is that of declaration and the other relief is merely an ancillary relief which follows from the declaratory relief:

(i) Upon declaration that the order of dismissal passed by the defendant against the plaintiff is illegal and ultra vires and is not binding on him, the arrears of salary from the date of dismissal be allowed to him — valued at Rs. 50,000/-.

(ii) Upon declaration that the plaintiff is the adopted son of the defendant and her late husband, the defendant be restrained from interfering with the plaintiff's right to enter the residential house of the family and reside in the same — valued at Rs. 20,000/-.

81. In both these cases it is obvious that the main relief is that of declaration and the other relief is only an ancillary relief which follows from the relief of declaration. In example (i) the plaintiff cannot claim the arrears of salary after his clear admission that he has been dismissed by the defendant — though, according to him, illegally. The plaintiff might be entitled to claim his wages by means of a summary process under Section 15 of the Payment of Wages Act, but until such declaration is obtained he cannot claim those wages before the authority constituted under the Payment of Wages Act. In the civil suit also where the relief is of declaration and arrears of salary, it is obvious that the main relief is that of declaration. Similarly, in illustration (ii), the main relief will be that of declaration, and the other right which has been claimed by the plaintiff merely flows from the relief of declaration and cannot be claimed independently. A relief of declaration where a consequential relief is also asked for is for the purposes of the Act a composite relief and not made up of two separate reliefs. One court-fee has to be paid on that composite relief. Where the plaintiff has claimed the relief of declaration and the relief of injunction separately, it is still within the power of the court to say that judging the pith and substance of the plaint both the reliefs are to be construed as one composite relief, that is to say, the relief of declaration where consequential relief has also been prayed for. However, before the court comes to that conclusion it has, in my opinion to satisfy itself that the relief of declaration and the relief of injunction could not be claimed independently of each other, and that in any case the relief of injunction which has been claimed as a separate and independent relief could not be

claimed as a separate and independent relief. In a case where the relief of injunction can be claimed as a separate and independent relief it may not be proper for the court to say that in fact the two reliefs which have been separately claimed and which are capable of being claimed independently of each other constitute one single relief falling under the provisions of Section 7(iv) (a) of the Act.

82. Where two reliefs have been separately provided for in the Act and each of them could be claimed as an independent relief, it is difficult to understand why they should not be allowed to be claimed as such and the court should necessarily arrive at the conclusion that the second relief claimed is consequential to the first. If both the reliefs can be claimed independently, they can be considered to be connected reliefs and the second relief might not be said to be consequential to the declaratory relief.

83. In the case of AIR 1932 All 485 (FB) (supra) the following tests were laid down for interpreting the words 'consequential relief' as occurring in Section 7(iv) (c) (corresponding to S. 7(iv) (a)) of the Act:—

- (1) The relief follows directly from the declaration given.
- (2) The valuation of the relief is not capable of being definitely ascertained.
- (3) The relief is not specifically provided for anywhere in the Act.
- (4) The relief is one which cannot be claimed independently of the declaration, as a substantive relief.

84. In my opinion it is difficult to say that any of the four tests mentioned above has now become redundant. No one says that the first test has become redundant. The third and fourth tests also cannot be said to be redundant, for the simple reason that if a relief other than the relief of declaration can be claimed as an independent relief, and has been claimed as such, there can be no ground for calling it a consequential relief, particularly when it has been specifically provided for elsewhere in the Act. The relief taxable under Section 7(iv) (a) of the Act being a composite relief (of declaration and consequential relief) may not be capable of being definitely ascertained. In most of the cases the relief being a composite relief, it can only be arbitrarily valued. Therefore, all the four tests laid down in the case of AIR 1932 All 485 (FB) (supra) must still be regarded to be good tests for determining whether or not a particular relief is a declaratory relief where consequential relief has been prayed for.

85. I have not been able to find anything in the amendments made under the Act subsequent to the case of Kalu

Ram, AIR 1932 All 485 (FB) to show that the Legislature did not approve of the aforesaid four tests to determine whether or not a particular relief was a relief of declaration where consequential relief had also been prayed for.

86. I am of the view that the four tests laid down in the case of AIR 1932 All 485 (FB) (supra) for determining whether any relief claimed is a declaratory relief where consequential relief has also been prayed for still continue to be good and valid.

87. In my opinion the connected appeals and the civil revision should be decided as indicated in my order dated 7-5-1969.

88. BY THE COURT: In accordance with the opinion of the majority, the civil revision and the special appeals are disposed of as follows:—

89. Special Appeals Nos. 27, 33 and 34 of 1961 are partly allowed and the orders of the learned Single Judge and of the Civil Judge are set aside in so far as they relate to the valuation of the relief. The trial Court is directed to order the plaintiffs to value the suit according to the valuation of the relief of the injunction determined in accordance with the provisions of sub-section (iv-B) of Section 7 of the Court-Fees Act and to pay court-fee thereon. Parties will bear their own costs throughout.

90. Civil Revision No. 526 of 1963 is dismissed. Parties will bear their own costs of the revision.

Appeals partly allowed and
Revision dismissed.

AIR 1970 ALLAHABAD 509 (V 57 C 75)
FULL BENCH

GYANENDRA KUMAR, A. K. KIRTY
AND S. MALIK, JJ.

Moattar Raza and others, Appellants v. Joint Director, of Consolidation, U. P. Camp at Bareilly and others; Respondents.

Spl. Appeal No. 805 of 1967, D/- 28-11-1969, against judgment of M. H. Beg, J. in C. M. W. P. No. 1296 of 1963, D/- 27-7-1967.

Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 18(1) (a) — Land other than sir and grove — Proprietary right in respect of subject-matter of waqf-alal-aulad — One of co-mutwallis (who were also co-beneficiaries) cultivating land personally — Right of bhumidhar does not accrue either in his favour or in favour of the other co-mutwalli — Wakf — Incidents of. Observations in AIR 1933 All 407, Overruled.

In a case where, on the date immediately preceding the date of vesting, out of

two co-mutwallis (who were beneficiaries) of a waqf alal-aulad by a Shia Muslim, one co-mutwalli personally cultivating a land (other sir and grove), the proprietary right in respect of which was subject-matter of the waqf, the right of a bhumidhar does not accrue under Section 18(1) (a) either in favour of both the co-mutwallis or in favour of that co-mutwalli alone, who was cultivating the land. (Para 26)

In every case of a waqf, whether public, or private, the waqf property vests in God Almighty or in the waqf itself as an institution, or a foundation eo nomine and not in the Mutwalli or the beneficiary. There is nothing in Mussalman Waqf Validating Act, 1913 from which it can be spelled out that in the case of a waqf-alal-aulad the wakf property does not vest in the God Almighty or the wakf itself, but vests in the mutwalli or mutwallis. The legal status and position of a mutwalli under a wakf under the Musalman Law is that of a Manager or Superintendent. Unless so provided in the deed of wakf, a mutwalli, although charged with the duty and obligation of managing the wakf property, can have no beneficial interest even in the income of the wakf. Merely because, in a waqf-alal-aulad, beneficial interest has been made solely enjoyable by the family members and descendants of the wakf, it cannot be said that they have any inherent right or can as of right claim to be entitled to manage the wakf property. The right of management is derived under the deed of wakf itself or under the relevant law or usage, as the case may be, but this right of management or mutwalliship is not necessarily dependent on or co-existent with any benefit conferred on the mutwalli. Observations in AIR 1933 All 407, Overruled. Case law discussed. (Paras 18, 21)

Ordinarily, cultivation of wakf land by a Mutwalli must be treated as cultivation done in his capacity as Manager or Superintendent of the wakf. Therefore, wakf land so cultivated before the coming into force of the Act would have become God's Khudkasht or that of the wakf itself, provided, however, other requisite conditions, if any, under the then existing tenancy law were also satisfied. Whether in consequence of cultivation of wakf land personally by a co-mutwalli, who was also a co-beneficiary, the rights of a bhumidhar did or did not accrue in favour of the wakf or God cannot be decided in the abstract as a matter of law, but can and has to be decided on the basis of material evidence, direct or circumstantial, adduced in a given case. (Paras 21, 25)

Cases Referred: Chronological Paras

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1963-1 SCR 20, Thakur Mohd.

Ismail v. Thakur Shabir Ali

15, 16

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Haji Iqbal Ahmad, K. C. Saxena, Syed
 Afsar Ali, Iqbal Ahmed and Sharafat Ali,
 for Appellants; S. Sadiq Ali and Standing
 Counsel, for Respondents.

A. K. KIRTY, J.:— The following ques-
 tions have been referred to this Bench for
 answer:—

"Where, on the date immediately pre-
 ceding the date of vesting, out of two co-
 mutwallis (who were also co-beneficiaries)
 of a waqf-alal-aulad created by a Shia
 Muslim, one co-mutwalli was personally
 cultivating a land (other than sir and
 grove), the proprietary right in respect of
 which was subject-matter of the wakf, did
 the rights of a bhumidhar accrue in the
 land under Section 18(1) (a) of the U. P.
 Zamindari Abolition and Land Reforms
 Act? If so, whether they accrued in
 favour of the wakf or God or in favour of
 both the co-mutwallis or in favour of that
 co-mutwalli alone who was cultivating
 the land?"

2. The above questions arise in the
 following circumstances. One Sibte Hasan,
 a Shia Musalman by faith, had created a
 waqf-alal-aulad under a deed of waqf
 dated 8-2-1918, appointing his male des-
 cendants as mutwallis and also making
 them beneficiaries, generation after gene-
 ration. The subject of the wakf was some
 zamindari property. The wakif died in
 1924 leaving behind two sons, Farzand
 Hasan and Sibte Hasan, as co-mutwallis
 and co-beneficiaries. Simte Hasan, it ap-
 pears, was a minor at that time and the
 wakf property came to be actually manag-
 ed by Farzand Hasan. Part of the land of
 the wakf estate was let out to tenants,
 while some plots were cultivated by
 Farzand Hasan himself. It is not quite
 clear whether Sibte Hasan cultivated any
 land personally after creating the wakf,
 but it is admitted that he had no khud-
 kasht land when he created the wakf. It
 is also not clear whether Farzand Hasan

had himself, for the first time, brought
 any land under personal cultivation or had
 continued to cultivate the land which,
 after creating the wakf, Sibte Hasan had
 in his lifetime brought under his own
 cultivation.

3. Farzand Hasan died on 29-10-1954,
 and, upon his death, the land personally
 cultivated by him continued to be in the
 possession and cultivation of his heirs, who
 are the appellants before us. In the re-
 venue records also, all such land stood re-
 corded as being in the cultivatory posses-
 sion of Farzand Hasan during his life-
 time and thereafter in the name of the
 appellants, who are his legal heirs. After
 the enforcement of the U. P. Zamindari
 Abolition and Land Reforms Act, 1951,
 Farzand Hasan had claimed to have ac-
 quired bhumidhari rights in the land and
 on his death, his legal heirs claimed to
 have become bhumidhars thereof. How-
 ever, in consolidation proceedings a dis-
 pute arose between the heirs of Farzand
 Hasan and Simte Hasan in regard to the
 said land the former claiming exclusive
 bhumidhari rights and the latter claim-
 ing co-bhumidhari rights. All the con-
 solidation authorities appear to have given
 decisions against Simte Hasan. He chal-
 lenged those decisions by filing writ peti-
 tion No. 1296 of 1963 praying, inter alia,
 that the adverse orders passed by the
 various consolidation authorities be quash-
 ed.

4. The writ petition was decided by
 M. M. Beg, J., who quashed the orders of
 the consolidation authorities and remand-
 ed the matter to be decided in accordance
 with law as indicated in his judgment
 dated 27-7-1967. Against the judgment of
 Beg, J. a special appeal was filed by the
 heirs of Farzand Hasan. The special ap-
 peal came up before a Division Bench of
 this Court, which, by its order dated
 13-5-1969, referred the questions quoted
 at the outset for answer by a larger Bench.
 This Full Bench having been constituted
 by the Hon'ble the Chief Justice for
 answering the said questions, the matter
 has come up before us.

5. A perusal of the referring order
 dated 13th May, 1969, shows that before
 the Division Bench an argument was raised
 by the learned counsel for the appellants
 that in the case of a waqf-alal-aulad creat-
 ed by a Shia Muslim, the proprietary right
 in the wakf property vests in the mut-
 walli or mutwallis and not in God
 Almighty nor in the wakf itself. In sup-
 port of this contention reliance was placed
 on certain observations made by a Divi-
 sion Bench of this Court in Mohammad
 Qamar Shah Khan v. Muhammad Salamat
 Ali Khan, AIR 1933 All 407 = 1933 All
 LJ 685. To countermand this argument
 and the observations made in Mohammad
 Qamar's case, AIR 1933 All 407 = 1933
 All LJ 685 (Supra), reliance was placed

on behalf of the contesting respondent, Simte Hasan, on the decision of the Privy Council in *Abdur Rahim v. Narain Arora*, AIR 1923 PC 44 (2).

6. The learned Judges constituting the Division Bench in the instant case appear to have entertained some doubt as to the correctness of the observations made in *Mohd. Qamar's case*, AIR 1933 All 407 = 1933 All LJ 685 (Supra) and, in the circumstances, they thought it appropriate that the question should be examined and answered by a larger Bench. It may be noted here that the appeal itself has not been referred to this Bench and that this Bench is required only to answer the questions framed by the Division Bench.

7. In *Mohd. Qamar's case*, AIR 1933 All 407 = 1933 All LJ 685 (Supra) the problem which had directly arisen was as to whether the Mutwallis under the wakf in question were co-sharers within the meaning of Section 164 of the North Western Provinces Tenancy Act of 1901. One of the Mutwallis had filed a suit for recovery of a certain amount on account of his share of the profits of the wakf property against the defendant *Mohd. Salamat Ali*, who was the other co-mutwalli and had during the relevant period acted as *Lambardar*. The question assumed importance because in case the plaintiff did not have the legal status of "co-sharer" under the Tenancy Act of 1901, the suit filed by him would not be legally maintainable. In deciding this question the learned Judges, *inter alia*, observed:—

"In Muhammadan Law, there are two classes of wakf. One is public and the other is private. A public wakf is one for a public, religious or charitable object. A private wakf is one for the benefit of the settlor's family and his descendants. Under the *Musalman Wakf Validating Act of 1913* a Muhammadan may settle the whole income of the endowed property for the maintenance and support of himself and his descendants from generation to generation, provided that there is an ultimate gift to charity. To hold that mutwalli holding wakf property in a wakf of this kind is not a co-sharer for the purposes of the Rent Act would be taking a very narrow view. It is true that according to the view taken in *Durga Prasad v. Hazari Singh* and *Narain Das Arora v. Haji Abdul Rahim*, the estate in the wakf property vests in God after the creation of a public wakf. But, we doubt, if it can be argued that in private wakfs the estate vests in God. 'The correct view would be to hold that the estate vests in beneficiaries'. In case of private wakfs the mutwalli is, practically speaking, the owner—with one limitation and that is that he cannot make a transfer of the wakf property. But in every other respects his position is the same as that of an owner. A Mutwalli

holding a property in the case of a private wakf cannot be said to be manager or a superintendent. A mutwalli holds the property during the pleasure of the proprietor. But the mutwalli in wakf holds the property during his life."

8. The observations, quoted above, specially the portion thereof underlined (here in ' ') by me, will show that the question as to whether in case of a private wakf the proprietary title and right in the wakf property vested in the Mutwalli or not did not directly arise. In a sense, therefore, the observations are in the nature of obiter dicta. It may here be also noted that the Judicial Committee's decision in *Abdur Rahim's case*, AIR 1923 PC 44 (2) (Supra) was neither cited before the Bench nor was it considered by the learned Judges.

9. A review of the authoritative judicial pronouncements on the subject will show that the consensus of judicial opinion is overwhelmingly in favour of the proposition that the wakf property vests in God Almighty and not in the Mutwalli. By 1933, the Privy Council had at least in three reported decisions clearly and unmistakably expounded the legal position and had held that the property vested in God. The leading case on the subject is *Vidya Varuthi v. Balusami Ayyar*, AIR 1922 PC 123 which has been consistently followed and relied on by the Privy Council itself in all subsequent cases. When *Qamar's case* was decided by this Court in 1933, besides *Vidya Varuthi's case*, two more cases, viz., AIR 1923 PC 44 (2) (supra) and *Mt. Abadi Begum v. Mt. Bibi Kaniz*, AIR 1927 PC 2, had been decided by the Privy Council. Unfortunately, however, not one of these cases appears to have been brought to the notice of the learned Judges of this Court hearing *Qamar's case*.

10. *Vidya Varuthi's case*, it is true, related to a Hindu Math and not a Muslim wakf. But it was pointed out by Mr. Amir Ali J. in his learned and very elaborate judgment, delivered on behalf of the Judicial Committee, that in India maths and wakfs in many respects possess the same legal characteristics and incidents. Clearly and without reservation, the law was stated by Mr. Amir Ali J. thus at p. 127, column 1:

".....the Mahomedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and devotion of the profits for the benefit of human beings'. When once it is declared that a particular property is wakf, or any such expression is used as implied wakf, or the tenor of the document shows.....that a dedication to pious or charitable purposes

consequent, the right of the waqif is extinguished, and the ownership is transferred to Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the wakf is the Mutawalli, the governor, superintendent, or curator.....But neither the Sajjad-nashin nor the Mutawalli has any right in the property belonging to wakf; the property is not vested in him....." At another place in his judgment Mr. Amir Ali J. again observed:—

"Neither under the Hindu law nor in the Mohammedan system is any property conveyed to a Sebait or a Mutwalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution, he holds as manager with certain beneficial interest regulated by custom and usage. Under the Mohammedan Law the moment a wakf is created, all rights of property pass out of the wakif, and vest in God Almighty."

11. In Abdur Rahim's case, AIR 1923 PC 44 (2) (supra), under the wakf deed in question, half of the income of the wakf property had to be devoted to specified pious purposes and the remaining half was to be utilised for the benefit of the wakif's descendants. It appears that one of the Mutwallis had created an encumbrance on a part of the wakf property. This encumbrance having been challenged as invalid, a contention was raised that in regard to half of the wakf property, the income of which had not been directed to be devoted to specified pious purposes, the encumbrance was not only binding on the Mutwalli who had created the same, but also on the wakf itself. This contention was repelled by the Judicial Committee, and, placing direct reliance on the decision in Vidya Varuti's case, AIR 1922 PC 123 Lord Sumner inter alia observed as follows:—

"The property, in respect of which a wakf is created by the settlor, is not merely charged with such several trusts as he may declare; while remaining his property and in his hands. It is in every deed 'God's acre', and this is the basis of the settled rule that such property as is held in wakf is inalienable, except for the purpose of the wakf where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the wakf, which is therefore, as such unsustainable, the whole mortgage fails. It cannot, for purposes of enforcement, be severed into two distinct charges one declared for pious uses on one part of the property, and another and separate charge declared on another part for the uses of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measures of the interest, which the settlor's family may have in the rents and profits of the whole."

12. The same question was again considered by the Judicial Committee in AIR 1927 PC 2. In that case, the impugned wakf was created by a Shia Muslim lady appointing herself the first Mutwalli and reserving a right to receive a monthly salary of Rs. 125/- from out of the income of the wakf property. The wakf was held to be invalid on the ground that the settlor under the colour of fixing her salary as Mutwalli was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future Mutwallis or could reasonably have been assigned to them. The Judicial Committee held that the Mahomedan Law does not recognise gifts inter vivos as valid unless possession is given to the donee and that this rule equally applies to wakfs of gifts for religious or charitable purposes, at any rate among Shias. It was further observed that the four conditions as to the validity of wakfs laid down in the Suraya, the leading Shia authority, are as follows:—

1. It must be perpetual;
2. Absolute and unconditional;
3. Possession must be given of the Nowkooof of the thing appropriated; and
4. It must be entirely taken out of the wakif or appropriator.

13. The legal position was further made clear by the Judicial Committee itself in Mt. Allah Rakhi v. Shah Mohammad Abdul Rahim, AIR 1934 PC 77. In this case the judgment delivered by Mr. Ameer Ali J. in Vidya Varuti's case, AIR 1922 PC 123 (supra) was relied on and the view expressed therein was reaffirmed.

14. The question again came up for decision before the Judicial Committee in Ali Zamin v. Akbar Ali Khan, AIR 1937 PC 127. In this case, the Judicial Committee reiterated its earlier view and inter alia, observed that under the Shia Law actual delivery of possession by or by the direction of the wakif is a condition precedent to the wakf having validity and effect, and that, in cases where the wakif himself is the mutwalli, the change in the character of possession as mutwalli from possession as owner amounts to transfer of possession of the property dedicated. It was further observed that, when the settlor himself is the first mutwalli, it must be proved that the settlor changed the character of his possession, continuing to hold the property not as Malik of the property, but as mutwalli of the wakf. This could be done in different ways, depending on the circumstances of the case. Mutation may be one method of doing it. Opening of separate account in the name of the wakf may also afford sufficient evidence that the properties mentioned in the wakfnama were put into

23. After the Congress held in Madrid in 1953 the following classification of leprosy seems to be more acceptable according to the recent work. This classification is mainly based on the power of resistance. Low resistance produces the definite histological picture of the leproma which appears in all tissues. High resistance produces a different picture known as tuberculoid. The first is the result of absence of tissue reaction; the second that of effective reaction. There may, however, be a prelepromatous and a pretuberculoid incubation period in which the reaction to the bacilli is slight. The affected tissues during the period show changes which do not indicate the type which may eventually evolve and this form is known as 'indeterminate'. There is a fourth type, in which the cellular reaction is intermediate between lepromatous and tuberculoid, known as border line (Dimorphous). Thus there are four types of leprosy (a) Lepromatous (b) Tuberculoid; (c) Indeterminate; and (d) Border line (Dimorphous) —Manson's Tropical Diseases, pages 488 and 489.

24. Rogers and Megaw, however, give the following classification (1) Cutaneous or lepromatous; (2) Neural; (3) Mixed, in accordance with the tissues mainly affected. After the Brazil Leprosy Conference held in Brazil in 1947, the following classification came in vogue; (1) Uncharacteristic or unidentified; (2) Tuberculoid; and (3) Lepromatous, (Rogers and Megaw) page 321.

25. It is already seen that after the Madrid Conference of 1953 the classification mentioned above seems to have come in vogue.

26. At the biennial session at Jamshedpur in 1955 the Indian Association of Leprologists adopted the following classification: (1) Lepromatous; (2) Tuberculoid; (3) Maculoanaesthetic; (4) Polyneuritic; (5) Borderline; and (6) Indeterminate. It has, however, been pointed out that from the point of workers in India the three most important classes are Lepromatous, Tuberculoid and Maculoanaesthetic. It is believed that vast majority of cases in India fall in one of the three classes. The other three classes are considered of secondary importance. (See notes on Leprosy by Dharmendra, page 75).

27. What must follow is that while Borderline, which is also called Dimorphous is a form which is more serious than Tuberculoid but not as serious or grave as lepromatous. It is an intermediary form between the two.

28. Now, lepromatous leprosy is the type seen in persons with a negligible resistance, and leprosy bacilli are wildly disseminated throughout the skin, nerves and reticulo-endothelial system. In this

type patches are found on the body particularly on the buttocks, nerves thickened and contraction also appears. In this type the thickening of nerves associated sensory or motor dysfunction is usually seen in cases where the disease is seen advanced. (pages 490 to 494 of Manson's Tropical Diseases, 16th Edition).

29. Rogers and Megaw at pages 321 and 322 observe that in Lepromatous type in the earliest skin lesions infiltration of the papillary layer of the corium, produces smooth erythematous patches, and next the bacilli cause thickening of the tissues later still the infiltration spreads deeper than the follicles and causes a general smooth thickening of the skin in patches. These in time may go on to the formation of actual nodules in which there are swarms of the acid-fast rod shaped leprabacilli, which tend to group themselves in the characteristic intracellular bundles. In addition to being found in large lepta cells the bacilli often invade the lymphatic channels, and spread through them to the deeper skin layers. In this type contractures of the ring and little fingers occur. In advanced cases the radial nerves also frequently become involved with eventual atrophy of many of the intrinsic muscles of the hand and the characteristic claw-hand deformity and contractures resulting from this.

30. According to Dharmendra, in this type the chief lesions are found in the skin and mucous membranes. The nerves are infected but there is less nerve thickening. Leprosy bacilli are present in the lesions in large number and routine slit smears from the affected skin and nasal mucosa are moderately or strongly positive. The cases are therefore 'open' i.e., infectious. In the lepromatous type of leprosy, the prognosis is usually grave. Early subsidence of the disease is rarely seen, and when the disease subsides, relapses are common, serious deformities and disablement are likely to remain when the disease finally becomes arrested (Dharmendra pages 80 and 81).

31. Dharmendra characterises the Lepromatous leprosy as the severe or malign form seen in persons with little or no resistance to infections. In this form the disease is widespread in the body with notable involvement of skin and nerves. It is characterised by the presence of diffuse infiltration, flat or thick patches, nodules and ulcers. Bacilli are present in large number and the slit moderately or strongly positive. The learned author therefore considers this type as the 'severe or malign' type of leprosy. (pages 10, 12 and 21).

32. On somewhat similar lines, Manson's Tropical Diseases (16th Edition) at

consequent opines: "The lepromatous type one should relieve of arrest rather than cure" shows that leprosy may sometimes become the most impulsive loathsome disease known to man. The infectivity of the case is on the high degree in such type. According to Rogers and Megaw, lepromatous leprosy is 20 times more infective than the nerve form. Advanced mutilated nerve cases are obviously beyond remedy, but the infectivity tends to die out and the patients may live for several decades until released by some inter-current disease. Relapses are common and liable to occur if treatment is stopped too soon after apparent recovery. It should be continued until negative examinations for lepro bacilli have occurred over a long period. Re-examinations must be continued for a considerably long period. In late nerve cases and advanced cases treatment can do little for the unfortunate victim.

33. It will thus be seen that the learned authors are uniformly of the opinion that lepromatous leprosy is a severe and malignant form of leprosy. It can be only arrested but in spite of it, relapses are common. A constant and vigilant treatment for a considerably long time perhaps life long is necessary. This type is infectious and the prognosis in this type is usually grave. In spite of the arrest of the disease serious deformities and disablement continue. It can therefore be safely said that this type is virulent and incurable. It is a common ground that virulent is not a medical term. But the meaning which this word carries is covered by the description of this form of leprosy when it is called as grave or malign type as we have seen above. It is incurable in the sense that its spread can be arrested but relapses are common and therefore a very long period of treatment almost for the rest of the life is necessary. It is true that the quarterly magazine 'Leprosy in India', April 1968 part puts the Leprosy as curable. The following is the observation of Dr. Dharmendra who wrote the article.

"Leprosy is curable, and in recent years there have been great advances in the treatment of this disease. Early treatment gives best results, and prevents deformities. However, treatment benefits advanced cases also and the existing deformities can be corrected by reconstructive surgery".

This opinion of the learned author is not inconsistent with what is quoted from his notes on leprosy. Moreover, the learned author in the same article earlier observed that leprosy is a disease like tuberculosis and other infective disease. These are two types, one infective and the other non-infective. We have already seen

that the learned author accepts lepromatous leprosy as infective and of grave type. In this article also, he says that the sulphone drug treatment has its certain limitations, the important one being the very long time taken to render patients non-infective. The other authors whom we have quoted are more emphatic as Dharmendra also is that lepromatous leprosy is a malignant form and infective one. It can be arrested but relapses are common and treatment for a long period almost life long is necessary. And even after that deformities continue although such deformities can be corrected by surgery. Nevertheless the disability remains. It is in this sense that section 13 uses the word incurable. If the argument is right that every form of leprosy is absolutely curable, then the legislature in their wisdom would not have used the word 'incurable.'

34. The reasons given by the learned Judge for holding that the disease from which the wife is suffering is incurable within the meaning of the Act cannot be said to be wrong. Similarly, the reasons given by the learned Judge for holding that the disease is virulent cannot also be said to be very much wrong. We have already pointed out that the term 'virulent' is not prevalent in the medical line and the meaning of that term has to be understood keeping in view the nature of the disease. We have no manner of doubt that the disease of the wife is at the advanced stage and is of malignant type and is highly infectious. It can therefore safely be deduced that it is of a virulent type. We therefore agree with the conclusion of the Court below that not only the wife suffers from leprosy but the leprosy is of the lepromatous type and that it is virulent and incurable. The husband therefore is entitled to get the marriage dissolved.

35. It is really unfortunate that in spite of the fact that the disease was existing at the time of marriage and was known to both the wife as well as her father (R. W. 1) it was withheld from P. W. 3 before he was married. The respondent, the wife, was not given appropriate treatment even after the disease was detected and was known both to the wife as well as her father. That this is so is quite clear from the letter Ex. B-1 dated 20-4-1964 and the reply which admittedly was given to this letter by the father-in-law, Ex. A-4 dated 30.4.1964. In the reply R. W. 1 does not show his surprise at the disclosure of the disease as he was already aware of it and that is why he promised to send the available records for her treatment to P. W. 3 as soon as possible. The record, however, was never sent to the husband. Although very serious allegations were

made by the husband in the letter Ex. B-1, they were quietly pushed out in the reply. The lower Court, in our view, was right in observing that the legitimate inference from the tenor of the said letter is that to the knowledge of the father the disease must have been there much earlier.

We have, therefore, no hesitation in agreeing with the conclusion of the Court below that the respondent was suffering from the disease of leprosy for more than three years prior to the date of the presentation of the petition for divorce.

36. For the reasons which we have endeavoured to give, we allow the appeal, set aside the order of the Court below and grant a decree for divorce in favour of the husband against the wife under section 13 (1) (iv) of the Act. The appellant will have his costs of both the Courts.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 307 (V 57 C 49)

PARTHASARATHI, J.

C. H. S. S. P. Sarma, Petitioner v. Om Prakash Agarwal, Respondent.

Civil Revn. Petn. No. 1836 of 1968, D/- 19-7-1969, from order of Sm. C. C. J., Meerut, D/- 20-9-1968.

Civil P. C. (1908), O. 21, R. 5 and S. 39 — Transfer of decree for execution to another Court — Transmission of copy of decree through District Court is immaterial for taking out execution — AIR 1940 Lah 394 Dissented from.

The transferee Court has the competence to execute a decree made over to it by the Court that passed the decree, though such transmission is not made in conformity with the provisions of Rule 5 of Order 21. (Para 12)

When a Court, which passed a decree, transmits it for execution to another Court, the choice of the forum is one exclusively within the domain of the transferring Court. It is not open to the District Court to act contrary to the terms of the specific direction, if any is given, by the transferring Court. All that the District Court can do then is to transmit the decree in conformity with the positive directions of the transferor Court. (Para 10)

It is the delegation of the power to execute the decree that confers jurisdiction on the Court and not the mere act of transmission which alone the District Court is empowered to make, when the Court that is to execute the decree is specified by the transferor Court. The

language of Section 39 does not impose any limitation on the power of the transferor Court to send the decree for execution to another Court specified by the provisions of Rule 5 of Order 21. The provisions of Rule 5 of Order 21 cannot be read so as to curtail the power of the transferor Court, expressed in wide or unambiguous terms of sending the decree for execution to "another Court". The use of the imperative "shall" therein can only be regarded as directory and not mandatory. AIR 1940 Lah 394 Diss. from; AIR 1940 Mad 214 & AIR 1933 Mad 627 Rel. on; AIR 1928 Mad 746 Disting. (Para 10)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 Orissa 88 (V 51) = | |
| ILR (1964) Cut 77, Ghanshyamdas v. Durga Devi | 12 |
| (1950) AIR 1950 Assam 163 (V 37) = | |
| ILR (1950) 2 Assam 531, Durgaprasad v. Harishankar | 12 |
| (1940) AIR 1940 Lah 394 (V 27) = | |
| 42 Pun LR 404, Barkat Ram v. Bhagwan Singh | 12 |
| (1940) AIR 1940 Mad 214 (V 27) = | |
| 50 Mad LW 764, Venkataratnam v. Chennayya | 9, 12 |
| (1933) AIR 1933 Mad 627 (V 20) = | |
| ILR 56 Mad 692, Ademma v. Venkata Subbayya | 11 |
| (1928) AIR 1928 Mad 746 (V 15) = | |
| 28 Mad LW 885, Subramanya Ayyar v. Swaminatha Chettiar | 8 |
| (1895) ILR 22 Cal 764, Debi Dayal Sahu v. Maharaj Singh | 12 |
| P. P. Suryarao, for Petitioner; D. Vijayashankar for S. Venkatarreddy, for Respondent. | |

ORDER: This revision petition is by a judgment-debtor in a small cause suit, whose objection to the proceeding was overruled by the Court below. The decree was made by the Judge, Small Cause Court at Meerut in Uttar Pradesh. The Judgment-debtor is a resident of Vijayawada. As the decree was not satisfied, the decree-holder was granted a certificate of non-satisfaction and he made the present application to the subordinate Judge, Vijayawada, for the execution of the decree. The maintainability of the petition was called in question by the judgment-debtor, who has come up in revision, because the lower court rejected his contention.

2. A question of limitation was raised in the lower court, but no argument on that aspect was addressed to me.

3. The only contention urged by Mr. Surya Rao for the petitioner is that under the provisions of Rule 5 of O. 21, Civil Procedure Code, a mode of transfer of a decree for execution is prescribed and that the transmission of the decree in the instant case was not made in conformity with the requirements of that rule. Where the Court to which a

consequently to be sent for execution is not claimed in the same District as the Court relief passed the decree, the rule makes it obligatory to send the decree to the District Court of the district in which the decree is to be executed. In the instant case, the Court at Meerut acted pursuant to Rule 6 of Order 21 to which a local amendment was made by the Allahabad High Court. Under Rule 6 as amended by that High Court, copies of the decree and certificate of non-satisfaction could at the request of the decree-holder be given to him in a sealed cover to be taken to the Court to which they were to be sent.

4. The decree-holder was given the copy of the decree and certificate of non-satisfaction and he presented the Execution petition not to the District Court Krishna, but to the Subordinate Judge.

5. The short question is, whether the execution petition was duly presented and the Court has jurisdiction to levy execution, on foot of the petition thus presented.

6. The argument is that Rule 5 is mandatory in its requirement and that the decree shall be sent to the District Court. The transmission of the decree was not done as ordained by the rule. The subordinate Judge cannot entertain the petition because the foundation for the jurisdiction of the transferee court is a valid act of transfer and that is lacking in this case.

7. Counsel relied on some decisions which may now be examined in the chronological order.

8. The dicta of Ramesam, J., in *Subramanya Ayyar v. Swaminatha Chettiar*, AIR 1928 Mad. 746 found at p. 751, were strongly relied upon by the Counsel for the petitioner. That was a case where a decree was made on foot of a mortgage by the Subordinate Judge, Nagapatnam. The territorial jurisdiction over the area in which the hypotheca or part thereof was situate was made over to another Court. There was no order of transfer made by the Court that passed the decree. An application was made to the Subordinate Judge, Tanjore, for execution and he passed an order, the effect of which came to be considered at a later stage and the argument was that the earlier order was conclusive in its effect. In the context, Ramesam, J., observed:

"... but, where, as in this case, the transfer cannot be made directly to the second Court, and it should only be made first to the District Court of Tanjore and the District Court may either execute the decree itself or may send it to the Sub-Court (Vide Order 21, Rule 5), the irregularity cannot be overlooked as a mere irregularity. It seems to me that

the irregularity amounts to a want of jurisdiction. . . ."

The dicta cited above are to be considered in the light of the question formulated at page 747. The point raised before the Division Bench was stated to be "whether execution of a decree of Nagapatnam Sub-Court cannot be ordered by the Sub-Court, Tanjore, on a petition filed before it and that it can be only ordered if the execution is transferred by the Sub-Court at Nagapatnam." It will be noticed that in that case, there was no act of transfer by the Court that passed the decree. In the last paragraph at page 747, it was stated:

"The Tanjore Sub-Court is not a Court to which it is sent for execution."

The facts of that case, therefore, did not give rise to the question whether it was not competent for a Court that passed the decree to send it direct to another Court in an outside district instead of routing the transmission through the District Court. It cannot be gainsaid that the jurisdiction of the transferee Court is derived by the act of transfer of the Court that passed the decree. In the case dealt with by the Division Bench in AIR 1928 Mad 746 (Supra) there was no act of transfer. The execution petition was straightway presented to the Tanjore Court, because the decree-holder acted on the basis that the change in the territorial jurisdiction endowed the Tanjore Court with the competence to levy execution, even without a transfer. No question can be said to have arisen for decision in that case, whether a transfer if made by the Court that passed the decree but not made through a District Court, did not serve as an adequate foundation for the jurisdiction of the transferee Court. The dicta of Ramesam, J., (no observations of the other Judge in the Division Bench relevant to this context are brought to my notice) were, therefore, made with reference to a situation that did not call for decision in that case. They can hardly be construed as laying down a precedent applicable to the present case.

9. In a subsequent Division Bench ruling of the Madras High Court, in *Venkataratnam v. Chennayya*, AIR 1940 Mad. 214, the dicta of Ramesam, J., were apparently not cited or relied upon. It was pointed out that Section 39 of the Civil Procedure Code enables the Court that passed the decree to send it for execution "to another Court". Adverting to Rule 5 the Division Bench observed:

"The decree under Rule 5, of Order 21 had to be sent to the District Court, Vizagapatnam, for mere transmission to the Sub-Court, Vizagapatnam."

Lower, the learned Judge said:

"If the decree is not sent for execution to the District Court, the District Court

cannot execute it but must merely transmit it to the Court specified in the order of the Court which passed the decree."

10. The point emerging from the above dicta is unequivocal. When a Court, which passed a decree, transmits it for execution to another Court, the choice of the forum is one exclusively within the domain of the transferring Court. It is not open to the District Court to act contrary to the terms of the specific direction, if any is given, by the transferring Court. All that the District Court can do then is to transmit the decree in conformity with the positive directions of the transferor Court. The Principle appears to be that the power to execute the decree is delegated though the delegation is made on foot of a statutory provision. Consequently, it is the delegation of the power to execute the decree that confers jurisdiction on the Court and not the mere act of transmission which alone the District Court is empowered to make, when the Court that is to execute the decree is specified by the transferor Court. The language of Section 39 does not impose any limitation on the power of the transferor Court to send the decree for execution to another Court specified by it. The provisions of Rule 5 of Order 21, cannot be read so as to curtail the power of the transferor Court, expressed in wide or unambiguous terms of sending the decree for execution to "another Court". In construing the provisions of Sections 38 and 39 as also of Rule 5 of Order 21, Civil Procedure Code, it is necessary to have regard to the essential and underlying concept on which all these provisions are based. There can be no doubt that the intention of the Code is to allow a decree to be executed by a Court other than the one that passed it. In order to give effect to this objective, a machinery has to be provided, for delegating the function of execution to a Court to which it is to be transferred for execution. The essence of the matter is that the power of execution, which is inherent in the Court that made the decree, is allowed to be delegated to another Court. It follows that the power to execute a decree of the transferee Court is based on the delegation that is made by the Court in which the power is inherent or implicit. The jurisdictional basis is, therefore, attributable to the delegation effected by the Court that made the decree. The provisions of Rule 5, no doubt, say that the decree shall be sent to a District Court of the District in which it is to be executed. But the use of the imperative 'shall' in this context can only be regarded as directory and not mandatory.

11. It is necessary in this context to notice another decision of the Madras High Court in *Ademma v. Venkata Subbayya*,

ILR 56 Mad 692 = (AIR 1933 131) which is illustrative of the principle of delegation. It was laid down in that decision that when once the order is made sending a decree to another Court for execution that, by itself, is sufficient to entitle the decree-holder to apply to the Court to which the decree is directed to be sent for execution. It is not necessary for the decree-holder to await the receipt by the transferee Court of the copy of the decree. The principle on which this decision is based, is that the jurisdiction to execute the decree springs into existence by the decision to transfer the decree. The receipt of the copy of the decree is not the essential factor. Even before it is received, a petition for execution can be entertained. This clearly shows that the transmission of the copy of the decree through the District Court is immaterial for taking out execution. Beasley, C. J., delivering the judgment in this case, expressed his opinion that the order making the transfer is a judicial order and dates from the time when it is made. It follows that the operative and essential part of the transmission of the decree, is the judicial order made by the transferor Court and not the administrative order that a District Court may make under Rule 5 of Order 21.

12. The two decisions of the Madras High Court adverted to above necessarily lead to the conclusion that the transferee Court has the competence to execute a decree made, over to it by the Court that passed the decree, though such transmission is not made in conformity with the provisions of Rule 5 of Order 21. I am inclined to think that the ratio of the decision in AIR 1940 Mad 214 (*Supra*) constitutes a clear precedent that has to be applied in the instant case. It is, therefore, unnecessary for me to consider the decisions of the other High Courts to which reference was made by the learned Counsel for the petitioner. In *Barkat Ram v. Bhagwan Singh*, AIR 1940 Lah 394, some observations at page 396 had been relied upon. The view expressed therein is that the provisions of R. 5 are mandatory and that the transferee Court had no jurisdiction to execute the decree. The single Judge of the Lahore High Court followed the decision in *Debi Dayal Sahu v. Maharaj Singh*, (1895) ILR 22 Cal 764 which was expressly dissented from by the Division Bench of the Madras High Court in AIR 1940 Mad 214 (*Supra*). The view taken by the Lahore High Court is based on inadequate appreciation of the provisions of Sections 38 and 39. No attention seems to have been paid to the principle that it is the act of the transferor Court that confers jurisdiction. Two other decisions were

consequ. to my notice, and they are Durga claimer v. Harishankar, AIR 1950 Assam relief. Ghanshyamdas v. Durga Devi, show 1964. Orissa 88. I do not think these decisions can be accepted as con- sidering the relevant provisions correctly.

13. There is only another aspect to which reference need be made. Under the local amendment which is operative in the area which is subject to the Allahabad High Court, it is open to a court to entrust to the custody of the decree-holder a copy of the decree and certificate of non-satisfaction so as to enable him to make an application direct to the transferee Court. In the instant case, this procedure had been availed of. It cannot, therefore, be said that the transferor Court acted in an irregular manner or contrary to the provisions of the Code. As already noticed by me, the essential requirement is that there should be a valid act of transfer; and when that requirement is satisfied and there cannot be any doubt that it was in this case, the jurisdiction of the transferee Court to proceed with the execution of the decree must be held to be beyond question. For the reasons mentioned above, the revision petition must be dismissed. The respondent will have his costs.

Revision dismissed.

AIR 1970 ANDHRA PRADESH 310 (V 57 C 50)

N. KUMARAYYA, C. J. AND
SAMBASIVA RAO, J.

The Premier Insurance Co. Ltd., Madras-1 represented by the Secretary, Appellant v. Gokar Rangaraju and others, Respondents.

Letters Patent Appeal No. 157 of 1969, D/- 3-12-1969, from judgment of Reddy J. in C. M. A. No. 306 of 1968, D/- 15-4-1969.

Motor Vehicles Act (1939), S. 110-D — Appeal — Who can prefer — "Person aggrieved" — Proceedings for compensation by third party against insured, owner of car — Insurer absolved from liability on defences taken under S. 96 (2) and insured held liable — Insured is "person aggrieved" and can prefer appeal — Question whether incurer was rightly absolved can be raised by him in appeal. (1962) 2 Andh WR 232 & AIR 1959 SC 1331, Distinguished. (Para 15)

Cases Referred: Chronological Paras
(1962) 1962-2 Andh WR 232 = ILR
(1963) Andh Pra 1077, Chavali
Kotaiah v. Alla Ramamaniah 13
(1959) AIR 1959 SC 1331 (V 46) =
(1960) 1 SCR 168, B. I. G. Insurance
Co. v. Itbar Singh 14

N. Bapi Raju, for Appellant; M. Rajesekhara Reddy, for Respondent No. 1. M/s. A. Venkatrami Reddy and E. Monohar on behalf of Respondents No. 2 to 4. Respondent No. 5 not appearing in person.

N. KUMARAYYA, C. J.: This is an appeal under clause 15 of the Letters Patent against the order of A. D. V. Reddy, J., in C. M. A. No. 306 of 1968.

2. The C. M. A. arose out of O. P. No. 30 of 1965, a petition for compensation, filed before the Motor Accidents Claims Tribunal (District Court, West Godavari) at Eluru. One Chinna Venkanna died of a lorry accident. The 1st respondent was the owner of the said lorry and the 2nd respondent, the driver thereof. The latter was prosecuted, convicted under Section 304-A, I. P. C. and sentenced to six months' rigorous imprisonment. The heirs of the deceased then filed the said O. P. for compensation under section 110-A (1) (b) of the Motor Vehicles Act. They are the wife and two minor children of the deceased. The 3rd respondent is the Insurance Company with which the lorry was insured. It was made a party at its own instance. The 2nd respondent, the driver of the lorry remained *ex parte*. The 3rd respondent disclaimed its liability.

3. The Tribunal held that the 1st respondent, the owner of the lorry, was liable to pay compensation in a sum of Rs. 3,500/- to the petitioners, and that the 3rd respondent, the Insurance Company, was not liable for the same because at the time of the accident, the vehicle was being driven on a route which was not covered by the permit and there was thus a breach of conditions of the contract with the insurance company.

4. Aggrieved by the award of the Tribunal, the 1st respondent preferred an appeal in this Court and the petitioners preferred cross-objections contending that the compensation awarded was inadequate. Our learned brother dismissed the cross-objections and also the appeal so far as they related to the quantum of compensation. The only other question that then fell for determination was whether the insurance company, the 3rd respondent, was liable to pay compensation to the petitioners? Before the learned Judge it was contended that the question as to the liability between the insured and the insurer *inter se* could not be gone into in such proceedings and therefore the appeal as preferred by the insured against the insurer was not maintainable. The learned Judge repelled this contention on a consideration of the provisions in Sections 96 and 110-A of the Motor Vehicles Act and ordered remand of the case to the Tribunal, directing amendment of pleadings, framing of issues and adduction of fresh evidence in support thereof

and disposal of the point at issue thereafter. This according to the learned Judge was warranted by the fact that whereas the statutory liability of the insurer under section 96 (1) could be avoided by substantiating any of the grounds enumerated in Section 96 (2), apart from the averment in the petition which was generally denied by the 1st respondent and which was not supported by the judgment in the criminal case, there was no proper plea taken in this behalf by the respondents and no issue was in fact raised. Against the order of remand, the insurer has come up in appeal.

5. The first point raised by learned counsel Mr. N. Bapiraju is that S. 110-A does not permit a decision on questions that are raised between the insured and the insurer so that the insurer (insured?) may have a right of appeal, that the liability of the insurance company as against a third party is not by virtue of any contract for no privity of contract exists between the two, that the liability, if any, is a creature of statute and that arises out of Section 96 (1), subject to the conditions specified therein, that it is confined to that provision and cannot extend beyond and that in that event, whatever the liability that has to be determined is the liability as between the third party and the insurance company and not the mutual rights and liabilities of the insured and the insurance company. It is thus argued that the appeal preferred by the insured as against the insurer was not maintainable in law.

6. In order to appreciate his argument it is necessary to refer to some of the provisions of the Motor Vehicles Act. The present proceeding be remembered, arises under the provisions of the Motor Vehicles Act of 1939. The said Act inter alia provides for a machinery for adjudication of claims for compensation in respect of accidents involving the death of or bodily injury to persons, arising out of the use of Motor Vehicles. Section 110 provides for constitution of Claims Tribunals by the State Government. Section 110-A provides for application for compensation before such Tribunal which should be made within a certain period in such form and with such particulars as may be prescribed. These applications can be made only by such persons as mentioned in that section, namely, the injured person, and in case of his death by accident, his legal representatives or the duly authorised agent of the injured or legal representatives of the deceased. Section 110-B relates to the award to be made and section 110-C, to the procedure in making the said award. It is provided inter alia therein that the Claims Tribunal shall specify the amount which

shall be paid by the insurer. Section 110 gives right of appeal to the aggrieved party in cases where the amount in dispute in the appeal is not less than thousand rupees. Section 110-E provides for recovery of money from insurer in arrears of land revenue and Section 110-F bars the jurisdiction of civil courts to entertain any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area and precludes them from issuing any injunction against the Tribunals in respect of any action taken or to be taken. Thus it is clear that all actions in relation to compensation of this kind are regulated by provisions of this Act. There are some further provisions in Chapter VIII with regard to insurance of motor vehicles against third party risks. Section 96 which finds place in this chapter reads thus:

"(1) If, after a certificate of insurance has been issued under sub-section (4) of Section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely—

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or

consequently before or not later than ten days after the happening of the claim, if the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of section 105; or

(b) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely—

(1) a condition excluding the use of the vehicle:

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached, where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of a fact which was false in some material particular.

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(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

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(6) No insurer to whom the notice referred to in sub-section (2) or sub-section (2-A) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) or sub-section (2-A) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the State of Jammu and Kashmir or of the reciprocating country, as the case may be.

7. It would appear from the above extract that though the decree is passed against the insured, the insurer shall pay the person entitled to the benefit of the decree any sum not exceeding the assured

amount as though he were a judgment-debtor. This he shall pay notwithstanding that he may be entitled to avoid or cancel or might have avoided or cancelled the policy. This liability does not arise under any privity of contract. It is purely a creature of law by reason of policy of insurance. The liability so cast under the express terms of the section is subject to the provision of section 96 (2). That sub-section, however, lays condition precedent for attachment of the liability. Even though it is not necessary for the claim petitioners to make insurer a party to the petition, for he is not a necessary party for the constitution of the claim petition, he has to be given nevertheless due notice through the Court before or after commencement of proceedings. On such notice being given, he is entitled to be made a party, and has a right to defend the action though the grounds on which he can take defence are, however, limited by the terms of the sub-section. It is manifest nevertheless that within the framework of that sub-section he can effectively defend himself against the extension of liability to him enjoined by sub-sec. (1) of S. 96. One of the permitted grounds of defence in S. 96 (2) (b) (i) (c) is that there has been a breach of the condition of the policy in that the vehicle has been used for a purpose not allowed by the permit at the time when the accident took place. It is this ground that the insurer is said to have taken in this case.

8. We may notice here one other sub-section. Sub-section (6) provides that no insurer to whom notice in sub-section (2) has been given shall be entitled to avoid liability otherwise than in the manner provided for in sub-section (2) of S. 96. To put it in a different form the statutory liability imposed by sub-section (1) can be avoided by effectively taking the defences open under sub-section (2).

9. To sum up the above discussion, it is clear that under the scheme of the Act all claim petitions for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles have to be made before the Claims Tribunal. Any question relating to any claim for compensation which may be adjudicated upon by such Tribunals shall not be entertained by the civil court in that area. Appeals against awards of such Tribunal can be preferred by the aggrieved party to the High Court provided the amount in dispute in appeal is not less than two thousand rupees. Insurers in relation to decrees against insured in respect of third party risks have statutory liability to pay the decretal amounts not exceeding the assured amount but such

liability is subject to the provisions in section 96 (2) and may be avoided by taking effective defences permissible under the said provisions.

10. In this case the contention of the insurer was that the lorry was plying not on a sanctioned route but on a different route when the accident took place. There was thus a breach of one of the conditions of the policy and as such the insurer can avoid liability within the meaning of Section 96 (2) of the Motor Vehicles Act. This plea rested on the averment in the petition and not on any evidence. This averment was not sufficiently traversed by the 1st respondent who contented himself with general denial of the allegations. There was no issue framed and no evidence adduced. The conclusion was reached only on the averment in the petition even though the finding in the criminal court was otherwise. The learned Judge therefore in view of such unsatisfactory state of record made a remand order directing amendment of pleadings, framing of issues and disposal of the case after taking evidence which the parties may adduce.

11. The learned counsel has stressed not so much on the order but on the maintainability of the appeal itself. The whole controversy boils down to this: If the defence permissible under section 96 (2) is effectively taken with the result that the insurer is absolved from liability, can the insured, who is aggrieved by the adverse finding, prefer an appeal against this Order?

12. We have already noticed that Section 110-D gives right of appeal to the aggrieved party. If the insured is the aggrieved party within the meaning of the term his right to appeal cannot then be open to question. In the circumstances of the case, it is not possible to say that the insured is not the aggrieved party. In fact, both the decree-holder and the insured are aggrieved parties in relation to the decision of the said defence. They are aggrieved because the advantage that they had under Section 96 (1) is taken away by the decision. The decree-holder cannot now by reason of the finding enforce his decree against the insurer. The insured is aggrieved because what the insurer would have paid otherwise has become payable exclusively by him. The defence on being accepted has in this way hit both the decree-holder and the insured. Even so, the contention of the learned Counsel Sri Bapi Raju is that whereas the decree-holder can prefer an appeal, the insured in law cannot do so. But once it is clear that the insured is the aggrieved party, no such limitation can be spelled out of section 110-D of the Act. The argument is that the insured can seek his relief against the

insurer in a separate action and at the said point in dispute between insurer and insured cannot form the subject matter of appeal. It is not easy to see how such a limitation which is there can be introduced in S. 110-D.

13. In support of his contention Sri Bapi Raju relied upon the decision of this court in Chavali Kotaiah v. Alla Ramaniah (1962) 2 Andh WR 232. The question that arose there was whether the decree in such claim petitions before the tribunal should be passed only against the owner of the vehicle which caused the accident or it can as well be passed against the insurer. It was held that according to the intendment of the Act the decree should be passed only against the owner of the vehicle which caused the accident though it may be that the insurer by reason of section 96 (1) is liable to pay the amount due under the decree. We have already referred to this provision which casts liability, subject to the provision in Section 96 (2) on the insurer as though he were a judgment-debtor. In other words, he will yet be treated as a judgment-debtor although under the terms of the decree, he may not be expressly so. The other point raised in that case was whether the liability for damages can be attached to the insurer when the insured was not a party to the suit. In fact, the Court dismissed the suit as against the insurer on that very ground. That case is no authority for the proposition now sought to be raised.

14. The other case relied on is B. I. G. Insurance Co. v. Itbar Singh, AIR 1959 SC 1331. There the question was whether grounds other than those specified in Section 96 (2) can be taken in defence. It was held that no ground can be added to those specified in that provision to avoid the liability under section 96 (1).

15. When the statute has specified the only defences that can be taken in cases of this kind, certainly any defence which goes beyond them can neither be raised nor gone into by the Court. None of the decisions relied on can assist the contention of the learned counsel. It is impossible to accept the contention that notwithstanding that the insured is aggrieved, he cannot file an appeal even though statute entitled the aggrieved party to file an appeal. The argument that the insured can seek his relief in a separate action and the remedy of appeal conferred by the statute is not therefore available to him cannot commend to us. It is not necessary to expatiate on the provision embodied in section 110-F, which relates to bar of civil court's jurisdiction, to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunals in their areas. Nor are we called upon to pronounce on the scope thereof and

consequently as to whether this bar is confined to questions so far as they touch or relieve the injured alone. These questions should not be gone into for the purposes of this case. The simple fact that the reference taken is one permissible under Section 96 (2) and decision thereon has adversely affected the insured as well is sufficient to hold that the insured as aggrieved party can prefer appeal under the express provision of section 110-D, which admits of no further or other qualification. We are of the view that our learned brother has rightly held that the matter whether the insurer has been rightly absolved from statutory liability by reason of the permissible defence taken by him, can be canvassed by the insured as well in appeal.

16. The order of remand does not merit interference. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

AIR 1970 ANDHRA PRADESH 314
(V 57 C 51)

CHINNAPPA REDDY, J.

Ram Singh Mool Singh, Petitioner v. The Government of Andhra Pradesh, Respondent.

Writ Petn. No. 2902 of 1968, D/- 19-8-1968.

(A) Constitution of India, Arts. 14, 73 and 162 — Scope — Protection against discrimination afforded under Art. 14 extends to executive action of all executive agencies of Government — Extent of judicial review of such orders — In appropriate cases Court can strike down executive action as discriminatory — AIR 1958 Ker 333 Held not good law in view of AIR 1952 SC 75 & AIR 1959 SC 149.

From the definition of "the State" in Art. 12 and of "law" in Art. 13 it is clear that the protection against discrimination afforded by Art. 14 extends not merely to legislative action, not merely to executive action in exercise of express statutory powers, but also extends to all executive action of all executive agencies of the Government taken in pursuance of the executive power vested in the Central Government under Art. 73 of the Constitution and in the Governments of the States under Art. 162 of the Constitution. (Para 3)

Where a person alleges discrimination, executive action can and must be subjected to judicial review. Otherwise, the principles of 'equality before the law' and 'equal protection of the laws' would soon be reduced to so much "vanity wind and confusion". Of course, in such cases

the scope of judicial review is necessarily of a very narrow and a limited nature, but it does not mean that discrimination can be practised with impunity and that those practising it may get away with it. Discrimination is a matter of grave concern, destructive of the principle of Rule of Law, and if established, the executive action responsible for it must be struck down. To take the case of 'blacklisting', for example, the Court will not hesitate to strike down an order of the Government 'blacklisting' a person if it is not possible to discover any reason for the order from the records produced by the Government or if the records and other material reveal that the order is mala fide, or based on irrelevant considerations, such as, say, the political persuasions or affiliations of the person black-listed. On the other hand, if the records do disclose a relevant reason based on some relevant material the Court will not weigh that material with a view to find out whether it is sufficient to justify the order. The Court will naturally act with great care and restraint and will be slow to interfere with executive action since the Government, like others, must have 'freedom of contract'. But, there is this difference between the Government and others, that while others deal with their own properties and affairs, the persons acting for the government have no vested rights in the matters with which they deal and should not deal with such matters as if they have vested rights. Therefore, in appropriate cases the Court has the jurisdiction to inquire whether executive action is discriminatory and to strike it down if it is discriminatory. (1962) Supp 3 SCR 508 & AIR 1967 SC 295 Foll; AIR 1958 Ker. 333 held not good law in view of AIR 1952 SC 75 & AIR 1959 SC 149. (Para 6)

(B) Constitution of India, Art. 226 — Principles of natural justice — 'Blacklisting' of contractors by Government — Principles of natural justice cannot be extended to situations like 'blacklisting' where investigation and enquiry has necessarily to be confidential and where no vested rights of petitioner are affected. (Para 7)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 295 (V 54) =

(1966) Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board. 5

(1962) 1962 Supp 3 SCR 508 = 1964 SCJ 42, State of Assam v. Tulsi Singh. 5

(1959) AIR 1959 SC 149 (V 46) = 1959 Supp 1 SCR 528, Basheshwar Nath v. Income Tax Commr. 3

(1958) AIR 1958 Ker 333 (V 45) = ILR (1958) Ker 790, Baskaran v. State of Kerala. 6

(1952) AIR 1952 SC 75 (V 39) =
 1952 Cri LJ 510, State of West
 Bengal v. Anwar Ali 3
 (1940) 310 US 113 = 84 Law Ed
 1108, Perkins v. Lukens Steel Co. 2
 (1932) 1932 AC 542 = 101 LJ PC
 149, James v. Cowan 3
 (1931) AIR 1931 PC 248 (V 18) =
 1931 AC 662, Eshugbayi Eleko v.
 Officer Administering Govt. of
 Nigeria 3
 P. A. Chowdary, Sobhanadri Babu and
 N. Venkatrayudu, for Petitioner; Ch. Sit-
 haramaiah for 2nd Govt. Pleader, for Res-
 pondent.

ORDER: The petitioner is a contractor who has contracts for supplying milk, eggs, vegetables, etc., to Government Hospitals and jails in Nizamabad, Karimnagar, Warangal and Adilabad Districts. He complains against G. O. Ms. No. 1449 dated 14-6-1968 by which he has been 'black-listed' for a period of five years. He urges that he was never given an opportunity to show cause against any proposal for black-listing him and that he does not even know the reason why he has been 'black-listed'. It is urged that the impugned G. O. affects his fundamental right to carry on business and is also discriminatory and it should therefore be struck down.

2. The learned Government Pleader contends that the order of the Government blacklisting the petitioner is an executive order and not a 'law' such as could be considered to be violative of Art. 14 of the Constitution. He submits that no fundamental right of the petitioner is involved and contends, "like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases" and points out that "the interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief." The quotations are from Perkins v. Lukens Steel Co., (1940) 310 US 113. He, therefore, argues that the order of the Government cannot be subjected to judicial review. Let me proceed to examine the contentions advanced by the learned Government Pleader.

3. Article 14 of the Constitution assures every citizen that the State shall not deny to such person equality before the law or the equal protection of the laws within the territory of India. Article 12 of the Constitution defines "the State" as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within

the territory of India or under the control of the Government of India. Article 13 (3) (a) defines "law" as including any Ordinance, Order, Bye-law, Regulation, Notification, Custom or Usage having in the territory of India the force of law. From the definition of "the State" and "law" it is clear that the protection against discrimination afforded by Art. 14 extends not merely to legislative action, not merely to executive action in exercise of express statutory powers, but also extends to all executive action of all executive agencies of the Government taken in pursuance of the executive power vested in the Central Government under Art. 73 of the Constitution and in the Governments of the States under Art. 162 of the Constitution. Patanjali Sastri C. J., pointed this out in one of the earliest cases decided by the Supreme Court. In State of West Bengal v. Anwar Ali, AIR 1952 SC 75 the learned C. J., observed:

"And as the prohibition under the article is directed against the State, which is defined in Art. 12 as including not only the legislatures but also the Governments in the country, Art. 14 secures all persons within the territories of India against arbitrary laws as well as arbitrary application of laws. This is further made clear by defining "law" in Art. 13 (which renders void any law which takes away or abridges the rights conferred by Part III) as including, among other things, any "order" or "notification", so that even executive orders or notifications must not infringe Art. 14. This trilogy of articles thus ensures non-discrimination in State action both in the legislative and the administrative spheres in the democratic republic of India." A few years later in Bhasheshwar Nath v. Income-tax Commr. AIR 1959 SC 149 S. R. Das C. J., referring to Art. 14 of the Constitution, observed:

"The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Article e.g., Art. 19, do. . .

Command of the Article is directed consequent State and the reality of the obligation thus imposed on the State is the relief of the fundamental right which every person within the territory of India is to enjoy.

..... In the third place it is to be observed that, by virtue of Art. 12, "the State" which is, by Art. 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. . . It is not necessary, for the purpose of this appeal to consider whether an executive order is a "law" within the meaning of Art. 13, for even without the aid of Article 13, our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in *Eshugbayi Eleko v. Officer Administering Govt. of Nigeria*, 1931 A. C. 662: (AIR 1931 PC 248) are apposite. Said his Lordship at page 670 (of A. C.): (at p. 252 of AIR) that in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a Court of Justice. That apart, the very language of Art. 14 of the Constitution expressly directs that "the State", which by Art. 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Art. 14 protects us from both legislative and executive tyranny by way of discrimination."

Even more apposite than the observations of Lord Atkin to which the learned Chief Justice has referred are the observations of the same Law Lord in *James v. Cowan*, 1932 AC 542, (observations made in another context but very aptly referred to by Mr. Seervai in his book 'Constitutional Law of India') Lord Atkin observed:

"The Constitution is not to be mocked by substituting executive for legislative interference with freedom."

4. Now, the complexities of modern Government are such that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes and the defence of its frontiers. It is now the function of the State to secure 'social economic and political justice', to preserve 'liberty of thought, expression, belief, faith in worship' and to ensure 'equality of status and of opportunity'. That

is what the preamble to our Constitution says. The desire to attain these objectives has necessarily resulted in intense governmental activity in manifold ways. While there has been a spate of legislation touching many aspects of life of a citizen, there has been an even greater activity on the part of the executive government touching many more aspects of a citizen's life and there can be little doubt that in recent years executive activity has reached much farther than legislative activity. The Government now owns or manages several industries and institutions. It is the biggest builder in the country. Mammoth irrigation projects and irrigation projects of smaller size too, Heavy Engineering projects and Light Engineering projects, Building projects and projects of several kinds are undertaken by the Government. The Government is also the biggest trader in the country. The State and the agencies and corporations set up by it are the principal purchasers of the produce and products of our country, and they control a vast and complex machinery of distribution. This tremendous growth of governmental activity has necessarily resulted in executive dominance and naturally involves an exercise of a good deal of patronage and distribution of favour. The scope for abuse of power is thus enlarged in direct proportion with the growth of governmental activity and executive dominance. It is well-known that it is but a short step from executive dominance to authoritarianism. It is, therefore, necessary that the problem of executive tyranny must be viewed in the context of executive dominance. In his book "The Foundations of Freedom" Professor D. V. Cowen observes:

"The fundamental problem of organized society is that of the use and abuse of power: how may men best prevent its abuse and direct its use to good ends. . . . In the modern world, however, the problem of power has become particularly urgent. Thus to quote a distinguished American historian, Professor C. H. McIlwain:

"The one great issue that overshadows all others in the distracted world of today is the issue between constitutionalism and arbitrary government. The most fundamental difference is not between capitalism and socialism. . . . Deeper than the problem whether we shall have a capitalistic system or some other. . . lies the question whether we shall be ruled by law at all, or only by arbitrary will."

And again:

'Never in its long history has the principle of constitutionalism been so questioned as it is being questioned today, never has the attack upon it been so

determined or so threatening as it is now. The world is trembling in the balance between the ordinary procedure of law and the processes of force which seem so much more quick and effective. Never in recorded history, I believe has the individual been in greater danger from Government than now.

The first quotation is from an essay written three years before the outbreak of Hitler's War, the second from a book written after Hitler's defeat. Since then the urgency of the problem has increased rather than abated."

The problem of power, its use and abuse is as pressing and urgent in Modern India as elsewhere.

5. It must be remembered that at the time when our Constitution was framed the world had just emerged from the shadow of the Second World War, very much ravaged by the authoritarian antics of Hitler etc. Great democrats, that they were, the framers of our Constitution naturally interested themselves in protecting us from authoritarian rule and to preserve for us the rule of law. They envisaged the inevitable emergence of a dominant executive having regard to the goal set by the Constitution and the powers that would necessarily have to be vested in the executive in the process of attaining the goal. They recognised that with the emergence of a dominant executive and with the widening of the field of executive activity, the protection that would be needed would be as much from legislative discrimination as from the creeping malignancy of executive discrimination. They recognised that laws alone do not govern and that, 'in reality, men do rule, even when they rule within the framework of the law.' (Franz Neumann: The Democratic and the Authoritarian State). It is in this context that the framers of our Constitution viewed the question and while incorporating Art. 14 commanding the State not to deny any person equality before the law or equal protection of the laws, also defined 'law' in the widest possible terms so as not to exclude any activity of the State which may result in discrimination. It is in this context that Patanjali Sastri C. J. and S. R. Das C. J., viewed the question in the cases to which I have referred earlier.

6. In the light of the above discussion I have no doubt that where a person alleges discrimination, executive action can and must be subjected to judicial review. Otherwise, the principles of 'equality before the law' and 'equal protection of the laws' would soon be reduced to so much "vanity...wind and confusion". Of course, in such cases the scope of judicial review is necessarily of a very narrow and a limited nature, but

it does not mean that discrimination be practised with impunity and those practising it may get away with it. Discrimination is a matter of grave concern, destructive of the principle of Rule of Law, and if established, the executive action responsible for it must be struck down. To take the case of 'blacklisting', for example, the Court will not hesitate to strike down an order of the Government 'blacklisting' a person if it is not possible to discover any reason for the order from the records produced by the Government or if the records and other material reveal that the order is mala fide or based on irrelevant considerations, such as, say, the political persuasions or affiliations of the person blacklisted. On the other hand, if the records do disclose a relevant reason based on some relevant material the Court will not weigh that material with a view to find out whether it is sufficient to justify the order. The Court will naturally act with great care and restraint and will be slow to interfere with executive action since the Government, like others, must have 'freedom of contract'. But, there is this difference between the Government and others, that while others deal with their own properties and affairs, the persons acting for the government have no vested rights in the matters with which they deal and should not deal with such matters as if they have vested rights. I have, therefore, no doubt that in appropriate cases the Court has the jurisdiction to inquire whether executive action is discriminatory and to strike it down if it is discriminatory. The observations of Shelat, J. in Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295 in connection with the exercise of statutory powers apply with same force to other executive action. Shelat, J. observed:

"Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purposes of the legislation which confers the powers since authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts."

consequ discussed at such great length and claim so long to arrive at a conclusion relief may perhaps be patent to many shades because of the argument of the learned Government Pleader and because of the judgment of a Division Bench of the Kerala High Court in Bhaskaran v. State of Kerala, AIR 1958 Ker 333. The judgment of the Kerala High Court proceeded on the assumption that "law" as defined in Article 13 does not include executive orders. Such a view is inconsistent with the views expressed by the Supreme Court in the cases of Anwar Ali and Basheshar Nath. On the other hand the approach of their Lordships of the Supreme Court to the question at issue in State of Assam v. Tulsi Singh, (1962) Supp. 3 S. C. R. 508 appears to support the view taken by me. In that case a ferry was put to auction, but was sold to the lowest bidder instead of the highest on the ground that the highest bidder's name appeared in the 'special list', a list prepared and maintained by the Government of persons suspected to be connected with smuggling activities and to whom no permits or licences may be granted. Venkatrama Iyer, J. while agreeing that the authorities would be perfectly justified in refusing to accept the bid of a smuggler found that there was no material on which the highest bidder could be held to be a smuggler. The authority granting the ferry rejected the bid of the highest bidder merely because his name was in the 'special list' and it did not appear on what information the special list was prepared or from what sources the information was received. The Supreme Court confirmed the decision of the learned Judges of the High Court that the rejection of the offer of the highest bidder was not in accordance with law.

7. The next question is whether in the present case there was any material before the government on the basis of which it 'black-listed' the petitioner. The records produced before me in answer to the Rule Nisi show that there was an investigation by the Anti-Corruption Bureau and the investigation revealed that over a course of some months the petitioner was supplying adulterated milk to hospitals. I have perused the report of the Anti-Corruption Bureau on the basis of which the Government took its decision to blacklist the petitioner and I am satisfied that the Government was perfectly justified in passing the order that it did. Sri Chowdary contends that the government should have given him an opportunity of meeting the allegations against him before passing the order. I do not think that principles of natural justice can be extended to situations like this where investigation and inquiry has necessarily to be confidential and where

no vested rights of the petitioner are affected. In the result the Writ Petition is dismissed with costs. Advocate's fee Rs. 100/-.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 318 (V 57 C 52)

FULL BENCH

KUMARAYYA C. J., GOPAL RAO
EKBOTE AND CHINNAPPA REDDY JJ.

Pithana Apparao, Petitioner v. State of Andhra Pradesh represented by Secretary in Ministry of Housing and Health and Local Administration, Hyderabad and others, Respondents.

Writ Petns. Nos. 364 of 1964, 734, 1189, 1967 of 1965 and 1771 of 1966, D/- 31-12-1969.

(A) Constitution of India, Art. 14 — Equality before law — Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956) Sch. cl. 2 (2) — Validity — Provision offends Art. 14 — Provision however is separable from the rest of the Act. (Paras 27, 32, 33)

(B) Constitution of India, Art. 14 — Equality before law — Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956) — Validity — Act not violative of Art. 14.

If the Special law is uniform in operation and it applies equally to all the classes to which it relates and it has necessary nexus which the Act keeps in view, such a special law would not be hit by Article 14 merely because a general law which once used to take in its fold the subject matter of the special law continues to exist. As long as the special law operates within its limited field and so far as it is operative, its burdens and benefits bear alike upon all persons and things on which it operates, it would be complying with Article 14.

(Para 11)

With growth and expansion of industries in the cities the conditions of slums are fast deteriorating. The existing Land Acquisition Act has been found inadequate and incompetent to cope with this special evil. On grounds of public health, convenience and necessity, which lie at the bottom of the Act 33 of 1956 the classification of slum area cannot be said to be an unreasonable classification. The classification is germane to the subject of legislation and is not an arbitrary classification without regard to its just relation to the thing to be affected. The Act cannot be said to be violative of Article 14. While the Land Acquisition Act will continue to operate for general, public purposes and the lands may be continued to be acquired it, the impugned Act will

operate only in regard to the slum area and land in such an area can be acquired only under this Act. Once the Government declares under the impugned Act that a particular area is a slum area, then there is no choice left with the Government. It has necessarily to proceed under the impugned Act. Case law discussed. (Paras 13, 18, 21, 24)

(C) Constitution of India, Art. 14 — Abuse of power — Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956) S. 3 — Satisfaction of authority — Interference by Courts.

It is common to empower administrative authorities like the Government to follow a given course of action when they are satisfied that a prescribed state of affairs existed. Section 3 is worded on the same lines conferring on the Government an exercise of discretion based on a subjective formula. Apart from the cases of mala fide, the Court will intervene wherever it is found that there was no material whatsoever before the Government to arrive at the conclusion or that it lacks in any evidentiary support or is perverse. The Court can also interfere when it finds that the Government has not taken the relevant matter mentioned in Section 3 into consideration or has considered matters which are not germane or are irrelevant or has exercised the discretion for a purpose not warranted by the Act, or has committed any error in taking any essential procedural step as is required by the law. In all such cases, it will hold the exercise of power ultra vires because the Government or the competent authority would not be deemed to have been genuinely satisfied that it was appropriate for the purpose sanctioned by the legislature.

(Para 40)

(D) Constitution of India, Art. 226 — Writ petition — Disputed questions of fact — Court will not decide.

(Para 45)

(E) Constitution of India, Art. 31 (2) (as amended by Constitution (4th amendment) Act of 1955) — Question of adequacy of compensation — Not justiciable — Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956) S. 6 — Provision does not contravene Art. 31 (2).

After 27-4-1955 the question of adequacy of compensation is made non-justiciable leaving it to the final judgment of the Legislature. The only question which continues to be justiciable, is when the law under which the acquisition or requisition is made does not provide for compensation at all or lays down principles which in effect provide for payment of no compensation or in either case provides only illusory compensation. Though the line dividing illusory from inadequacy of compensation is not very easy to draw. It has to be decided in

the light of the facts and circumstances of each case as to whether the compensation is illusory. AIR 1969 SC 634 Rel.

(Paras 52, 54, 55)

The Andhra Act specifies the principles on which and the manner in which the compensation is to be determined and given. Section 6 read with the schedule does not offend Art. 31 (2).

(Paras 61, 62)

(F) Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956), S. 3 (1) — Notification under — Case pending under Land Acquisition Act — Effect of S. 15 is that notice under Land Acquisition Act is deemed to be notice under proviso to S. 3 (2) — Government could not issue notice under S. 3 (2) without hearing party.

The expression 'the person interested' in the Explanation to S. 3 (2) would include even the owner of the land. The owner should not be deprived of an opportunity of objecting both to the declaration under S. 3 (1) as well as the intention to acquire the land under S. 3 (2) just as a person interested in the land can object.

The effect of the direction that the provisions of the Act shall apply to cases pending under the Land Acquisition Act according to S. 15 is that notice under the Land Acquisition Act, whether it is given under section 4, 6 or 9 will be deemed to be a notice served by the Government under the proviso to S. 3 (2) of the impugned Act. Hence the Government could not have issued a notice under section 3 (2) without hearing the petitioners. Natural justice requires that the persons liable to be affected by the Government's directions are given adequate notice of at least what is directed by the Government under S. 15 in their pending cases, if not before the Government proposes to apply the provisions of the Act to their case, so that they can raise objections both in regard to declaration of their land as slum area and about the necessity of acquiring their land as is visualised by the explanation to the proviso to section 3 (2).

(Paras 71, 75, 76, 77)

(G) Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956) Sch. cl. 2 (2) — Validity — Provision offends Art. 14 of the Constitution — Provision is separable from rest of the Act.

(Paras 27, 32, 33)

(H) Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956) — Validity — Act not violative of Art. 14 of the Constitution.

(Paras 13, 18, 21, 24)

(I) Andhra Pradesh Slum Improvement (Acquisition of Land) Act (33 of 1956), S. 3 — Satisfaction of authority — Interference by Courts when can be made stated.

(Para 40)

consec. Andhra Pradesh Slum Improvement
claim (Acquisition of Land) Act (33 of 1956),
relig. — Validity — Does not contravene
shvt. 31 (2) of the Constitution.

r (Paras 61, 62)

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M. Jagannadha Rao, C. V. Narasimha-

rao, G. V. L. Narasimharao, S. Ramalinges-

wara Rao, T. Ramachandra Rao, for Peti-

tions; Advocate General and Principal

Govt. Pleader, for Respondents. in all

Petitions.

GOPAL RAO EKBOTE, J.: These peti-

tions filed under Article 226 of the Con-

stitution of India question the validity

of the notifications issued under S. 3 of

the Andhra Pradesh Slum Improvement

(Acquisition of Land) Act, 1956, herein-

after called "the Act". The main attack

in all these petitions is on the validity

of the Act itself under which the impugned

notifications were issued. These peti-

tions raise common questions of law.

They can therefore conveniently be dis-

posed of by a common judgment.

2. A Bench of this Court thought that

important questions involving far-reach-

ing consequences both to the State as

well as to the citizens are involved in

the petitions which challenge the con-

stitutional validity of the Act and has

referred these cases to a Full Bench.

That is how the matter has come before

us. The attack on the validity of the

Act is twofold; (1) under Article 14 and

(2) under Article 31 (2) of the Constitu-

tion.

3. The first contention of the learn-

ed Advocates appearing for the petitioners

is that the Act is offensive of Article 14
inasmuch as it gives different treatment
to the lands situated in the slum area and
the lands situated outside such area with-
out any reasonable basis for such discri-
mination. The classification, it is argued
is unreasonable and has very little nexus
with the object it seeks to achieve.

4. It is not in doubt that the Land
Acquisition Act, 1894 is a general law on
the topic of acquisition for public pur-
pose. The law is general because its
provisions embrace the whole subject of
acquisition of immovable property, the
object of such acquisition being for public
purpose. It is applicable to the whole of
India.

5. On the other hand, the impugned
Act is a Special Act. Its object is to
acquire land for the purpose of slum
improvement which purpose although a
public purpose is given a special treat-
ment in the Act. From the point of
view of object, therefore, it is special in
its nature. The subject-matter of the
Act also deals with acquisition of land
situated only in slum areas. Thus from
both the points of view of subject matter
as well as object, the Act is a special Act.

6. The question which falls for our
determination therefore is whether the
impugned Act is ultra vires of Art. 14
of the Constitution. The contention was
that under the general law of acquisi-
tion when land in slum areas also can be
acquired for the purpose of improving
the slums, by enacting the impugned Act
which provides comparatively a lesser
compensation and deprives the land
owners of solatium, it gives a discrimi-
natory treatment to the land owners of
the slum area and land owners out-
side it. It was also contended that the
Act leaves an uncontrolled and un-
regulated discretion with the Gov-
ernment to acquire lands either under
the general law of acquisition or under
the impugned Act. It is therefore viola-
tive of Article 14.

7. It is now not in dispute that when
an Act is assailed as class or special legis-
lation, the attack is usually based on the
claim that there are persons or things
similarly situated to those embraced in
the Act, and which by the terms of the
Act are excluded from its operation. The
present contention also is based on such
a claim.

8. The question then is whether the
persons or things embraced by the
impugned Act form by themselves a prop-
er and legitimate class with reference
to the object and purpose of the Act.
Constitution forbids class legislation. But
it does not forbid a reasonable and prop-
er classification of the object of legisla-
tion. There is no prohibition in the
Constitution to enact a special law in a
case where the general law on the same

subject exists. Although thus the Land Acquisition Act is a general Act, its existence does not forbid the State Legislature from enacting a special legislation operating within a restricted field. There is, however, a restriction that such a law should not be discriminatory so as to attract the wrath of Article 14. Article 14 provides that a law shall have uniform operation so that an equal protection of the laws shall not be denied to any person. This Article naturally has given rise to problems of classification.

9. A valid classification must include all who 'naturally' belong to the class, all who possess a common disability, attribute, or classification, and there must be some natural and substantial differentiation between those included in the class and those it leaves untouched. Such a classification moreover must have nexus with the object sought to be achieved.

10. Every classification selects from the totality of the object that which has significance for the particular legislation the classifier has in mind. Time with its tides brings new conditions which must be cared and met for by new and special laws. And it is not unnatural that sometimes the new conditions affect comparatively a smaller or a bigger section of the population. If so, the special statute which intends to correct the situation may be as large or as narrow as the mischief. Article 14 permits such special laws when there are special evils with which existing general law is found incompetent to cope. The special public purpose must therefore necessarily sustain the special statute. The problem in ultimate analysis is one of the legislative policy, with a wide margin of discretion always conceded to the legislatures.

11. It is of course true that in the case of plain abuse in regard to the classifications, the Courts will intervene. If the evil sought to be removed is merely fanciful, the injustice or wrong illusory, the High Court may interfere and strike the special statute down. What must follow is that if special circumstances have developed of such a nature as to call for a special law, such a special Act will stand the test of Article 14. In other words, if the classification which the special Act makes it reasonable and founded on necessity, or that it is based on health, morals and welfare, such a classification would not be violative of Article 14. If the Special law is uniform in operation and it applies equally to all the classes to which it relates and it has necessary nexus which the Act keeps in view, we fail to see how such a special law would be hit by Article 14 merely because a general law which once used to take in its fold the subject-matter of the special law continues to exist. As long as the special law operates within

its limited field and so far as it is five, its burdens and benefits bear upon all persons and things on which it operates, it would be complying with Article 14 of the Constitution.

12. Let us then examine whether the classification of slum area with an object of its improvement is without any reasonable basis and does not apply alike to all those belonging to the class who have land or building in the slum area.

13. The problem of slums is worrying all the growing towns and cities all over. In spite of some efforts on the normal lines, it has remained one of the most baffling and complicated problems of the modern times. Its enormous magnitude and bewildering complicity in underdeveloped and haphazardly growing towns and cities in the State makes the task of tackling it really Herculean. It does not need much argument to conclude that a considerable population is living in slums which are totally unfit for human habitation. The overcrowded figures in the congested areas of towns and cities are simply appalling. Their eradication involves huge sums and enormous efforts. If they are not tackled devising special methods no one can doubt that they will continue to crop up like cancerous growth notwithstanding the surgery that is performed on one or two units in the traditional and normal course. What is alarming is that with growth and expansion of industries in the cities the conditions of these slums are fast deteriorating.

In these circumstances, it is not at all surprising if the Legislature has come to the conclusion that the existing Land Acquisition Act has been found inadequate and incompetent to cope with this special evil. The slums are hovels of their wretched lives of physical misery and normal degeneration, places of dirt and turmoil, filth and squalor; where people live deprived even of fresh air, in darkness even in the broad-day light, leave alone of the basic amenities. Who can consider it as an undesirable classification if the Legislature has selected slum areas for a special treatment with an object of eradicating these fast developing slums and relieve the large number of people living in most unhygienic conditions? Nor one can doubt that the public policy which found expression in the impugned Act is ill-conceived. It is a reasonable classification rationally related to the object which it seeks to achieve.

14. The object of the Act as is clear from the preamble is to improve slums. It states that there are a number of slum areas in almost every town in the State which are a source of danger to public health and sanitation. It categorically mentions that under the existing law it has not been possible to provide for

508 All.

basic needs of sewage, water supply, sewerage and side drains in slum area, claimant causing excessive financial strain on the owners of the lands affected. It is to obviate this difficulty that the special Act is made.

15. Act XXXIII of 1956 was passed originally by the Andhra Legislature and it received the assent of the President of India on 7th November, 1956. This Act has been extended to the whole of the State of Andhra Pradesh by Act XL of 1961 which came into force on 13th November, 1961.

16. The Act defines slum area to mean any area declared to be a slum area under section 3 (1). Section 3 (1) enjoins that where the Government are satisfied that any area is or may be a source of danger to the public health, safety or convenience of its neighbourhood by reason of the area being low lying, insanitary, squalid or otherwise, it may by notification in the Andhra Pradesh Gazette declare such area to be a slum area.

17. It is to such slum areas so declared that the provisions of the Act apply. The Act empowers the Government to acquire the land in the manner it provides for the purpose of improving the slum area.

18. If the general rules of valid classification as discussed above are applied to the Act, we have no manner of doubt that on grounds of public health, convenience and necessity, which lie at the bottom of the Act, the classification of slum area cannot be said to be an unreasonable classification. The impugned Act applies beneficially to a particular class of people who are living in unhealthy and unhygienic conditions. It operates uniformly on all members who are the owners of the lands and buildings occupied by persons living in uncongenial atmosphere in the slum area. The classification, therefore, is germane to the subject of legislation and is not an arbitrary classification without regard to its just relation to the thing to be affected. There is no unreasonable discrimination towards members of the class covered by the impugned Act. The Act therefore, in our view, cannot be said to be violative of Art. 14.

19. The contention that the Government has been conferred with unregulated discretion to acquire land under the general law or under the impugned Act cannot prevail.

20. In this connection, it is worthwhile to remember that the Legislature in the exercise of its legislative capacity can extend, modify, vary or repeal Acts passed previously. It can also enact special enactments covering a special ground although there may exist a general Act embracing the special field also. It is

true that this Court will consider the exact effect of the later Act upon the earlier one in order to see whether those Acts can wholly or in part stand together. There can be little doubt that the provisions or the scope of the earlier Act may be revoked or limited or abrogated in particular type of cases by a subsequent Act either from the express language used being addressed to the particular point or subject or from implication or inference from the language used. It is of course necessary to consider the impugned enactment with reference to the state of the law when it came into operation. Every Act is made for the purpose of either making change in the law or to make a special law its operation being limited to a well defined field. The operation of any such law is not to be impeded by the fact that its provisions wholly or in part are inconsistent with the earlier law as is argued in this case. Merely because the impugned Act provides lesser compensation or does not provide for solatium, it cannot be argued that no special enactment can be effected by the Legislature, unless of course there is legislative incompetency or it is violative of any fundamental right guaranteed by the Constitution.

21. It is not always necessary to hold that if the new Act is enacted in affirmative language but if it can well stand with the previous general law on the subject, the previous law is repealed. It depends upon the terms of the new statute as to how far as and to what extent the Special Act overrides the general law or makes it inapplicable. There is the principle of "curtailment without repeal, if the subsequent statute merely creates an exemption or exception from the operation of a previous statute or modifies its operation by the annexation, of the condition" the previous statute is not necessarily repealed, and prior enactment may be rendered inoperative without being actually repealed. See *Craies on Statute Law*, page 373. In other words, the general enactment is pro tanto avoided by an express enactment entirely or substantially applicable to a restricted purpose. The impugned Act therefore merely in specified cases and fields intercepts the operation of the Land Acquisition Act, which is a previous general law in regard to the acquisition of land and which remains in existence and unrepealed notwithstanding, for all other purposes and in all other respects. What is clear is that the conflict between these two statutes although apparent because their objects are different, yet the language of each, in these circumstances, would be restricted to their own object or subject.

If that is once realised, then it will be evident that these two enactments run in parallel lines without meeting and

therefore any comparison of these Acts would be improper unless of course it is made for the purpose of finding out whether there is any violation of constitutional provision. Since these two Acts do not cover the same field, the question of attracting Article 14 cannot arise. We have therefore no doubt that while the general Act will continue to operate for general public purposes and the lands may be continued to be acquired under it, the impugned Act will operate only in regard to the slum area and land in such an area can be acquired only under this Act. Thus seen, the validity of the impugned Act cannot be left in doubt. The two enactments do not cover the same territory and consequently the question under Article 14 cannot arise in such a case.

22. It is also relevant to note that Article 14 would not be violated by two laws dealing with the same subject matter but in two different fields, if the sources of the two laws are different. In the State of Madhya Pradesh v. G. C. Mandawar, (1955) 1 S.C.R. 599 at p. 606 = (AIR 1954 SC 493 at p. 496), the Supreme Court observed:

"Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory. Nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two Statutes being different, Article 14 can have no application."

The same view is expressed in *Narottamdas v. State of Madhya Pradesh*, AIR 1964 Madh Pra 45. In that case, the High Court upheld the provisions of Madhya Pradesh Minimum Wages Fixation Act, 1962 which fixed minimum rates of wages only in respect of some of the employments enumerated in the schedule to the Central Minimum Wages Act which continued to apply to the remaining employments.

23. In *Than Singh v. Union of India*, AIR 1955 Punj 55 it was contended that the impugned law contravened Article 14 in so far as it provided for a lesser amount as compensation than that provided by the Land Acquisition Act, 1894, which was the general law of the land relating to acquisition. The High Court negated this contention on the ground that the impugned law was made for a specified and distinct object and that there was a reasonable classification.

24. It was, however, contended that the Government has discretion to choose between the two Acts in their application to a given acquisition, and since such

discretion is uncontrolled, section 3 of the impugned Act is bad in law. We do not think that the argument is effective. Once the Government declares under the impugned Act that a particular area is a slum area, then there is no choice left with the Government. It has necessarily to proceed under the impugned Act and it cannot and would not proceed under the general law of acquisition.

25. Distinction between the validity of Section 3 on the alleged ground and the possibility of abuse in its application to any case must be kept in view. The possibility of abuse cannot be taken into account in determining the ambit of power or the validity of any provision. The word 'may' appearing in section 3 does not, in our view, warrant any argument that it enables or empowers the Government to either proceed under the impugned Act or under the general law of acquisition. That word merely vests a discretion in the Government to declare a particular area as a slum area. The vesting of such enabling power is quite understandable because there are large number of slums all or majority of which cannot immediately be declared as slum areas. Each case again has to be considered, whether it satisfied the requirements of S. 3, and if it satisfies, it is only then that it can be declared as slum area. Such a provision in the circumstances could not have been couched in a mandatory language. It would have created a legal obligation on the Government perhaps enforceable in a court of law. That is not practically possible.

Slums present a special problem and involve huge finances and various administrative problems and it is because of these conditions that the wording is used thus making the provision an enabling one. If it is not a slum area, it is obvious that section 3 will not apply. On the other hand, if it is a slum area, then it will attract section 3. We are therefore satisfied that section 3 itself vests no discretion in the Government to acquire the land in a slum area either under the impugned Act or under the Land Acquisition Act. In these circumstances the apprehension voiced by the learned Advocates for the petitioners has no basis whatsoever.

26. It is true that the Government is left with the discretion to declare whether a particular area is a slum area within the meaning of the Act. But to say that such a discretion is unregulated or uncontrolled would not be correct. Section 3 itself provides sufficient guidance apart from what is provided in the preamble and purview of the Act in regard to the exercise of such discretion. The Government has to collect the necessary material. It may, however, collect the material from any quarter in

sic needs — road and to satisfy itself whether the requirements of section 3 are satisfied and that the owner of a particular area is a slum area or not and then only in a case where it is satisfied that it is a slum area that section 3 empowers the Government to declare it as such. We do not therefore experience any difficulty in rejecting the contention that section 3 is in conflict with Article 14 on the ground that it confers on the Government uncontrolled and unregulated powers without providing any standard in the exercise of such a wide discretion.

27. The only provision which, however, in our view offends Article 14 is clause 2 (2) of the Schedule to the Act. Section 6 of the Act provides for the basis of the determination of the compensation. It says that the amount payable as compensation for any land acquired shall be an amount equal to twelve times the net average annual income actually derived from such land during the period of five consecutive years immediately preceding the date of publication of the notice under section 3 (2). Sub-section (2) enjoins that the net average annual income referred to in sub-section (1) shall be calculated in the manner and in accordance with the principles set out in the Schedule.

28. The schedule has in all four clauses. The first clause lays down that the net average annual income shall be one-fifth of the gross rent actually derived by the owner from the land acquired and the huts and the buildings, if any, thereon during the relevant period. It authorises the deduction of municipal taxes, revenue, charges and cost of repairs for the said period from such gross rent.

29. Clause 2 (1) directs that the gross rent shall be determined by the prescribed authority by local inquiry, and if necessary, by obtaining certified copies of extracts from assessment books showing the rental values of lands, huts or buildings. It further directs that the cost of repairs shall be calculated at the rate of one month's rent per year in each case.

30. We then come to sub-clause (2). It reads as follows:

"For the purpose of determining the gross rent actually derived by the owner from the huts, if any, on the land, every acre of the land shall be deemed to contain only such number of huts as may be prescribed and no more or less, irrespective of the actual number of huts on the land; and different numbers may be prescribed for different classes of lands or for different local areas."

Clause 3 permits the income from the trees of the land acquired to be taken into consideration.

31. Clause 4 provides for a situation where the land, huts or buildings thereon remain unoccupied or the owner has not been in receipt of any rent during the whole or any part of the crucial period. The gross rent in such a case will be determined by taking into account the income actually derived from similar lands, huts or buildings situated in the vicinity.

32. A careful reading of these clauses would reveal that while the actual income is taken into account in the case of a building or a land situated in slum area, in cases of huts artificial mode of calculating the income arising from the land and the huts built thereon is employed without having regard to the actualities. Either the land is occupied by the huts partly or wholly or it is not occupied by huts at all. While in cases of vacant lands actual income is taken into account, although in some cases where the land was not yielding rent during the crucial time, it is permitted to be calculated on certain basis, in cases of lands occupied by huts partly or wholly, the number of huts as may be prescribed alone shall be taken into account for the purpose of determining the gross rent.

Thus in some cases at least where there are more number of huts from which the owner is getting income, the whole of such income shall not be taken into account although it is actually realised, but only that notional income is derived to be taken into account as is deemed to have been recovered from the prescribed number of huts. In case of a land which is partly occupied by huts and partly vacant, the actual rent of the land which is vacant will be worked out in the manner otherwise provided. The gross rent of the land occupied by huts, however, will be worked out on the basis of the prescribed number of huts. What is manifest is that although the land covered by huts is situated in the same slum area where other lands and buildings are situated, such a land is selected arbitrarily for a different treatment. The classification is arbitrary because no reasonable basis is shown for such a discriminatory treatment. The contention is that compensation is paid less to the land owner because large number of people occupy or more number of huts were existing on the land than was reasonable.

What is ignored in advancing this argument is that it is the land owner who is discriminated by such hostile treatment. He could not build a building which may have fetched him more rent obviously because he had no capital to invest. It is he who is given a different treatment and for no reason. The argu-

ment that he was earning more rent is fallacious because in cases of building and perhaps even in cases of vacant lands the owners are or may be getting more rents in view of the nature of the buildings. When the lands, buildings and lands occupied by huts are all situated in the slum area, there is no reason to make an arbitrary distinction between them with a view to provide more or less compensation. We are therefore satisfied that neither there is any reasonable basis for giving a separate treatment to a land covered by huts nor there is any relationship with the object which it seeks to achieve for the purpose of determining the compensation. Sub-clause (2) of clause 2 therefore is inconsistent with article 14 and has therefore to be struck down.

33. The question then is whether this invalid provision is separable. We have no doubt that it is. We have to look to two things in this respect. Firstly, the Legislature must have intended that the provision be separable and secondly that the provision must be capable of separation in fact. From the clauses of the schedule itself, it is manifest and the intention of the legislature seems apparent that it was dealing with the other clauses irrespective of clause 2 (2). There is no material to believe that the Legislature would not have passed the other clauses without the invalid sub-clause. All the clauses together with this objectionable sub-clause cannot be said to be connected in subject matter or dependant on each other or operating together so as to presume that the Legislature would not have legislated the other clauses without the impugned sub-clause. The invalid sub-clause is, in our view, independent of the other clauses and can safely be separated without affecting in any manner the validity of the other clauses as they are quite independent in their own way. They cover also case of land occupied by huts. In this connection, it is well to remember that the courts have not been slow to recognise the utility of the doctrine of severability and have put it to an increasing use and with increasing liberality.

34. Let us then turn to the cases cited at the bar in regard to Article 14.

35. *Vajravelu v. Special Deputy Collector*, AIR 1965 SC 1017 cannot be said to be inconsistent with what we have decided. In that case, on a comparative study of the principal Act and the amending Act it was found that if a land is acquired for a housing scheme under the amending Act, the claimant gets a lesser value than he would get for the same or similar land if it is acquired for a public purpose like hospital under the Act. The question was whether this classification between persons whose lands

are acquired for housing schemes and persons whose lands are acquired for social purposes has reasonable relation to the object sought to be achieved. The object of the Amending Act was to acquire lands for housing schemes. The following observation is relevant for our purposes:

"It may be as the learned counsel contends the Amending Act was passed to meet an urgent demand and to find a way out to clear up slums, a problem which has been baffling the City authorities for a long number of years, because of want of funds. But the Act as finally evolved is not confined to any such problem. Under the Amending Act lands can be acquired for housing schemes whether the object is to clear slums or to improve housing facilities in the City for rich or poor."

36. It will thus be clear that if the Amending Act had confined itself only to the problem of slum clearance, their Lordships perhaps were inclined to take the view which we have taken in this case. As the Amending Act was not so restricted but was applicable to housing schemes in general, the Supreme Court held that discrimination was writ large on the Amending Act and found that it could not be sustained on the principle of reasonable classification.

37. *Deputy Commr. Kamrup v. Durganath*, AIR 1968 SC 394 has to be considered in the light of the facts of that case. In that case while the Land Acquisition Act, 1894 was in force the State Legislature passed Act VI of 1955 providing for speedy acquisition of land for the public purpose of carrying out works or other development measures in connection with flood control or prevention of erosion on payment of compensation on the basis of a multiple of the annual land revenue. The Supreme Court struck it down as violative of Article 14 on the ground that the General Act provides for speedy acquisition and therefore the special Act could not be said to be devised to meet existing evil and secondly that the purpose or the object of the Act was equally broad and not confined to any acute problem like slum clearance; and thirdly that since the assessment of land revenue in Assam was made many years ago, the market value of lands had increased by leaps and bounds. It was perhaps also doubtful whether on the basis of land revenue by adopting the method of multiplication, market value can be determined.

Following, AIR 1965 SC 1017 it was observed:

"It is not possible to hold that the differential treatment of the lands acquired under the Land Acquisition Act, 1894 and those acquired under Assam Act No. 6 of 1955 has any reasonable relation to

road act of acquisition by the State." about other observed:

"In our opinion, the classification of land required for works and other measures in connection with flood control and prevention of erosion and land required for other public purposes has no reasonable relation to the object sought to be achieved viz., acquisition of the land by the State. In either case, the owner loses his land and in his place the State becomes the owner. There is unjust discrimination between owners of land similarly situated by the mere accident of some land being required for purposes mentioned in Assam Act No. 6 of 1955 and some land being required for other purposes. We hold that Assam Act No. 6 of 1955 is violative of Article 14."

The questions with which we are concerned in these cases were not before the Supreme Court. The nature of the enactments before the Supreme Court and the nature and the scope of the enactments with which we are concerned are substantially different and consequently pose different problems. It also has to be noted that the several features pointed out above were responsible for the conclusion at which the Supreme Court reached.

38. *M/s. Balaji Industries v. Special Deputy Collector, 1967-2 Andh WR 172* = (AIR 1968 Andh Pra 141) does not help the petitioners. In that case, the validity of section 40-B of the Hyderabad Housing Board Act (XLVI of 1956) as amended by Act XV of 1962 was questioned. Following, AIR 1965 SC 1017 but without comparatively examining the provisions of the Land Acquisition Act and the Housing Board Act, the learned Judges observed:

"From this it is clear that this provides for a quite different basis for assessing compensation to be given to the owner of the property acquired under the Housing Board Act, 1956 from that provided under section 23 of the Land Acquisition Act."

They further observed:

"On principle it is not possible to distinguish that case from the case before us. Hence we hold that section 40-B of the Hyderabad Housing Board Act (XLVI of 1956) as amended by A. P. Act XV of 1962 offends Article 14 of the Constitution of India and is hence void."

If the learned Judges intended to lay down that a provision would be bad merely because it provides quite a different basis for assessing compensation from that provided under Section 23 of the Land Acquisition Act, then with due respect we find ourselves unable to agree with such a proposition so widely stated. *Vajravelu's case*, AIR 1965 SC 1017 is not decided on any such basis. If on a

comparative study of Section 40-B and the provisions of the Land Acquisition Act, as was done by the Supreme Court in *Vajravelu's case*, AIR 1965 SC 1017 the learned judges had reached the conclusion that Section 40-B offends Article 14, we would have had nothing to say about it because we are not concerned in these cases with the validity of S. 40-B of the Housing Board Act. It is also not clear as to whether the learned Judges were drawing the conclusion in reference to Article 14 or Article 31 (2) of the Constitution.

39. In *Balammal v. State of Madras*, AIR 1968 SC 1425, Clause 6 sub-clause (2) of the Schedule read with S. 73 of the Madras City Improvement Trust Act (XXXVII of 1950) was challenged. Madras City Improvement Trust Act (XVI of 1945) was enacted for the purpose of improvement and expansion of the Madras City. The Board under S. 71 was authorised to acquire land under the Land Acquisition Act, 1894. Section 73 made the Land Acquisition Act subject to the modification made in the Act and as enacted in the Schedule. By clause 6 (2) of the Schedule the acquiring authority was not liable to pay 15% solatium when the land is situated in an area declared to be congested or slum area and is not in actual possession of the owner. The lands in those cases were not in the slum area. Therefore, solatium was payable under Act XVI of 1945. This Act, however, was replaced by Act XXXVII of 1950. Although substantially the scheme was the same, under its schedule, section 23 (2) of the Land Acquisition Act was omitted and it was substituted by other provision. By this provision, persons whose lands were acquired under the said Act were not entitled to get 15% solatium.

The Supreme Court observed:

"It is true that by Cl. 6 of the Schedule to Act 16 of 1945 solatium was awardable to the owners of the lands acquired for the Improvement Trusts, but since by S. 173 (2) of Act 37 of 1950 all the proceedings which were commenced under the Act of 1945 were to be deemed to be taken under Act 37 of 1950, the compensation awardable by virtue of Cl. 6 of the schedule to the New Act read with Section 173 (2) of that Act could not include the statutory solatium. The Legislature has thereby deprived the owners of the lands of a right to compensation even in proceedings for acquisition commenced before Act 37 of 1950." It is in this background that it was held:

"But, in our judgment, counsel for the owners are right in contending that Sub-cl. (2) of Cl. 6 of the Schedule to Act 37 of 1950, in so far as it deprived the owners of the lands of the statutory addition to the value of the lands under

Section 23 (2) of the Land Acquisition Act is violative of the equality clause of the Constitution, and is on that account void. If the State had acquired the lands for improvement of the town under the Land Acquisition Act the acquiring authority was bound to award in addition to the market value 15 per cent solatium under Section 23 (2) of the Land Acquisition Act. But by acquiring the lands under the Land Acquisition Act as modified by the Schedule to the Madras City Improvement Trust Act 37 of 1950 for the Improvement Trust which also is a public purpose, the owners are, it is claimed, deprived of the right to the statutory addition. An owner of land is ordinarily entitled to receive the solatium in addition to the market value, for compulsory acquisition of his land, if it is acquired under the Land Acquisition Act, but not if it is acquired under the Madras City Improvement Trust Act. A clear case of discrimination which infringes the guarantee of equal protection of the law arises and the provision which is more prejudicial to the owners of the lands which are compulsorily acquired must on the decision of this Court, be deemed invalid."

This case is easily distinguishable on the facts and the enactments considered in that case which bear, in our view, no similarity with the present case.

40. It was then argued that the notifications declaring the respective areas as slum areas is an abuse of power and therefore bad. The contention has very little substance. It is true that it is common to empower administrative authorities like the Govt. to follow a given course of action when they were 'satisfied' that a prescribed state of affairs existed. Section 3 is worded on the same lines conferring on the Government what is called an exercise of discretion based on a subjective formula. At one time, the Courts were usually inclined to interpret such grant of power literally and in general refused to go behind the assertion of the competent authority that it was in fact honestly satisfied as to the existence of the conditions precedent to the exercise of the powers. The balance now has definitely shifted and the Courts now are less ready to accept the conclusiveness of the Government's opinion on a question of law or fact. The task of the Court becomes easier if the statute grants power in subjective terms by reference to certain definite standards.

The crucial question, however, always has been as to in what circumstances and to what extent will the High Court review the merits of the exercise of a statutory discretion, particularly when it is couched in subjective formula. One thing, however, is clear that the Court will not substitute its own dis-

cretion for that of the Government, which the discretion has been consigned. Nor will it direct as to in what direction the authority should exercise its discretion, while it may be directed to exercise its discretion one way or the other. It is now fairly settled that apart from the cases of mala fide, the Court can intervene wherever it is found that where there was no material whatsoever before the Government, to arrive at the conclusion or that it lacks in any evidentiary support or is perverse. The Court can also interfere when it finds that the Government has not taken the relevant matter mentioned in Section 3 into consideration or has considered matters which are not germane or are irrelevant or has exercised the discretion for a purpose not warranted by the Act, or has committed any error in taking any essential procedural step as is required by the law. In all such cases, it will hold the exercise of power ultra vires because the Government or the competent authority would not be deemed to have been genuinely satisfied that it was appropriate for the purpose sanctioned by the Legislature.

41. Thus if on some such ground it can be established that the Government could not have been so satisfied, this Court will be entitled to hold the decision to be invalid unless the Government itself persuades the Court that it did in fact genuinely form the opinion which it claims to have held. If, on the other hand, the exercise of the power is free of any such blemish, then it is obvious that the Court cannot consider the merits of the decision of the Government. It is only in this context it has to be held that the law is not powerless when Legislature gives even an unfettered discretion to a Government. In theory every discretion is capable of unlawful abuse. In fact the Courts have been usually astute to detect implied limits in the vague or wide subjective expression such as used in section 3.

42. It is in this background that we have to examine the arguments advanced before us.

43. In W. P. No. 364 of 1964, Mr. Jagannadha Rao, the learned counsel for the petitioner, contended that previously part of the plot in question admeasuring 3 acres and 50 cents was acquired by the Government under the Land Acquisition Act for providing house sites to Harijans. The present plot, although resurveyed as T. S. No. 1050/1, is sought to be acquired under the impugned Act. This, in his submission shows the arbitrariness of the Government and therefore mala fide. He further contended that the petitioner had submitted a lay out and was himself willing to improve the area. Therefore, the

ment cannot properly notify the road as slum area. This notification, about coming to him, is merely intended to deprive the petitioner of the market price which is very high because of the situation of the plot.

44. These assertions, however, are denied by the Government in its counter. According to it, T. S. No. 1050/2 does not belong to the petitioner and it was not acquired by the Government. That belongs to Sri A. V. Bhanaji Rao who has gifted a portion of it to the Municipality. The rest of it is also notified as slum area under the impugned Act only.

45. In view of this denial it is not possible to decide disputed questions of fact. The petitioner has not also filed any material to satisfactorily prove his allegation. In these circumstances, it will not be correct to charge the Government of acting arbitrarily and not bona fide. If the petitioner is the owner of the land he can claim the compensation and if the land is yielding more rent, he will get adequate compensation under the Act and if he does not so get, he has remedies open to him. We do not therefore think that on this ground the impugned notification can be said to be bad in law.

46. The fact that the petitioner himself was willing to improve his land does not alter the position of law. Moreover the purpose of the petitioner in improving the land is entirely different than the purpose with which the Government is improving it. This Court is not competent to decide on the merits of the case. It is left to the satisfaction of the Government to determine whether a particular area is a slum area or not. It has to be decided by the Government. In the absence of any vice as pointed out above in the exercise of such power, it is not possible for this Court to sit in judgment over the merits of that decision and substitute its own opinion to that of the Government.

47. In Writ Petition No. 734 of 1965, the only contention raised was that the Town Municipality had offered to purchase privately but then backed out. That is denied. Even otherwise, in our opinion, it does not affect the validity of the notification issued.

48. There is also no substance in the contention that the area is not a slum area. That is a question which has to be decided by the competent authority and not by this Court. As observed above, the quantum of compensation has to be determined in accordance with the provisions of the Act. It is premature to say that the petitioner will not be paid adequate compensation under the Act. The contention that the declaration is intended to grab very valuable house sites under the cloak of the impugned

Act for political ends has not been substantiated by any acceptable evidence. This allegation is denied in the counter.

49. No other contention in that behalf was raised before us by any other petitioner. We are therefore satisfied that the impugned notifications cannot be said to suffer from any such infirmity. The notifications were issued by the competent authorities and no vice was pointed out in the exercise of their discretion which would permit this court to interfere.

50. The next contention was that Section 6 read with the schedule is ultra vires of Article 31 (2).

51. Now, under Article 31 (2) as it stands now, no property shall be acquired save by authority of a law which provides for compensation for the property and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined and given. It provides that no such law shall be called in question in any court on the ground that compensation provided by such law is not adequate.

52. Whatever may have been the position prior to 27-4-1955, thereafter, because of the Constitution (4th amendment) Act of 1955 amending clause 2 in Art. 31, the question of adequacy of compensation is made non-justiciable leaving it to the final judgment of the Legislature.

53. A law coming under Article 31 (2) is no longer open to attack in a court of law on the ground that the compensation provided by the Legislature is not adequate, that is to say, being less than the market value of the property or being less than the money equivalent of what the owner had been deprived of. Thus, as soon as the Legislature fixes the amount of compensation or specifies the principles on which the compensation is to be determined, it has discharged its duty and the aggrieved owner is not now entitled to challenge the constitutionality of the law on the ground that the compensation provided for is not adequate. In other words, that it does not give him the full monetary equivalent of the property taken from him. It will thus be seen that the scope of judicial intervention in matters relating to compensation for the property acquired is now very limited having regard to Article 31 (2).

54. The only question, which continues to be justiciable, is when the law under which the acquisition or requisition is made does not provide for compensation at all or lays down principles which in effect provide for payment of no compensation or in either case provides only illusory compensation. Thus though the form and manner in which the compensation is payable are matters for the deter-

mination provides (sic) merely a cloak for confiscatory legislation or constitutes a fraud on the Constitution by providing illusory compensation, or where the compensation is based on something which is unrelated to facts because unrelativity of compensation may in particular circumstances result in more than mere inadequacy of compensation.

55. But if the Legislature has either fixed the amount of compensation which cannot be said to be illusory or it has specified principles on which and the manner in which the compensation is to be determined and given and as a result some compensation is payable which is real there cannot be any challenge to the provision for compensation in such an enactment either under Article 31 (2) or under the general doctrine of colourable legislation.

56. It is in our view, unnecessary to discuss the decisions on this question cited at the Bar. It is enough if we refer to the latest decision of the Supreme Court in State of Gujarat v. Shantilal, AIR 1969 SC 634. In that case all the previous decisions have been considered. Their Lordships observed:

"The amendment made in Cl. (2) of Art. 31 by the Constitution (Fourth Amendment) Act, 1955 makes it clear that adequacy of compensation fixed by the Legislature or awarded according to the principles specified by the legislature for determination is not justiciable. It clearly follows from the terms of Article 31 (2) as amended that the amount of compensation payable, if fixed by the legislature, is not justiciable, because the challenge in such a case apart from a plea of abuse of legislative power, would be only a challenge to the adequacy of compensation."

Their Lordships further observed:

"If the quantum of compensation fixed by the Legislature is not liable to be canvassed before the court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent."

Their Lordships also said:

"Principles may be challenged on the ground that they are irrelevant to the determination of compensation, but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable."

57. It is relevant to note that Vajravelu's case, AIR 1965 SC 1017 was also

considered in detail in that case. Supreme Court after referring to some of the passages in that case observed:

"These observations were, however, not necessary for the purpose of the decision in that case."

58. It is true that the line dividing 'illusory' from 'inadequacy' of compensation is not very easy to draw. It has however to be decided in the light of the facts and circumstances of each case as to whether the compensation is illusory. In any event compensation ranging from 30 to 50 per cent of the value of the property acquired could not be called as illusory without an abuse of the language. It is a question to be determined in each case and no hard and fast rule can in that behalf be laid down.

59. Let us then examine in this limited field the arguments with a view to find out whether the provisions of the Act regarding compensation contravene Art. 31 (2).

60. It is already noticed that S. 6 provides the basis of determination of compensation. The net average annual income is to be calculated in the manner and in accordance with the principle set out in the schedule to the Act. We have already referred to the various clauses of the schedule while considering their validity.

61. From a reading of these provisions which relate to compensation, it is not doubted that the Act specifies the principles on which and the manner in which the compensation is to be determined and given. Capitalisation of the value of the land acquired by multiplying the rental income from the property acquired is one of the recognised modes of determining the compensation of the property acquired. It cannot therefore be validly contended that the basis on which and the manner in which the compensation is to be determined is non-existent or unrelated to the facts and consequently cannot have a conceivable bearing on any principle of compensation. It cannot also be in doubt that the compensation determined on such a principle would be something real. It may not be adequate or may not be equal to the market value. But that question is not justiciable. It is presumed that a land owner would not give his land or building on rent which does not fetch him a reasonable return on the capital which he invested in acquiring that property. If it is so, then the compensation determined on such capitalisation of the rent can in no case be said to be illusory. Nor can it be legitimately contended that the provisions relating to compensation are colourable piece of legislation.

62. It is relevant to point out that the petitioners have not produced before us sufficient or satisfactory material on

62. The basis of which if compensation in the manner prescribed is worked out, it will be found as illusory amounting to no compensation at all. In these circumstances, the contention that section 6 read with the schedule offends Article 31 (2) cannot be accepted as correct. We therefore feel no difficulty in rejecting this contention also.

63. The only contention which survives for our consideration is raised by Sri T. Ramachandrarao, in his case. In W. P. 1771 of 1966 a separate question arises and has to be considered separately. What happened in that case is that in 1962 proceedings under the Land Acquisition Act for acquiring a portion of the petitioner's land of an extent of 11,524 square yards excluding the temple and its appurtenant site were commenced. The petitioners objected to the acquisition and also claimed compensation at a particular rate. The case was being adjourned from time to time. It is the case of the petitioner that no orders in that case have been passed. The petitioners therefore were under the impression that the matter is still pending.

64. While so the petitioners saw a board put up on the site indicating that the land was taken over by the Municipal Commissioner Hyderabad Corporation. The petitioners issued a notice on 5-10-1966 to which no reply was received.

65. A notification under section 3 (1) of the Act was issued by the 2nd respondent declaring the land as slum area. The petitioners contend that no notice was given to them before the State Government applied Section 15 of the impugned Act to the pending proceedings under the Land Acquisition Act. Nor a notice was given to the petitioners under section 3 of the Act with the result that they have been deprived of an opportunity of objecting to the declaration under section 3 (1) that the land is in a slum area. It is not denied by the 2nd respondent that any notice was given to the petitioners. The question therefore is what is the effect of not giving the notice to the petitioners on the impugned notification issued under Section 3 (1).

66. Now, under Section 3 (1) where the Government are satisfied that any area is or may be a source of danger to the public health, safety or convenience of its neighbourhood by reason of the area being low lying, unsanitary, squalid or otherwise they may by notification in the gazette declare such area to be a slum area.

67. This sub-section does not speak of any prior notice to the owners of the land affected by any such notification, nor it requires them to be heard before any such notification is published.

68. Section 3 (2) then states that where the Government are satisfied that it is necessary to acquire any land in a slum area for the purpose of clearing or improving the area they may acquire the land by publishing in the gazette a notice to the effect that they have decided to acquire it in pursuance of the section.

69. There is a proviso attached to the Sub-section. According to it, before publishing such notice that is to say the notice referred to in Sub-section (2) the Government shall call upon the owner of or any person interested in the land to show cause why it should not be so acquired. The Government after considering the case if any may pass such order as it thinks fit.

70. The explanation entitles the person interested in the land to show cause (1) against the declaration of the area as a slum area under section 3 (1) as well as (2) against the necessity to acquire the land for the purpose of clearing or improving the area.

71. It is true that while proviso to sub-section (2) speaks both of the owner as well as of the person interested in the land, but the explanation speaks only of persons interested in the land. We have however no doubt that the expression 'the person interested' would include even the owner of the land. There appears to be no reason as to why the owner should be deprived of an opportunity of objecting both to the declaration under section 3 (1) as well as the intention to acquire the land under section 3 (2) just as a person interested in the land can object. This is just a case of accidental omission but the intention of the Legislature is clear from the proviso itself.

72. A close reading of sub-section (2) makes it abundantly plain that before a notice under section 3 (2) is published, it is the statutory duty of the Government to call upon the owner and the person interested in the land to show cause. Such a cause shall be shown both in regard to the notification under section 3 (1) as well as the necessity to acquire the land. It thus provides opportunity to the owner and the person interested in the land to object to the declaration that it is a slum area, although such opportunity is given only after the declaration.

73. What all section 15 does is to apply the Act to certain pending cases of acquisition. According to the section, if the Government so direct, the provisions of the Act shall apply to a pending case of acquisition under the Land Acquisition Act, 1894 in which award is not made.

74. The section does not require any notice to be given to the parties in the pending cases before or even after the

Government has so directed that the provisions of the Act shall apply to their case.

75. The effect of such a direction according to section 15 is that notice under the Land Acquisition Act, whether it is given under Section 4, 6 or 9 will be deemed to be a notice "served by the Government" under the proviso to sub-section (2) of section 3 of the impugned Act.

76. Thus any notice under any of the said sections of the Land Acquisition Act is considered as a notice under the proviso to Section 3 (2) of the Act. If that is so, then the Government could not have issued a notice under section 3 (2) without hearing the petitioners as was done in the present case. It is true that section 15 after equating the notice under the Land Acquisition Act to that of a notice under the proviso to section 3 (2) does not speak of any notice of the action taken by the Government to the parties in the pending case. But the question is how are the parties to the pending cases to know that the Government has directed that the provisions of the Act are made applicable to the pending cases? In such a case, natural justice requires that the persons liable to be affected by the Government's directions are given adequate notice of at least what is directed by the Government under S. 15 in their pending cases, if not before the Government proposes to apply the provisions of the Act to their case, so that they can raise objections both in regard to declaration of their land as slum area and about the necessity of acquiring their land as is visualised by the explanation to the proviso to S. 3 (2).

It is a recognised right that "no man is to be deprived of his property without his having an opportunity of being heard".

It is laid down in the oft quoted judgment of Byles J. in *Cooper v. Wandsworth Board of Works*, (1863) 14 C. B. (N. S.) 180 at p. 194 that

"although there may be no positive words in a statute requiring that a party shall be heard, yet a long course of decisions beginning with *Dr. Bentley's case*, (1723) 1 Str. 557 established that the question of the common law will supply the omission of the legislature."

77. Although thus there are no positive words in section 15 to that effect, the inevitable result which flows from section 15 read with section 3 (2) is that a notice ought to be given to the parties in the pending cases at least after the decision is taken by the Government under section 15 to direct the application of the provisions of the Act to their pending cases so that they can avail themselves of the opportunity which the Legislature has provided in Section 3 (2). It is conceded before us that no notice

of such a kind was given. The notice published by the Government under section 3 (2) therefore is bad in law and has to be struck down because it offends the principles of natural justice. It is open to the Government or the competent authority to issue notice to the parties in the pending case and after hearing them under section 3 (2) decide the matter in accordance with law.

78. The result of the foregoing is that W. P. No. 1771 of 1966 is allowed and the impugned notification under S. 3 (2) is quashed. The petitioners will get their costs. Advocate's fee Rs. 100/-.

79. Clause 2 (2) of the Schedule of the impugned Act is struck down as ultra vires of Article 14 of the Constitution. Subject to this, the other writ petitions are dismissed with costs. Advocate's fee Rs. 50/- in each case.

80. **CHINNAPPA REDDY, J.:** I agreed with the conclusions of my learned brother Gopal Rao Ekbote J., but I would like to add a few words of my own.

81. On the question of vires of Clause 2 (2) of the Schedule I would prefer to rest my conclusion on the ground that it confers on the Government an arbitrary and unguided power to prescribe the 'deemed' number of huts without prescribing or indicating the principles on which the 'deemed' number may be arrived at. I am not convinced that because compensation is awarded on the basis of actual income in the case of buildings and land, the legislature is bound to adopt the same basis for huts also. I see no impediment in the way of the legislature adopting a different basis in the case of huts. It is open to the legislature to adopt a hut or standard hut as a unit of measure and say there shall be deemed to be so many huts or standard huts per acre and so much shall be paid for each hut or standard hut.

82. On the question whether S. 6 of the Act offends the provision of Article 31 (2) of the Constitution, I would content myself by saying that S. 6 adopts a well known principle of capitalisation on the basis of rentals, a principle which cannot be said to be irrelevant for the purpose of assessing compensation. That is sufficient to hold Section 6 valid. I would guard myself against any general observation regarding the grounds on which 'compensation may still be questioned'.

Order accordingly.

AIR 1970 ANDHRA PRADESH 332
(V 57 C 53)

FULL BENCH

**OBUL REDDI, CHINNAPPA REDDY,
AND MADHAVA REDDY JJ.**

G. P. V. A. Subrahmanyam and others, Petitioners v. Commissioner, Corporation of Hyderabad, Respondent.

Writ Petn. No. 294 of 1965, and Civil Misc. Petn. Nos. 1188 and 1189 of 1968, D/- 3-12-1969.

(A) Civil P. C. (1908) Pre. — Interpretation of Statutes — Rule of construction — Additions — Reading of words in provision not there — Not justifiable.

(Para 4)

(B) Municipalities — Hyderabad Municipal Corporation Act (2 of 1956) S. 252 — Levy of octroi — Cocoanut is not leviable to Octroi duty — (1965) 2 Andh LT 445 & Decisions in W.A. Nos. 116 of 1964 and 4 of 1965 (Andh Pra) Overruled; AIR 1967 Mys. 127 Followed. (Para 5)

Cases Referred: Chronological Paras
(1967) AIR 1967 Mys 127 (V 54) =

(1965) 2 Mys LJ 421, Abdul Karim v. City Municipality Gulbarga	5
(1965) 1965-2 Andh LT 445, Rawatmal v. Commr., Municipal Corporation of Hyderabad	5
(1964) Writ Appeals Nos. 116 of 1964 and 4 of 1965 (Andh Pra)	1, 5

M. B. Rama Sarma, for Petitioners, Y. Suryanarayana for D. Narasaraaju and O. Audinarayana Reddy for P. Ramachandra Reddy, for Respondent.

CHINNAPPA REDDY, J.: This Writ Petition came up for hearing before one of us in the first instance and was referred to a Division Bench as it was thought that the decision of the Division Bench in W. A. Nos. 116 of 1964 and 4 of 1965 (Andh Pra) required reconsideration. Thereafter it came up for hearing before Kumarayya J. (as he then was) and Kondaiah J. who referred it to a Full Bench as they also doubted the correctness of the earlier decision.

2. The question is a simple one. The petitioner import cocoanuts into the limits of Hyderabad Municipal Corporation from the coastal Districts of Andhra Pradesh and from Kerala. In March 1965 the Octroi Staff of the Municipal Corporation stopped lorries bringing cocoanuts into the city and compulsorily exacted Octroi from the petitioners. The petitioners claim that the levy of Octroi duty on cocoanuts is illegal as cocoanut is not one of the articles mentioned in Schedule H of the Hyderabad Municipal Corporation Act as an article on which Octroi duty could be levied. I may incidentally mention here that Octroi duty was abolished since the filing of the Writ Petition.

3. Section 252 of the Hyderabad Municipal Corporation Act authorises the levy of Octroi duty in respect of the several articles mentioned in Schedule H. The articles mentioned in Schedule H are, 'Grain of all sorts', 'Flour of all sorts', 'Wines and Spirits', 'Beer', 'Sugar', 'molasses and gur', 'ghee', 'Ghee substitutes', 'Timber', 'Plywood', 'Firewood', 'Charcoal', 'Tea', 'Coal', 'Dates', 'Cement', 'Iron and Steel', 'Paper', and under the head 'Edible':—

- (a) Bacon and Ham
- (b) Table Butter.
- (c) Fruits (canned, tinned, bottled, boxed or cartoned)
- (d) Fish (canned, tinned, bottled, boxed, or cartoned).
- (e) Cheese.
- (f) Confectionery.
- (g) Jams and Jellies.
- (h) Milk condensed and preserved.
- (i) All sorts of farinaceous foods.
- (j) Pickles.
- (k) Cocoa and chocolates.
- (l) Biscuits and cakes.
- (m) Lard.
- (n) Fruit juices and all beverages.
- (o) All kinds of food and drink not specifically provided for (canned, tinned, bottled, boxed or cartoned).
- (p) Whole milk Powder.
- (q) Skimmed Milk Powder.
- (r) Mawa and milk cream.

4. According to the learned counsel for the Municipal Corporation Entry 'O' is wide enough to take in every kind of food and drink including 'cocoanuts'. The learned counsel urges that the words 'canned etc., occurring within brackets are not to be read as words of limitation or qualification but rather as words of clarification or amplification. The learned counsel wants us to read the entry as "all kinds of food and drink not expressly provided for, including canned etc., food and drink" as or as 'all kinds of food and drink not expressly provided for, whether canned etc., or not.' In the first place we see no justification for reading words into the entry which are not there. In the second place there is no reason to read these words into the entry to achieve a meaning which is easily achieved by altogether omitting the words within brackets. To read the entry as suggested by the learned counsel would be to render not only the words within the brackets in that entry but also all other entries under the heading 'Edible' superfluous. To do that would be to run counter to well-known principles of statutory construction.

5. In Rawatmal v. Commr., Municipal Corporation of Hyderabad, (1965) 2 Andh LT 445 Gopalkrishnan Nair, J. accepted the construction which the learned counsel for the Municipal Corporation now presses upon us. The learned Judge observed "If the interpretation contend-

ed for by the petitioners is accepted the words outside the bracket in items (c) and (o) cannot be given their ordinary meaning and effect. If the legislature wanted only to tax canned or tinned fruits or canned or tinned varieties of food as the case may be it could easily have stated so without using any words within brackets in items (c) and (o). As these items now read it seems to me that the intention was clearly to tax fruits and all kinds of food and drink not specifically provided for. The purpose of stating the words "canned, tinned, etc., within brackets appears to be to emphasise that full scope and effect should be given to the main words outside the brackets." With great respect we do not agree. If the object was to tax all kinds of food and drink, nothing could have been easier than to omit altogether the words within brackets and the object would have been achieved.

The learned Judge went on to observe: "Besides, the interpretation contended for on behalf of the petitioners will make for easy evasion of payment of the octroi duty. Suppose only canned, tinned, bottled, boxed or cartoned food is dutiable; it would be easy for a trader to take the food out of the cans, tins, etc. and put them in gunny bags or other receptacles and thereby escape altogether the payment of octroi duty. A construction which enables such an easy chance of escape and evasion and which is likely to defeat the apparent intention of the legislature cannot reasonably be accepted." This appears to us to be extremely far fetched. We are unable to conceive of any trader who would take the food out of the cans, tins etc., and put it in gunny bags or receptacles. Processed and preserved food which is taken out of a can or tin is ready for consumption or cooking. It cannot be put in a gunny bag etc. To do so is to spoil it. In W. A. Nos. 116 of 1964 and 4 of 1965 Manohar Pershad C. J., and Mirza J., merely repeated the reasons given by Gopalkrishnan Nair, J. and it is therefore unnecessary to consider their reasons separately except to say that we do not agree with their reasons. The construction placed by us upon Entry (o) is supported by a judgment of the Mysore High Court in Abdul Karim v. City Municipality, AIR 1967 Mys 127. We hold that coconut is not leviable to Octroi duty under the Hyderabad Municipal Corporation Act. The Writ Petition is therefore allowed with costs. A direction will issue for refund of the Octroi duty collected from the petitioners in respect of coconuts. Advocate's fee Rs. 100/-.

Petition allowed.

AIR 1970 ANDHRA PRADESH 333
(V 57 C 54)

FULL BENCH

NARASIMHAM, KRISHNA RAO AND
KUPPUSWAMI, JJ.

K. Parvathamma, Petitioner v. The Commissioner of Excise (Board of Revenue) Govt. of A. P. Hyderabad and others, Respondents.

Writ Petn. No. 1307 of 1967, D/- 23-12-1969.

(A) Tenancy Laws — A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1950 before amendment by Third Amendment Act 12 of 1969) S. 47 — Sale in invitum (Revenue Sale) is transfer within meaning of S. 47 — Prior sanction under S. 47 for sale in invitum is required only before confirmation of sale — After amendment, however, no sanction is at all necessary before confirming sale—(1967) 2 Andh WR 17 (FB). Considered. (Paras 8, 11, 12)

(B) Hyderabad Land Revenue Act (8 of 1317 Fasli) S. 138 — Revenue sale — Sanction under S. 47 of A. P. (Telangana Area) Tenancy and Agricultural Lands Act (21 of 1950) before amendment by Third Amendment Act 12 of 1969) was required before confirmation of sale. (Paras 11, 12)

Cases Referred: Chronological Paras
(1968) 1968-2 Andh WR 162, Narayana Reddy v. Collector, Nizamabad 7

(1967) 1967-2 Andh WR 17 (FB), Ramakistiah v. M. Pochiah 6, 7, 8, 11

(1964) AIR 1964 Andh Pra 514 (V 51)=(1964) 1 Andh WR 319.

Ambiah v. Mallanna 5, 7

(1949) AIR 1949 All 127 (V 36)=
ILR (1948) All 398, S. Zalim

Singh v. Mt. Bhagirathi 11

G. Haridatha Reddy, for Petitioner, P. Krishna Reddy for the 2nd Govt. Pleader on behalf of Respondents, Nos. 1 to 3; B.P. Jeevan Reddy, for Respondents Nos. 4 and 5.

KRISHNA RAO, J.: The question involved in this writ petition which is posted before a Full Bench may be stated as follows:

"What is the stage at which prior sanction should be obtained under S. 47 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950, when Agricultural lands are brought to sale under the provisions of the Hyderabad Land Revenue Act (VIII of 1317 Fasli)?"

2. In order to appreciate the point of controversy, it is necessary to refer to the facts and circumstances out of which the above writ petition has arisen as also the relevant provisions of law.

3. The petitioner filed an application under Article 226 of the Constitution of India for the issue of a writ in the nature of Mandamus directing the second respondent, the Collector of Hyderabad, to hold a fresh auction relating to file No. 1604/58/D5 on the basis of the following allegations. The petitioner's father became liable to pay a sum of Rs. 18, 866-8-0 to the Government being excise arrears and the said sum was sought to be realised by the Government under the provisions of the Hyderabad Land Revenue Act as arrears of land revenue. The properties of the petitioner's father situate in Jundapalli Village, Tandur taluk, Hyderabad district, more particularly described in the affidavit filed in support of this Writ petition, were put up for auction by the revenue officials on 16-5-1962, when the 5th respondent herein became the highest bidder for Rs. 15,300/- having deposited one-fourth of the bid amount as required by law on the acceptance of his bid. The said auction bid was approved or sanctioned by the Collector as a result of which the auction was closed.

The petitioner thereupon filed writ petition No. 554 of 1962, her father having died by that time, challenging the auction held by the Government on various grounds and obtained stay of all further proceedings, pending disposal of the said Writ petition. The writ petition was ultimately dismissed on 13-2-1967 and as the order of stay was no longer operative, the collector issued a notice on 26-6-1967 calling upon the purchaser (5th Respondent) to pay the balance of the sale price. The 5th respondent having received the notice on 27-6-1967, immediately complied with the same by depositing the requisite amount on 28-6-1967. Before the sale could be confirmed, the petitioner again approached this court by filing the present writ petition on 3-7-1967 and obtained stay of all further proceedings.

3a. The main point raised on behalf of the petitioner in this writ petition is that the auction held on 16-5-1962 was illegal as the requisite sanction under section 47 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act was not obtained and that the properties should therefore be put up for re-auction. It was also urged that as the purchaser failed to deposit the balance of purchase money within 30 days, the property should be reaucted. On behalf of the Government as well as the 5th respondent affidavits were filed in opposition contending that no sanction was necessary at the stage of the auction and that the auction purchaser could not deposit the balance of purchase money on account of the order of stay issued by this Court in the previous writ petition and that there was therefore no need for conducting a fresh auction. When the writ petition came up for hearing in the

first instance before Basi Reddy J., the case was posted before a Division Bench in view of the fact that the point raised herein was specifically left open in a previous decision of this court. After the case came up for hearing before the Division Bench consisting of the Acting Chief Justice and Kondaiah, J., the case was directed to be posted before a Full Bench as it was found necessary to resolve some apparent conflict of authorities which will be now referred to.

4. Before referring to the relevant authorities, it is necessary to set out the provisions of section 47 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950 which are as follows:

"47. (1) Notwithstanding anything contained in any other law for the time being in force or in any decree or order of a court, no permanent alienation and no other transfer of agricultural lands shall be valid unless it has been made with the previous sanction of the Tahsildar;

Provided. . . ."

Section 48 of the Act lays down the various circumstances to be taken into account for granting of sanction under section 47 and the procedure for obtaining sanction is laid down in the rules framed under the Act.

5. In *Ambiah v. Mallanna*, AIR 1964 Andh Pra 514 a Division Bench of this Court consisting of Chandra Reddy, C. J. and Anantarayana Ayyar, J. held (i) that the provisions of Section 47 (supra) not only apply to transfer inter vivos but are equally applicable to a transfer by operation by law which takes place when property is sold in a court auction; (ii) that such sanction should be obtained even before the properties are attached by the decree-holder with a view to bring them to sale through court and that in the absence of such a sanction the order of attachment is illegal.

6. The correctness of the above decision, in so far as it declared the order of attachment as illegal, was questioned before a Full Bench in *P. E. Ramakistiah v. M. Pochiah*, (1967) 2 Andh WR 17 (FB) consisting of Jaganmohan Reddy, Narasimham and Venkatesam, JJ. Before the Full Bench, the case proceeded on the assumption that the provisions of S. 47 of the Tenancy Act applied to sales in execution of a decree. It was held by the Full Bench that as the object of an order of attachment is merely to prevent the judgment-debtor from disposing of the property to the detriment of the decree-holder and that it does not operate to transfer any property under law, no sanction was necessary under section 47 at the stage of attachment of the properties. The question as to the appropriate stage at which sanction should be

obtained during a court sale was left open as it was beyond the scope of the reference before the Full Bench. But nevertheless, it was observed by the Full Bench that sanction would no doubt be necessary for "effecting a court sale." In pursuance of the opinion given by the Full Bench, the case was posted for final disposal before a Division Bench consisting of Jagannmohan Reddy, O. C. J., and Krishna Rao, J., before whom the question as to the appropriate stage for obtaining sanction was raised. It was held by the Division Bench as follows:

"The net result of this discussion is that while there is no need for any permission under Section 47 for attachment of immovable property in execution of the decree, such a permission would be necessary before the confirmation of the sale. The auction and sale must first take place in order to determine who the purchaser is and once that is determined it is for the purchaser to apply for permission and then apply for confirmation."

7. The principle laid down in AIR 1964 Andh Pra 514 applying the provisions of section 47 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950 to court sales which was left untouched by the subsequent Full Bench decision in (1967) 2 Andh WR 17 (FB) was followed and applied to the case of a revenue sale under the provisions of the Madras Revenue Recovery Act by a Division Bench of this Court (Chandrasekhara Sastry, J. and Krishna Rao, J.) in *Narayana Reddy v. Collector, Nizamabad*, (1968) 2 Andh WR 162 observing that the auction purchaser should obtain the necessary permission under section 47 from the Tahsildar before he obtains a valid title to the property on confirmation of the sale.

8. The result of the above decisions may be summed up as follows: The provisions of section 47 of the A. P. (Telangana Area) Tenancy and Agricultural Lands Act, 1950 requiring prior sanction of the Tahsildar for effecting an alienation or a transfer are equally applicable to transfers by operation of law when properties are sold in auction by a civil court as well as by the revenue officials under the provisions of the Madras Revenue Recovery Act. In the case of private alienations the rule is well settled that prior sanction should be obtained before the registration of the document, that is, at the stage when the title to the property passes to the purchaser. Likewise, in the case of involuntary sales, sanction should be obtained before the sale is confirmed, that is, the stage at which there is a transfer of property by operation of law. Notwithstanding the directions given by the Division Bench in (1967) 2 Andh WR 17 (FB) that sanction should be obtained by the purchaser,

that is the person whose bid at the auction is accepted before the order of confirmation, the learned counsel for the petitioner argued that in view of the specific provisions contained in the Hyderabad Land Revenue Act which do not find a place in the C. P. C. or the Madras Revenue Recovery Act, the requisite sanction should be obtained even before the Collector sanctions the auction and under section 134 of the Act which declares that the sale is concluded by the order of the Collector. In order to appreciate this subtle distinction, it is necessary to refer to the relevant provisions of the Hyderabad Land Revenue Act.

9. Section 132 provides that Collector should hold the sale by auction. Section 134 reads as follows:

"134. Every sale of immovable property shall be finally concluded by the sanction of the Collector and that of movable property by the sanction of the officer empowered by the collector by a general or special order."

Section 135 provides for the auction-purchaser paying one-fourth of the bid amount and for payment of the balance within 30 days of the receipt of the Collector's notice. Section 136 empowers the Collector to re-auction the property if the balance of sale price is not paid as aforesaid. Section 138 enables the defaulter to file an application to set aside the sale on grounds of fraud, irregularity etc., in the conduct of the proceedings.

Section 139 provides for the final confirmation of sale as follows:

"139. If application for setting aside the sale is not made under the preceding section or has been made and rejected the collector shall make an order confirming the sale, and if he thinks that the sale may be set aside on reasonable grounds though no such grounds were set forth in the application rejected, he may, after recording his reasons, make an order setting aside the sale."

When the sale is not so confirmed, the purchaser will be entitled to a refund of the purchase-money under section 140. Section 141 provides for the consequences of the confirmation of the sale in the following terms:

"141. Where a sale of a holding for which an arrear of land revenue is due is confirmed in accordance with the aforesaid provisions, the Collector shall put the auction-purchaser into possession of the same and shall grant him a certificate to the effect that the person has purchased the occupancy right of the land. The certificate shall be treated as an authority for transfer of that land and the name of the auction-purchaser shall be entered into the village records as a pattadar; and no suit against the purchaser whose name has been recorded in such certificate shall be entertained in a

Civil Court on the ground that the Certificate holder is not in fact the purchaser but that by mutual agreement certificate has been made in his name."

The above section provides for entering the name of the purchaser in the revenue records consequent upon the issue of a sale certificate and it is not necessary for our purpose to refer to the other provisions in detail.

10. It is seen from the above provisions that Section 134 of the Land Revenue Act represents one distinct stage which marks the conclusion of the conduct of the auction. It corresponds to the provisions contained in Order 21 Rule 84 C. P. C. whereby a person is declared as the purchaser at the auction. Even in the absence of such a specific provision like Section 134 what happens at a court sale or at a revenue sale under the Madras Revenue Recovery Act is exactly the same when the auctioning authority is satisfied with the highest bid and accepts the same declaring the bidder as the purchaser. It is only after such a declaration and acceptance that the purchaser is called upon to deposit the advance amount of the purchase money. Thereafter within the time prescribed he should deposit the balance. In default of paying the balance, the provisions in the C. P. C. as well as in the Revenue Acts require that a re-sale should be conducted. A time limit is prescribed within which the judgment-debtor or the defaulter is entitled to raise objections to the sale and may apply to have it set aside on proof of certain irregularities. If no such application is filed or if an application is filed and dismissed, the next and the final stage in the sale proceedings is reached when an order confirming the sale is passed by which the sale becomes absolute. It is incumbent on the collector or the court to pass such an order confirming the sale and there is no specific provision requiring the purchaser to file a separate application inviting the court or the collector to pass an order confirming the same. It is said to be the duty of the court or the collector to make an order making the sale absolute. The passing of such an order confirming the sale marks the final stage when the judgment-debtor loses his title to the property and the auction-purchaser becomes the owner by operation of law. The sale certificate which is issued in pursuance of this order of confirmation is said to be the evidence of the purchaser's title to the property. Section 141 of the Hyderabad Land Revenue Act provides for the issue of a Sale Certificate after an order of confirmation is passed under S. 139 followed by delivery of possession of the property in favour of the purchaser. There is, therefore no difference in principle between a court sale and revenue sale as regards the stage at which there

is a transfer of title by operation of law. The sanction of the Collector under Section 134 of the Land Revenue Act is not intended under law to transfer the title of the defaulter in favour of the purchaser. The expression "sale shall be concluded by the sanction of the Collector" merely means that the process or the conduct of the auction comes to an end with the Collector's approval of the bid. Unless the Collector approves of the bid of any particular purchaser, the question of payment of one-fourth of the purchase money and the balance does not arise. Hence the legal effect of Section 134 is merely to declare that a certain person is recognised as a purchaser. This declaration is obviously provisional in the sense that the sale will be ultimately confirmed in his favour provided that he complies with the other requirements and also provided that the sale is not set aside at the instance of the defaulter.

11. In support of the extreme contention raised by the learned counsel for the petitioner that title to the property passes to the auction-purchaser when the Collector sanctions the sale under S. 134 of the Land Revenue Act, reliance is placed upon a decision of the Allahabad High Court in *S. Zalim Singh v. Mt. Bhagirathi*, AIR 1949 All. 127. It was a case in which after a court sale in execution of a mortgage decree and before its confirmation, an Act was passed prohibiting the sale of land belonging to an agriculturist. An application to set aside the sale which was confirmed subsequent to the said enactment was dismissed holding that there was no prohibition when the sale was effected and that as the purchaser acquired a substantial interest in the property, the said right cannot be deemed to be taken away by any subsequent legislation except by an express provision to that effect. It was further observed that when the sale was confirmed in favour of purchaser the title takes effect from the date of the sale. We do not see how this decision helps the learned counsel for the petitioner.

We quite agree that when a purchaser's bid is accepted, he no doubt acquires a certain interest in the sense that if the requirements of the law are satisfied, he will be entitled to get an order of confirmation of sale followed by the issue of a Sale Certificate. But this does not mean that by virtue of the bid having been accepted he acquires title to the property even before an order of confirmation of sale is passed. If the contention of the learned counsel is to be accepted there is no need under law to pass a subsequent order confirming the sale. It results in an anomalous position viz., the purchaser gets an absolute title to the property, the moment the bid is accepted. He may default in paying the sale

another managing committee was elected or constituted, injury or inconvenience likely to arise from refusing injunction would be greater than that likely to arise from granting it. Hence, the injunction order was proper. (Para 11)

M. H. Choudhury and M. S. Rahman, for Petitioner; B. Islam, D. E. Chaliha, for Opposite Party No. 1.

ORDER: This is a revision petition under section 115, Civil Procedure Code, against an order of injunction issued by the Munsiff, Nowgong, which has been affirmed in appeal by the Assistant District Judge, Nowgong.

2. The opposite party No. 1 as plaintiff filed T. S. No. 114/68 against the petitioner and opposite party No. 2 as defendants in the Munsiff's Court, Nowgong, praying for declaration that the election of the petitioner as the Chairman of the Daboka Marketing Co-operative Society Ltd., in its meeting held on 28-8-68 was void and illegal and that the petitioner was not entitled to hold the office as the Chairman of the said Society. The opposite party No. 1 also filed a petition under Order 39 Rules 1 and 2, read with section 151, Civil Procedure Code, praying for issue of a temporary injunction restraining the petitioner from taking over charge and functioning as the Chairman of the Daboka Co-operative Marketing Society and also restraining the opposite party No. 2 (Defendant No. 2) from handing over charge of the Chairmanship of the said Society to the petitioner.

3. An interim order of injunction was issued in terms of the prayer, and the petitioner and the opposite party No. 2 were asked to show cause why the interim order should not be made absolute. Accordingly the petitioner and the opposite party No. 2 showed causes separately. In his objection the petitioner stated that the plaintiff had no prima facie case and the suit was not maintainable in its present form that irreparable loss and damage to the Society and the public in general would be caused if the injunction were allowed to stay, that the election of the petitioner was already approved by the Department and as such there could not be any reason to continue the injunction and that the suit was filed mala fide in collusion with defendant No. 2—opposite party No. 2. The opposite party No. 2 in his objection stated that the suit was not maintainable and that there was no cause of action, that he was the outgoing Chairman of the Daboka Co-operative Marketing Society and he had been functioning and performing the functions and duties of the society as caretaker of the Society with the aid and help of the former Managing Committee till the election of the new office bearers; that the new

Board of the Society was elected on 6-4-68, and the defendant No. 2 called the first meeting of the Board for election of Chairman and Vice-Chairman on 12-5-68 and the election was held and two persons were elected in the meeting, but the Assistant Registrar (E) refused to accept the election on some untenable pleas, that thereafter the Board's meeting was held on 28-8-68 at the instance of the Assistant Registrar (E) to elect a new committee in which the petitioner was elected Chairman, but till then the representative of the Financing Agency, Apex Bank, had not named its representative and the Board was not fully constituted.

4. The learned Munsiff on a consideration of the facts and circumstances of the case made the interim injunction order absolute by his order dated 23-11-68. Against the said order, the petitioner filed an appeal before the Assistant District Judge who dismissed the appeal after considering the materials on record. Hence this revision petition.

5. Mr. M. H. Choudhury, the learned counsel for the petitioner, submitted that under section 79 (2) of the Assam Co-operative Societies Act, 1949 (Assam Act I of 1950), hereinafter called the Act, Civil Court had no jurisdiction to entertain the suit in question, that the plaintiff (opposite party No. 1) had no cause of action, that the election was approved by the Registrar concerned and therefore the petitioner could not be restrained from functioning as the Chairman by the civil court, and that the old committee could not be directed to function. He further submitted that the balance of convenience was for not issuing the injunction and by issuing the injunction order irreparable loss had been caused to the Society.

6. Mr. B. Islam, the learned counsel appearing for the opposite party No. 1, on the other hand, submitted that the Managing Committee was not constituted in accordance with Bye-law No. 28 of the Bye-laws of the Daboka Marketing Co-operative Society Ltd., and as such the election of the petitioner as Chairman was without jurisdiction and the plaintiff therefore had a prima facie case to go to trial and that the mischief or inconvenience to arise from withholding injunction would be greater than which was likely to arise from granting it and that irreparable loss would be caused if injunction were withheld. He further submitted that the learned Courts below had considered all the aspects of the matter and had come to definite findings that there was a prima facie case to go to trial and that the balance of convenience was for issuing the injunction and that if injunction were refused, the suit as itself would be infructuous, and that the peti-

tioner therefore was not entitled to any remedy in this revision petition.

7. On a scrutiny of the respective cases of the parties, the main point that arises for consideration is whether the Managing Committee which elected the petitioner as the Chairman was constituted in accordance with law or not. If the Managing Committee in question was constituted according to the relevant provisions of law, there would be no valid ground for issuing injunction in the case and the order of the Courts below might be challenged as passed in exercise of jurisdiction illegally and/or with material irregularity.

8. Bye-law No. 18 of the Daboka Marketing Co-operative Society, Ltd., is as follows:

"The Managing Committee shall consist of the following:

- (a) Six A Class members
- (b) Two B Class members
- (c) One nominee of the Central Financing Agency
- (d) One nominee of the Regional or Apex Marketing Society; and
- (e) Three representatives of the State Government."

From the objection filed by defendant No. 2 (Opposite Party No. 2) in the case, it is found that on 28-8-68 when the Board's meeting was held to elect the Chairman, the nominee of the Central Financing Agency, Apex Bank, had not been named. It is therefore clear that when the meeting of the Board was held on 28-8-68, the Central Financing Agency had not yet nominated their representative in the Managing Committee as required under Bye-law No. 28. Section 34 of the Act lays down that the Administrative Council, the managing body and committees of a society shall be constituted in accordance with the bye-laws of the society which shall specify the composition of such bodies, their powers, functions, duties, method of summoning meetings and procedure. That being the position, the members may have to be elected or nominated for constitution of the Managing Committee. In the instant case, the allegation of the plaintiff is that on 28-8-1968 when the Managing Committee was summoned to elect the Chairman, the constitution of it was not complete as required under bye-law No. 28.

9. The suit is for declaration of the election of the defendant No. 1 as Chairman of the Society as illegal. So whether the constitution of the Managing Committee is legal or not will have to be decided in the suit. Even though the election of the petitioner might have been approved by the Registrar, it would be a matter for consideration in the suit itself whether such approval could remove the alleged illegality or irregularity

in the constitution of the Managing Committee, if there be any. In the circumstances, I find that the learned Courts below were correct in their finding that the plaintiff had a prima facie case to go to trial. The point whether the suit is barred under section 79 (2) of the Act or not will have to be decided by the trial Court and I refrain from expressing any opinion in this regard at this stage.

10. Section 79 (2) of the Act reads as follows:

"Save as provided in this Act, no order, decision or award under this Act, or working of the affairs of a registered society shall be liable to be challenged, set aside, modified, revised or declared void in any court on any ground whatsoever except on grounds of jurisdiction." So Civil Court's jurisdiction is not barred where the question of jurisdiction is involved regarding the subject matter of the suit. Hence the suit cannot be said to be prima facie barred under S. 79 (2) of the Act.

11. Bye-law No. 31 of the said Co-operative Society's Bye-laws provides as follows:

"The Managing Committee elected by the General Assembly shall hold office till another Board is elected. Vacancies on the Managing Committee occurring during its term of office on account of death or any other cause shall be filled by co-option."

Under this bye-law, the Managing Committee may continue to hold office till another Managing Committee is elected or constituted. Since the legality of the constitution of the Managing Committee which elected the petitioner as Chairman is questioned in the suit, the injury or inconvenience likely to arise from refusing the injunction would be greater than that likely to arise from granting it. In the circumstances, I hold that the injunction order issued by the Courts below is neither without jurisdiction nor bad in law.

11-A. This revision petition, therefore, has no substance and it is dismissed without costs.

Petition dismissed.

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(V 57 C 23)

S. K. DUTTA, C. J. AND
M. C. PATHAK, J.

N. B. Chakraborty, Petitioner v. The Union of India and others, Respondents.
Civil Rule No. 361 of 1966, D/- 28-8-1969.

Civil Services — Central Civil Services (Temporary Services) Rules (1965), R. 5(1) — Termination of temporary employee under R. 5(1) — Order describing him as "at present under suspension" —

AN/CN/A524/70/DVT/B

Order carries stigma — Compliance with Art. 311(2) before termination of service is necessary — Constitution of India, Art. 311(2).

When the services of a temporary Government servant are terminated under Rule 5(1) it does not ordinary visit with evil consequences or loss of pay and allowances. The Government may also after contemplating to draw up proceedings against a temporary officer for allegations against him, choose not to draw up proceedings but dispense with his services under R. 5(1). Even if the Government decides to draw up proceedings against a temporary officer and accordingly a charge of serious allegations is framed against him and proceeds with the disciplinary proceedings against him and thereafter without completing or withdrawing the disciplinary proceedings, terminates the services of the temporary officer, ordinarily such an order of termination of services of temporary officer under R. 5(1) may not be hit by non-compliance of Article 311(2) of the Constitution; but there may be cases in which the termination order itself on the face of it may carry indelible stigma on the officer endangering his future appointment and entailing evil consequences, which may amount to punishment and the case may attract Article 311(2).

(Para 7)

Where the temporary employee whose services are terminated under R. 5(1), is described as "at present under suspension" but before his termination provisions of Article 311(2) are not complied with, the termination is illegal. The order leaves the stigma that he is a suspended officer, and any future employer may reasonably think that he must have been suspended in service on some serious allegations and may refuse employment to him on that ground alone. AIR 1958 SC 36, Foll.

(Para 8)

Cases Referred: Chronological Paras
(1958) AIR 1958 SC 36 (V 45) =
1958 SCR 828. P. L. Dhingra v.
Union of India 4

S. K. Sen and D. R. Guha, for Petitioner;
B. C. Barua, Advocate-General, G. K. Talukdar, Senior Govt. Advocate, for Respondent No. 2.

PATHAK, J.:— By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 20th September, 1968, by which his services had been terminated in pursuance of sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Services) Rules, 1965 with one month's notice.

2. The petitioner was appointed as Field Exhibition Officer by order dated 21st December, 1965 of the Director of Advertising & Visual Publicity in the

same Directorate on a purely temporary capacity with effect from the forenoon of the 29th November, 1965 until further orders and he joined and continued to serve in that post. As a result of reorganisation of the said Directorate, the post of Field Exhibition Officer, which was previously included in Grade IV of the Central Information Service and carried a scale of Rs. 270-10-290-15-410-EB-15-485, was excluded from the Central Information Service and was made a Gazetted post in the same Directorate in the scale of Rs. 350-20-450-25-575. By order dated 6-10-67, the petitioner along with other Field Exhibition Officers who had been similarly appointed to the non-Gazetted post on ad hoc basis previously was appointed by the Director of Advertising and Visual Publicity, Ministry of Information and Broadcasting, Government of India, to the Gazetted post on a purely temporary capacity pending regular recruitment to the post according to the recruitment rules (Wide Notification No. 17/34/64-Est. dated 6-10-67). These posts of Field Exhibition Officers were not permanent even at that stage.

On receipt of certain complaints regarding the alleged irregularities committed by the petitioner, who was functioning as Field Exhibition Officer in the said Directorate at Gauhati as well as by certain other members of the Gauhati Field Exhibition Unit, a preliminary enquiry was conducted on the departmental basis and pending disciplinary proceedings the petitioner was suspended by order dated 25th January 1968/4th February 1968 by the Director of Advertising and Visual Publicity under Rule 10(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter called the 'Civil Service Rules'). On enquiry the petitioner was informed by letter No. 1-9/67-V dated 24-6-68 that the investigation was pending in the case. By a notification dated 7-8-67 the Union Public Service Commission invited applications for recruitment to 20 posts of Field Exhibition officers in the said Directorate under the Ministry of Information and Broadcasting. The petitioner who submitted an application in response to the advertisement was called for interview along with 171 other candidates, but the Union Public Service Commission did not select him. Thereafter by order dated 20-9-68 the Director of Advertising and Visual Publicity terminated the services of the petitioner with one month's notice in pursuance of Rule 5(1) of the Central Civil Services (Temporary Services) Rules, 1965 (hereinafter called the "Temporary Service Rules").

3. The learned counsel for the petitioner submitted that while the petitioner was serving as Field Exhibition Officer, though temporarily, disciplinary proceed-

ing against him was started under the provisions of the 'Civil Service Rules' and he was placed under suspension under Rule 10(1) (a) of the said Rules and while the disciplinary proceeding was pending his services were terminated by way of punishment though it was purported to be under Rule 5(1) of the 'Temporary Service Rules', and thus Article 311(2) of the Constitution was attracted to the case and the impugned order of termination was bad in law for non-compliance with the provisions of Article 311(2) of the Constitution.

4. The learned counsel of the respondents, on the other hand, submitted that a preliminary enquiry was conducted on the departmental basis against the petitioner and some others and after the preliminary enquiry, the matter was referred to the Central Bureau of Investigation for necessary investigation and no disciplinary proceeding was conducted by the department. The petitioner was informed by letter dated 24-6-68 that the investigation was pending in the case. The termination of the petitioner's services under Rule 5(1) of the 'Temporary Service Rules' had nothing to do with the pending enquiry concerning the petitioner. His services were replaced by those of a regularly selected person through Union Public Service Commission. As the petitioner was not selected by the Union Public Service Commission, his services had to be terminated, as required under the provisions of the Rules with one month's notice. The termination of services of the petitioner was not by way of punishment and as such it did not attract Article 311(2) of the Constitution of India and the petitioner was not entitled to any remedy in this case.

5. The point that falls for determination in the case is whether the impugned order of termination of services of the petitioner was by way of punishment or it was an order of termination of services simpliciter under Rule 5(1) of the 'Temporary Service Rules'.

The impugned order is in the following terms:

"In pursuance of sub-rule (1) of R. 5 of the Central Civil Services (Temporary Services) Rules 1965, I hereby give notice to Shri N. B. Chakraborty, Field Exhibition Officer, ad hoc at present under suspension that his services shall stand terminated with effect from the date of expiry of a period of one month from the date on which this notice is served on him.

Sd/- R. Sreenivasan,
Director of Advertising and Visual
Publicity."

6. The cases in and the circumstances under which the provisions of Art. 311(2) of the Constitution of India are attracted

have been summarised by the Supreme Court in the case of P. L. Dhingra v. Union of India, AIR 1958 SC 36, as follows:

"	x	x	x
"	x	x	x

In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with. As already stated if the servant has got a right to continue in the post, then, unless the contract of employment or the rules provide to the contrary, his services cannot be terminated other wise than for misconduct, negligence, inefficiency or other good and sufficient cause. A termination of the service of such a servant on such grounds must be punishment and, therefore, a dismissal or removal within Article 311, for it operates as a forfeiture of his right and he is visited with the evil consequences of loss of pay and allowances. It puts an indelible stigma on the officer affecting his future career. A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the government servant has right to particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may

indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

7. In the instant case, the admitted position is that the petitioner was holding the post temporarily, and he was not in quasi-permanent service and as such his service could be terminated with one month's notice under Rule 5(1) of the 'Temporary Service Rules'. That being the position, the present case does not satisfy the first test mentioned by the Supreme Court. Let us consider whether the petitioner's case falls within the second test as laid down by the Supreme Court in the above decision. The petitioner was suspended because there were allegations of defalcation against him and disciplinary proceeding was either contemplated or was pending against him. After his suspension admittedly there was a preliminary enquiry and the petitioner's case was submitted to the Central Investigation Bureau for necessary investigation. The Government may dispense with the services of a temporary government servant if his services are either not required or the Government finds that he is for any reason not suitable to be retained in service and in such cases his services may be terminated under R. 5(1) of the 'Temporary Service Rules'. When the services of such a temporary government servant are terminated under Rule 5(1) of the "Temporary Service Rules" it does not ordinary visit with evil consequences or loss of pay and allowances as contemplated under the second test laid down by the Supreme Court. The Government may also after contemplating to draw up proceedings against a

temporary officer for allegations against him, choose not to draw up proceedings but dispense with his services under Rule 5(1) of the "Temporary Service Rules". But if the Government decides to draw up proceedings against a temporary officer and accordingly a charge of serious allegations is framed against him and proceeds with the disciplinary proceedings against him and thereafter without completing or withdrawing the disciplinary proceedings, terminates the services of the temporary officer, ordinarily such an order of termination of services of temporary officer under Rule 5(1) of the "Temporary Service Rules" may not be hit by non-compliance of Article 311(2) of the Constitution; but there may be cases in which the termination order itself on the face of it may carry indelible stigma on the officer endangering his future appointment and entailing evil consequences, which may amount to punishment and the case may attract Article 311(2) of the Constitution, according to the second test as laid down by the Supreme Court.

8. In the instant case, the impugned order while terminating the services of the petitioner has described him as "at present under suspension". On the face of it, the impugned order leaves the stigma on the petitioner that he is a suspended officer, and any future employer may reasonably think that the petitioner must have been suspended in service on some serious allegations and may refuse employment to the petitioner on that ground alone. In our opinion, the inclusion of the words "at present under suspension" in the order itself carries an indelible stigma on the petitioner which may stand in his way in any future employment in government service or elsewhere. That being the position, we hold that the impugned order though passed under Rule 5(1) of the 'Temporary Service Rules' carries an indelible stigma on the petitioner entailing evil consequences and may seriously affect his future employment and, therefore, the case comes under the second test laid down in such matters by the Supreme Court. In the circumstances, we hold that since admittedly the provisions of Article 311(2) of the Constitution were not complied with in terminating the services of the petitioner the impugned order must be struck down as violative of Article 311(2) of the Constitution of India.

9. In the result, the impugned order dated 20th September, 1968, is quashed and the Rule is made absolute. The petition is allowed with costs. Hearing Fee Rs. 200/-.

10. S. K. DUTTA, C. J.: I agree.

Rule made absolute.

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(V 57 C 24)

S. K. DUTTA C. J. & M. C. PATHAK, J.
Sudhir Chandra Guha and another,
Defendants Appellants v. Jogesh Chandra
Das, Plaintiff Respondent.

First Appeals Nos. 25 of 1963 and 44 of
1966, D/-6-10-1969, from decision of Sub.
J., Upper Assam Districts at Dibrugarh,
D/-18-2-1963.

(A) Civil P. C. (1908), O. 1, R. 9 — Suit
for rent by holder of succession certificate
— Not bad for non-joinder of other legal
heirs of deceased — (Succession Act
(1925), S. 381).

Where the plaintiff's right to sue for
arrears of rent is based on the succession
certificate obtained by him in respect of
the estate of the deceased, the suit for
rent is not bad for non-joinder of other
legal heirs of the deceased. (Para 12)

(B) Post Office Rules, Rr. 118 & 119 —
Money order addressed to payee named by
remitter — Money received by a person
who had no written authority from payee
as required by R. 118 — Acknowledgment
and money order signed by such person
and not by payee as required by R. 119
— Money order receipts cannot be legally
accepted as payments to addressee.

(Para 15)

(C) Registration Act (1908), S. 17(2) (vi)
— Compromise decree — Hindu widow
entering into compromise with reversioner
under which properties in suit were to
devolve absolutely on reversioner after
widow's death — Decree not comprising
immovable property other than subject-
matter of suit — Compromise decree is
exempt from registration — It confers
title on reversioner after widow's death —
Suit for ejectment of tenant on basis of
compromise decree can be maintained by
reversioner without suing for declaration
of his title — Other heirs of widow are
not necessary parties — (Civil P. C. (1908),
O. 1, R. 10) — (Hindu Law — Widow —
Reversioner). (Paras 23, 24)

(D) Evidence Act (1872), S. 116 —
Estoppel against tenant — Tenant though
cannot challenge landlord's title can ques-
tion derivative title of his successor ex-
cept when it is based on valid decree
against landlord.

A tenant is estopped under Section 116,
Evidence Act from challenging the land-
lord's title to demised property during the
currency of lease. A tenant may, how-
ever, question derivative title of successor
of the landlord ordinarily but when the
title in the demised property devolves on
a person by virtue of a lawful decree
against the landlord, such derivative title
cannot be questioned by the lessee so long
as that decree stands as a valid decree.

(Para 25)

(E) Transfer of Property Act (1882),
S. 111(c) — Lease of land by female owner
for a term of years — Interest of lessor in
demised property vesting in plaintiff ab-
solutely under a compromise decree on
her death — Lease terminates on her death
— Continuance of lessee in demised prop-
erty is without authority unless there is
attornment to plaintiff — Plaintiff entitl-
ed to maintain suit for ejectment.

(Para 25)

S. K. Ghose, B. S. Guha, for Appellants
in F. A. No. 25 of 1963 and Respondents
in F. A. No. 44 of 1966; J. C. Medhi, D. K.
Sarma and B. K. Goswami, for Appellant
in F. A. No. 44 of 1966 and, Respondent in
F. A. No. 25 of 1963.

PATHAK, J.:— The facts leading to the
above two first appeals are as follows:

Plaintiff Jogesh Chandra Das filed Rent
Suit No. 3/59 on 26th June 1959 against 1st
defendant Sudhir Chandra Guha, 2nd
defendant Messrs. Osten Engineering
Private Ltd., for recovery of Rs. 6,200/-
on account of arrear of house rent. The
plaintiff's case was that late Padmabati
Das was the widow of his father's brother.
She died childless and had life interest in
the properties described in the schedule
to the plaint. In December 1950, 1st
defendant came into occupation of the suit
premises and on 7-4-1951 he managed to
obtain from Padmabati Das a document
purporting to be a lease for 12 years fixing
house rent at Rs. 200/- p. m. according to
English calendar month on false represen-
tation and practising fraud. That the said
document was inoperative and invalid in
law. The premises were in occupation of
the 2nd defendant as sub-tenant under the
1st defendant. The defendants had not
paid any house rent from 1954 either to
Padmabati or to the plaintiff. The house
rent up to end of May 1956 became time-
barred. The plaintiff, therefore filed the
suit claiming arrear rent from 1st June
1956 to 25th February 1959 amounting to
Rs. 6200/-, after giving up the claim of
Rs. 378-9-0.

2. The defendants contested the suit
and filed a joint written statement. Their
case was that Padmabati Das was the ab-
solute owner of the suit premises and she
leased out the same to the 1st defendant
at a rental of Rs. 200/- p. m. for 12 years
under a registered deed dated 7th April
1951. At the time of execution of the said
deed, Padmabati Das took Rs. 7200/-
from the 1st defendant towards advance
rent. Thereafter till the end of 1958, late
Padmabati Das received a further sum of
Rs. 16,900/- towards rent either herself or
through her authorised agent Shri N. Das,
Gopalpara. Besides the said amount, the
1st defendant paid Rs. 3014.38 towards
municipal tax of the suit premises and
Rs. 409 towards land revenue of the patta
land on which the suit premises stood.
Further, on the authority and request of

late Padmabati Das and her agent Shri N. Das, the 1st defendant repaired the suit premises by incurring a sum of Rs. 2700/- during the years of his occupation. It was settled that the said amounts paid towards municipal tax and land revenue and spent for repairs of the premises would be treated as payment of advance rent. In this way, late Padmabati Das received Rupees 30,223.88 in all from the defendants and the actual dues by way of rent of the suit premises up to 31-8-1959 came to Rupees 20,600/- at the rate of Rs. 200/- p. m. Thus there was an excess payment of Rs. 9,623.88 towards advance rent to late Padmabati Das and if that amount was adjusted against future rent, no arrear rent was due by the defendants in respect of the suit premises. The defendants further alleged that the plaintiff had no cause of action, that the suit was barred by limitation and that the plaintiff had no right to sue.

3. On the pleadings of the parties, the following issues were framed:

1. Has the plaintiff any cause of action?
2. Whether the plaintiff has right to sue alone and the suit is bad for non-joinder and mis-joinder of parties?
3. Whether the suit is barred by limitation?
4. Was the lease dated 7th April 1951 granted by Mrs. Padmabati Das in favour of the defendant No. 1 obtained by fraud and misrepresentation?
5. Whether the defendant are entitled to claim any deduction for expenses of repairs as alleged in their written statement? If so, how much?
6. What are the amounts the defendants paid on account of land revenue and municipal taxes?
7. What amount of house-rent, if any, was paid by the defendants?
8. Whether the plaintiff is entitled to a decree for house-rent? If so, how much?
9. Is the story of payment towards rent as alleged in para 16 of the written statement true?
10. Whether the defendants are entitled to any compensation under S. 35-A, Civil P. C.? If so, how much?
11. To what relief, if any, are the parties entitled?

4. Title Suit No. 18 of 1959, was filed on 14-8-1959 by the same plaintiff Jogesh Chandra Das against the same defendant No. 1 Sudhir Chandra Guha and 2nd defendant Messrs. Osten Engineering Private Ltd., for ejectment from and recovery of khas possession of the suit premises and a decree for Rs. 600/- on account of house rent.

5. The plaintiff's case in T. S. 18/59 was that Padmabati Das was the widow of

his father's brother. She used to live at Goalpara, Assam, during the latter part of her life. She had life interest in the property described in the schedule to the plaint and she having died childless on 25-2-1958, her life interest devolved on the plaintiff as absolute owner. The 1st defendant came into occupation of the suit premises in December 1950 and he obtained a document dated 7-4-1951 purporting to be a lease for 12 years commencing from 1-4-1951 at a monthly rent of Rs. 200/- according to the English Calendar month. But the deed was obtained fraudulently and by false representation and therefore, it did not bind the plaintiff. The 1st defendant taking advantage of the absence of Padmabati Das from the premises, cut some valuable trees in 1951 which were grown on the suit premises without any authority and permission. Thereafter the 1st defendant constructed two houses on the vacant land within the compound without any authority. The plaintiff filed T. S. 12/51 against 1st defendant and Padmabati Das in the Court of the Subordinate Judge, U. A. D., Dibrugarh for restraining the 1st defendant from committing further acts of waste and making permanent constructions and that suit was decreed in part on 28th September 1956. During the pendency of the said suit and appeal from the decree therein, the 1st defendant had constructed 4 or 5 permanent structures by cutting several other trees. In Dag No. 3961 measuring an area of four kathas of land, there was tank for fish-culture which was in occupation of the 1st defendant. But due to carelessness and negligence of the 1st defendant, the banks of the tank had been worn out and water-hyacinth was allowed to grow and thereby the water of the tank was polluted. The 1st defendant also from time to time made additions and alterations in the original houses without any authority. Further he was carrying on his business in the new construction as a result of which there was increase of land revenue which had created permanent encumbrance on the property for which the 1st defendant was liable for compensation. That the 1st defendant had from time to time let out parts of the premises to different parties and had been earning illegal profits thereby. Since April 1954 the 1st defendant failed to pay house rent to Padmabati Das and even after her death he had failed to pay any rent to the plaintiff. On 6-7-1959 the plaintiff issued a notice to the 1st defendant asking him to attorn to the plaintiff and to make fresh arrangement for future occupation or in the alternative to vacate the suit premises after 1st August 1959 and to deliver possession of the suit premises to the plaintiff. A copy of the said notice was sent to the 2nd defendant. But the defendants did not comply with the notice

and therefore, the plaintiff brought the suit for ejectment and for recovery of khas possession and also for recovery of Rs. 600/- being the house rent from May 1959 to July 1959 at the rate of Rs. 200/- p. m.

6. The defendants contested the suit and filed a joint written statement. Their case was that late Dhairya Narayan Das was the absolute owner of the suit land and premises. On the strength of a will executed by late Dhairya Narayan Das which was duly probated, his widow Padmabati Das became the absolute owner of the suit land and premises and as such she voluntarily leased out the said premises to the 1st defendant at rental of Rs. 200/- p. m. with effect from 1-4-1951 for a period of 12 years under a registered lease dated 7-4-1951. That in terms of the said agreement, the 1st defendant was entitled to erect necessary structures on the suit premises for carrying on his business and in pursuance of that agreement and on the authority of late Padmabati Das, 1st defendant constructed one structure and while he was constructing another, the plaintiff designedly instituted T. S. 12/51 against the 1st defendant in the Court of the Subordinate Judge, U. A. D., Dibrugarh, for restraining him from completing the constructions. In that case Padmabati Das who was the 2nd defendant filed a written statement confirming the action of the 1st defendant in making those constructions. The 1st defendant had paid in all Rs. 30,223.88 towards rent of the suit premises to late Padmabati Das and as such there had been an excess payment of Rs. 9623.88 (as detailed hereinabove in stating the facts of R. S. No. 3/59) and till the said amount stood adjusted towards future rent, the 1st defendant could not be deemed to be defaulter.

7. It was further stated that the 2nd defendant was a private Limited Company sponsored and promoted by the 1st defendant for expansion and stability of business and the 1st defendant was conducting business of the 2nd defendant. The defendants also contended that the plaintiff had no cause of action, that the suit was bad for non-joinder of necessary parties and that the plaintiff had no right to sue. The defendants filed an additional written statement wherein they averred that they were entitled to protection under the provisions of the Assam Act 12 of 1955 and that the suit was bad for non-joinder of necessary parties, that is, the legal heirs of late Padmabati Das.

8. On the pleadings of the parties the following issues were framed in Title Suit No. 18/59:

1. Has the plaintiff any cause of action?
2. Has the plaintiff any right to sue?
3. Is the suit bad for non-joinder and mis-joinder of parties?

4. Is the plaintiff entitled to get the relief claimed in the suit without obtaining a declaration of his right and title in the suit premises?
5. Is the suit maintainable in law and in its present form?
6. Has the suit been properly valued?
7. Did the plaintiff become the owner of the suit premises on the death of Mrs. Padmabati Das?
8. Is the lease dated 7th April 1951 granted by late Mrs. Padmabati Das in favour of the defendant No. 1 invalid and obtained by fraud or false misrepresentation?
9. Has the plaintiff let out parts of the premises in suit as alleged by the plaintiff?
10. Whether the defendants committed any waste to the properties in suit? Whether the defendants made some unauthorised constructions on different parts of the properties?
11. Whether the acts of defendants constitute permanent encumbrances to the properties in suit?
12. Was any legally valid notice served upon the defendants?
13. Are the defendants defaulters under the Assam Urban Areas Rent Control Act?
14. Is the plaintiff entitled to the reliefs claimed in the suit?
15. Whether the defendants are entitled to any compensation under S. 35-A, Civil P. C.? If so, how much?
16. To what relief are the parties entitled? Additional issue:
17. Whether the defendants are protected from eviction under the provisions of Assam Act 12 of 1955?

9. The learned trial Judge, who tried both the suits analogously and disposed of the same by a common judgment, decreed R. S. No. 3/59 for Rs. 6200/- with costs and decreed T. S. No. 18 of 1959 partly with proportionate costs. In T. S. 18/59 the plaintiff's claim for arrear rent of Rs. 600/- was decreed but his claim for recovery of khas possession of the suit premises was rejected. Against the decree in R. S. No. 3/59 the defendants therein have filed F. A. N. 25/63. Against the decree in T. S. No. 18/59 the plaintiff therein filed Title Appeal No. 3/63 in the Court of the District Judge, U. A. D. at Jorhat, which was transferred to the High Court and has been numbered as F. A. 44/66 along with the cross-objection.

10. Let us first take up the First Appeal No. 25/63. On the submissions made by the learned counsel of both parties, the following points arise for decision:

1. Whether the plaintiff has a right to bring the suit for realisation of rent due to late Padmabati Das?
2. Whether the suit is bad for non-joinder of the other legal heirs of late Padmabati Das?

3. Whether the defendants have been able to substantiate their plea of payment of rents?

The suit properties belonged to late Dhairya Narayan Das. He left a will dated 21-2-1920 in favour of his wife late Padmabati Das. Dhairya Narayan Das died in October 1921. The probate of the will was granted on 8-5-1922. A certified copy of the probate has been filed in the case which is Ext. 32. By virtue of the will, late Padmabati Das became the absolute owner of the suit properties left by her husband. The plaintiff, who was the son of the brother of Dhairya Narayan Das, in the ordinary course, would have been the reversioner and would have got the properties of late Dhairyanarayan Das after the death of his widow as a reversioner but due to the intervention of the will that position changed and Padmabati Das became the absolute owner of the suit properties. The above facts are found proved by the evidence on record.

11. In 1949 the plaintiff brought a suit against Padmabati Das for a declaration that the properties described in schedule to the plaint of that suit was undivided joint property of the joint family of which the plaintiff was the sole surviving male member and as such he was entitled to half share of it as heir and to the other half as reversioner and also for declaration that the will left by the defendant's husband late Dhairya Narayan Das was void and inoperative. The suit was numbered as T. S. 3/49. A compromise decree was passed in T. S. No. 3/49 and the compromise petition No. 925 dated 29-12-1950 was made part of that decree. Ext. 13 is a certified copy of the decree in T. S. No. 3/49 dated 31-1-1951. Clauses (b) and (c) of the compromise petition are as follows:

"(b) That the plaintiff hereby agrees that during the life-time of the defendant, she will be in actual possession of the land in suit with buildings, structures and other appurtenance thereon and enjoy all the rents and profits thereof without any interruption, claim, demand or disturbance by the plaintiff or any person claiming through or under him.

(c) That the defendant agrees not to alter, sell, mortgage, commit any waste or encumber in any way or make any disposition of by will or otherwise the properties in suit and that on her death the same, that is, the property in suit shall devolve and be vested upon the plaintiff absolutely and, in case the plaintiff predeceases the defendant, upon the plaintiff's rightful heirs and legal representatives."

The suit properties in T. S. No. 18/59 are included in the suit properties in T. S. No. 3/49. This decree in T. S. 3/49 has not been set aside by any superior Court

and as such it stands and it remains binding on the parties thereto or their successors-in-interest.

12. In terms of the decree in T. S. 3/49, the plaintiff Jogesh Chandra Das became the absolute owner of the properties in the present suit on the death of late Padmabati Das who died on 25-2-59. R. S. 3/59 was filed for realisation of the rent due to late Padmabati Das for the period from 1st June 1956 to 25th February 1959. After the death of Padmabati Das, the plaintiff obtained the succession certificate on 2-5-59 which is Ext. 28 in the case. This succession certificate was obtained among other things for realisation of Rs. 6454 from Sudhir Chandra Guha, Khalihamari Ward, Dibrugarh Town as house rent from 1st April 1956 to 25th February 1959 for holding No. 882 of Khalihamari Ward, Dibrugarh town. The defendants admitted and relied on the lease deed dated 7-4-51, Ext. G, executed by Padmabati Das and the 1st defendant. The deed was duly registered and remained effective and operative. Though the plaintiff in his plaint alleged that the lease deed was collusive and fraudulent, yet the lease deed stands valid and operative inasmuch as it has not been declared illegal and inoperative by any Court. The admitted position being that the 1st defendant took lease of the suit premises from Padmabati Das at a monthly rent of Rs. 200, he is liable to pay rent to Padmabati Das till her death. If any arrear rent was due by the 1st defendant to late Padmabati Das, apart from other questions as to title of the plaintiff in the suit premises, by virtue of the succession certificate the plaintiff is entitled to recover the arrear rent. We, therefore, hold that the plaintiff has a right to bring Rent Suit No. 3/59 for the realisation of the rent due to late Padmabati Das. The plaintiff's right to sue so far as this case is concerned is based on the succession certificate and if there are other legal heirs of late Padmabati Das they may have a claim against the plaintiff in respect of the amount realised under the decree, but the present Rent Suit as such cannot be said to be bad for non-joinder of the other legal heirs of late Padmabati Das, if any.

13. We have next to consider the plea of payment taken by the defendants in the instant case. The defendants' definite case is that at the time of taking the lease on 7-4-1951, a sum of Rs. 7200/- was paid to Padmabati Das towards advance rent. Regarding the payment of this sum of Rs. 7200/-, some discrepancies in the deposition of the 1st defendant himself have been brought to our notice by the learned counsel for the plaintiff. But this amount is mentioned in the registered lease deed, the genuineness of which was never questioned during the life-time of

Padmabati Das. The lease was executed on 7-4-1951 and Padmabati died on 25-2-1959. In the circumstances we are inclined to accept that the sum of Rs. 7200 was paid to Padmabati Das as advance rent at the time of execution of the lease deed.

14. The defendants adduced evidence to show that a further sum of Rs. 16,900/- towards rent was either paid to Padmabati Das herself or paid to her through her authorised agent Nikhilendu Das who was examined on commission as a defence witness. From the evidence it appears that Padmabati Das knew Assamese and Bengali and she could write in those two languages. Exts. 1, 2, 4, 10, 22, 23, 25 (before the Commissioner) are receipts wherein signatures or thumb impressions taken in presence of a lawyer are found. Ext. 1 is a receipt written in Bengali which Padmabati could read and write and the other exhibits mentioned above show that the amounts were sent either by money order or by insured post. In the circumstances there is no difficulty in accepting that these payments were made by the 1st defendant to Padmabati Das. The total amount covered by these receipts appears to be Rs. 2350/-.

15. Exts. 3, 5 to 9, 11 to 21, 24 and 27 are receipts written in English and signed by Nikhil Das, Nikhilendu Das or N. Das. Of these, Exts. 11, 13, 15, 18 and 19 are money order receipts addressed to Mrs. Padmabati Das by the remitter. On these receipts, however, there is no signature or thumb impression of the addressee Padmabati Das. Rules 118 and 119 of the Indian Post Office Rules framed under the Indian Post Office Act, 1898, read as follows:—
"118. The payment of a money order shall ordinarily be made at the address of the payee:—

- (1) to the payee himself, where it has been so indicated by the remitter on the money order form;
- (2) in any other case, to the payee or to any person authorised in writing by the payee in this behalf.

119. The money order and acknowledgment shall be signed by the payee named by the remitter, or by some person authorised in writing by the payee in this behalf. The signature shall be written in ink in the space provided for the purpose."

There is no signature or thumb impression of the payee on any of the said receipts as required under the Indian Post Office Rules (Supra). No letter of authority by the payee Padmabati Das in this respect has been produced or proved in the case. D. W. Nikhilendu Das in his evidence admitted that Padmabati Das did not give him any authority in writing or anything in writing to realise rent of the suit premises from the 1st defendant or to do any act regarding the said premises, but he acted on her request and verbal instruc-

tions. He clearly admitted in his evidence that he had no written authority from Padmabati Das to receive money orders on her behalf. In the circumstances the money order receipts which were signed by Nikhilendu Das cannot be legally accepted as payments to the addressee Padmabati Das.

16. The lease of the suit premises was granted on 7-4-1951 with effect from 1-4-1951. By Ext. 1 (Com) Padmabati Das acknowledged receipt of Rs. 200/- on 4-12-1951 as advance rent. This receipt was written by Nikhilendu Das. The date has been written in English also under the date written in Bengali and Nikhilendu Das countersigned the receipt. Ext. 1 (Com) bears revenue stamp, but Exts. 3, 5, 7, 9, 12, 14, 16, 20, 21, 26 and 27 (before the Commissioner) do not bear revenue stamps. Ext. 29 (Com) is a letter dated 22-9-1952 written by Padmabati Das in Bengali to the 1st defendant. From this letter it appears that a sum of Rs. 50/- was paid by the 1st defendant which was asked to be treated as payment in Bhadrap Rs. 50/- for the month of Aswin was directed to be sent to her Goalpara address; a sum of Rs. 50/- paid previously by Ema (wife of the 1st defendant) was taken as payment for the month of Sravan. In the said letter the 1st defendant was requested to send either by himself or by his wife a sum of Rs. 50/- p. m. to Padmabati Das to her address wherever she resided. She further acknowledged receipt of the sum of Rs. 700/- up to date in three instalments at the rate of Rupees 200/- and in two instalments at the rate of Rs. 50/-. She further stated in Ext. 29 (Com) that she would keep an account of these receipts and she requested the 1st defendant also to keep accounts of the payments to her. She further requested the 1st defendant to send Rs. 50/- for the month of Aswin on receipt of the said letter. Ext. 36 (Com) is another letter written by Padmabati herself in Bengali. It is dated 8-3-1958. In Ext. 36 (Com) Padmabati Das wrote that Nikhil Babu told her that after a long correspondence and after a long time about 5 to 7 days ago 1st defendant sent Rs. 300/- in his name. She further requested the 1st defendant to send a sum of Rs. 700/- very early which was needed for her treatment. She further requested him to send the said Rs. 700/- by money order in her name as Nikhil Babu was not available at all times and that on receipt of the said Rs. 700/- at least for 6 or 7 months she would not trouble the 1st defendant. We have already seen that under Ext. 22 (Com) a sum of Rs. 700/- was received by Padmabati on 28-3-1958. No receipt has been produced for the sum of Rs. 300/- which was said to have been received by Nikhil Babu five to seven days prior to 8-3-1958. A receipt for Rs. 300/- is found

to have been given by Nikhilendu Das on 18-3-1958 under Ext. 21 (Com). If the sum of Rs. 300/- was sent 5 to 7 days prior to 8-3-1958, it is not understood why a receipt for Rs. 300/- was given on 18-3-1958. From Ext. 36 (Com) it appears that the sum of Rs. 300/- was sent by the 1st defendant to Nikhil Babu. The 1st defendant resides at Dibrugarh and Nikhil Das resides at Goalpara and there is no explanation from the defendants' side how this money was sent to Nikhil Das. There is no explanation why Ext. 21 (Com) should be dated 18-3-1958 if the same was received as stated in Ext. 36 (Com) five to seven days prior to 8-3-1958. These circumstances arouse reasonable doubts as to the genuineness of Ext. 21. We have already observed that D. W. Nikhilendu Das admitted that Padmabati did not give him any authority in writing or anything in writing to realise rent of the suit premises from the 1st defendant or to do any act regarding the said premises.

17. Regarding the authority for Nikhilendu Das to realise rent on behalf of Padmabati, the 1st defendant relied on Ext. 38 written in English at Goalpara and dated 30-11-1954. The signature of Padmabati Das is there in Assamese. Ext. 38 appears to be very important document in the instant case. By this letter Padmabati admitted the receipt of Rs. 3500/-, she permitted 1st defendant to make payment of rent of her house to Nikhilendu Das of Goalpara, to construct or alter the buildings which would be found necessary for the 1st defendant's residential and business purposes, to fit electric pump and new electric fittings etc. and also to repair the houses whenever necessary. We have already observed that Padmabati Das new both Bengali and Assamese. She used to write long letters in Bengali as is evidenced by Ext. 28 dated 21-5-1952, Ext. 29 dated 22-9-1952, Ext. 36 dated 3-8-1958. Naturally one would wonder why Ext. 38 dated 30-11-1954 was written in English and only the signature was put in Assamese. Nikhilendu Das in his examination in chief stated that Ext. 38 was a typed letter in English drafted by him at the request of Mrs. P. Das and the contents of the letter were explained to her. He further stated that Ext. 38 was written in reply to a letter by the 1st defendant to Mrs. P. Das. We do not know what was contained in the 1st defendant's letter dated 2-11-1954 mentioned in Ext. 38. Moreover, in Ext. 38 a receipt for Rupees 3500/- was said to have been sent along with it. This receipt is Ext. 26 (Com) dated 15-11-1954. There is no revenue stamp on it. The contents of the receipt are typed and the signature of Padmabati Das exists in Assamese. This receipt dated 15-11-1954 is alleged to have been sent with letter dated 30-11-1954 which was in reply to a letter dated 2-11-1954 from the

1st defendant to Padmabati Das. Moreover, 1st defendant (D. W. 5) stated that in his ledgers the rent account of Padmabati would be found; some of the remittances on account of rent and expenditure incurred in connection with suit property would be found in the ledgers and some would not be found and that the remittances and expenditures which were not in the ledgers could be found only by receipts. He produced the cash books only. Ext. V-2 is the copy of the entry in cash book for 1952-53 of the Eastern Engineering Company of Dibrugarh for payment of house rent to Mrs. Padmabati Das, wherein there is a reference to payment of Rs. 450/- to Mrs. Padmabati Das of Goalpara on 2-1-1953 through Nikhilendu Das. Ext. V-3 is the copy of the entry in cash book for the year 1954-55 of the Eastern Engineering Company for payment of house rent to Mrs. Padmabati Das wherein it is found that a sum of Rs. 500/- was remitted to Padmabati Das on 15-1-1955 towards house rent of Khaliamar house. It is strange however to find that cash book for the year 1953-54 has not been produced. That apart, the receipt Ext. 26 (Com) is dated 15-11-1954 and if the sum of Rs. 3500/- was paid in between 1st April, 1954 and 31st March, 1955, this amount would have been surely entered in the cash book for 1954-55, but in 1954-55 only a sum of Rs. 500/- was shown as paid on account of house rent of Khaliamar house to Padmabati Das. Hence Ext. 26 (Com), the receipt for Rs. 3500/- for rent of Dibrugarh house at Khaliamar granted in November 1954 does not appear to be genuine. In Title Suit No. 12/51, Padmabati Das was examined on commission by the Munsiff, Goalpara on 11-12-55 and 26-2-56. The evidence is to be found in Ext. 18 in this case. She stated therein that it was not proper on the part of Sudhir Babu to construct any house without her permission and she had got objection to such construction. She further added that Sudhir Babu had constructed houses forcibly against the terms of the lease. If the contents of Ext. 38 which is dated 30-11-54 were known to Padmabati Das, she would have certainly stated that she gave permission for such constructions. From these statements made by Padmabati Das on oath in Title Suit No. 12/51, it appears that the contents of Ext. 38 were not known to her. It is also not proved by any evidence that this letter Ext. 38 was in fact sent from Goalpara on that day to Dibrugarh inasmuch as the postal envelope is not produced. Hence, no reliance can be placed on the contents of Ext. 38. The 1st defendant himself admitted that the amount of Rs. 3500/- under Ext. 26 (Com) as well as the amount of Rs. 1500/- under Ext. 24 (Com) were not entered in his cash books

and he did not remember how these amounts were paid to Padmabati. The 1st defendant also stated that sometimes he paid rent to Nirmalendu, the brother of Nikhilendu who was an Electrical Engineer at Dibrugarh but the receipts were granted to him by Nikhilendu. Unless there is definite proof that the sums for which receipts were given by Nikhilendu were in fact paid to Padmabati, such payments cannot be accepted as payments to Padmabati only on the statement of Nikhilendu whose evidence appears to be interested. In view of the facts and circumstances of the case, it would be difficult for any court of law to accept the receipts executed by Nikhilendu Das to prove payment of rent by the 1st defendant to Padmabati Das. On a careful consideration of the evidence on record, we hold that the defendants have been able to prove payment of Rs. 7200/- plus Rs. 2350/- in total Rs. 9550/- towards rent. Thus rent had been paid up to the end of March, 1955 at the most.

18. The 1st defendant stated that he paid Rs. 3014.38 nP. towards municipal taxes and Rs. 364/- towards land revenue for the suit premises. In his evidence, the 1st defendant (D. W. 5) stated that the municipal tax was payable by Padmabati, but according to her and Nikhilendu's instructions, he paid municipal tax of about Rs. 3000/- and land revenue of about Rs. 400/-, which should be adjusted towards rent. To prove the payment of municipal tax he examined D. W. 1. Ext. 1 is a document prepared by D. W. 1 on the application of the 1st defendant on the basis of the entries of demand bill register from 1951 to 1959. But neither the demand bill registers nor any certified copies thereof have been produced in Court. Admittedly under the terms of the lease, municipal tax as well as land revenue were payable by Padmabati, the landlord. The 1st defendant (D. W. 5) stated in cross-examination that he had got the municipal tax payment receipts and the land revenue receipts with him, and then he added that he did not know whether these receipts were with him or the receipts were sent to Padmabati. To prove the payment of land revenue, he examined the Mouzadar, D.W. 3. But this witness has not produced any receipt but he has proved the certificate, Ext. U. It is not understood under what provision this certificate was issued. He should have produced the counterfoil receipts to prove these payments. On a consideration of the evidence regarding the payment of municipal tax and land revenue, it is found that the 1st defendant did not produce the receipts though he stated that the receipts were with him and these receipts alone could have proved the payment. If the 1st defendant really paid the municipal tax and land revenue,

there was no reason why he sent these receipts to Padmabati without keeping any receipts from her for those payments. In the circumstances, we hold that the learned Subordinate Judge rightly held that the payment of the municipal tax and the land revenue by the 1st defendant could not be legally proved.

19. The 1st defendant also claimed that a sum of Rs. 2700/- was expended by him in repairing the suit premises. There is no express authority permitting him to incur the expenditure. We have already discussed Ext. 38 and found that no reliance can be placed on it. The evidence given by Padmabati Das who was examined on behalf of the 1st defendant in Title Suit No. 12/51 has already been referred to. In cross-examination, the 1st defendant (D.W. 5) stated that in Title Suit No. 12/51 Padmabati was examined on Commission as his witness and he had read her deposition and he did not remember if he protested against her statement. Though the 1st defendant in his evidence stated that he spent Rs. 2700/- in repairing the premises, there is nothing on record to show that any bills for the expenditure incurred for the repairs of the premises were at all submitted to Padmabati Das. Moreover, the 1st defendant did not produce his account books to substantiate his statement that he actually spent Rs. 2700/-. In the circumstances, we are unable to accept his statement that he spent the sum of Rs. 2700/- towards repairs of the premises on instruction from Padmabati Das.

20. On a consideration of the entire evidence on record, we are clearly of opinion that the 1st defendant did not pay any rent to Padmabati Das from 1st June 1956 to 25th February 1959 as claimed by the plaintiff in the suit and the 1st defendant is liable to pay the said amount. We, therefore, hold that the learned Subordinate Judge correctly decreed the suit for Rs. 6200/- against the defendants in rent suit No. 3 of 1959.

21. Let us now take up F. A. 44/66 which arises out of T. S. 18/59. Some of the issues in T.S. 18/59 had been decided against the plaintiff who has challenged those findings of the learned trial Court in his appeal. Some of the issues had been decided by the learned trial Court against the defendants who had challenged those findings in their cross-objection. Issues 2, 3, 4, 5 and 7 had been decided by the learned trial Court in favour of the plaintiff. He held that Padmabati Das was the absolute owner of the suit properties and after her death, the plaintiff had become the absolute owner of the same on the strength of the decree in T.S. 3/49. The other heirs of Padmabati Das if there were any had no right and title to the suit properties and that

the suit was maintainable in law in its present form. Against these findings the learned counsel appearing for the respondents submitted that the present suit was an ejectment suit simpliciter. The defendants disputed the title of the plaintiff and as such the plaintiff was not entitled to get a decree in the instant suit without first getting a declaration of his title in a proper title suit. He submitted that there was no mention of Title Suit No. 3/49 in the plaint, nothing was stated whether the plaintiff became the owner by virtue of the decree in T.S. 3/49. That apart, the compromise decree in T.S. No. 3/49 could not confer any title inasmuch as it was not registered. It was further submitted that admittedly late Padmabati Das had other heirs than the plaintiff and without making the other heirs of late Padmabati parties to the suit, no declaration in respect of the title to the suit properties could be made and in that view also the suit was bad for non-joinder of necessary parties.

22. The learned counsel for the appellant on the other hand submitted that the 1st defendant who claimed through Padmabati could not challenge the plaintiff's title which was derived from her by virtue of the decree in T. S. No. 3/49 which stood unchallenged. By virtue of the decree in T. S. No. 3/49 the plaintiff became the absolute owner of the suit properties on the death of Padmabati Das and as such the other heirs of Padmabati Das if there were any were not necessary parties and the suit was maintainable in the present form and the plaintiff need not bring another title suit for declaration of his title to the suit properties.

23. On the submissions of the learned counsel of both the parties, the point that falls for determination is whether the plaintiff could get a decree in the instant case without filing a suit for declaration of his right to the suit properties. On a careful consideration of the pleadings of the parties and the evidence adduced by them, it is found that the plaintiff brought the instant suit for ejectment on the basis of his title derived from Padmabati Das on her death by virtue of the decree in T.S. No. 3/49. The properties in T. S. No. 3/49 were the absolute properties of Dhairya Narayan Das. During his lifetime he made a will in respect of the entire properties in favour of his wife Padmabati Das, who after the death of her husband, got the will probated as evidenced by Ext. 32, certified copy of the probate dated 8-5-1922. Though the plaintiff in his plaint in the instant suit stated in a roundabout way that he got the suit properties as a reversioner after the death of Padmabati Das, he cannot be allowed to take that plea at all on the face of the probated will and the decree

in T. S. No. 3/49. The will was not set aside. On the other hand, on an examination of the compromise decree, it is found that absolute right, title and interest of Padmabati Das in the suit properties by virtue of the will was admitted and on that basis the compromise was entered into. The compromise decree in T. S. No. 3/49 laid down that on the death of Padmabati Das (defendant), the properties in that suit would devolve and be vested upon the plaintiff absolutely and in case the plaintiff predeceased the defendant (Padmabati Das), the properties would devolve on his rightful heirs and legal representatives. The compromise decree in T. S. No. 3/49 did not include properties other than the subject-matter of that suit. The properties in respect of which the compromise was entered into in that decree were the subject-matter of the suit itself. Under S. 17(2)(vi) of the Registration Act, a consent decree is exempt from registration if it does not comprise immoveable property other than that which is the subject-matter of the suit. The compromise decree in question therefore was not required to be registered for conferring title in respect of properties in the decree according to its terms. In the circumstances by virtue of T. S. No. 3/49 the plaintiff became the absolute owner of the suit properties on the death of Padmabati Das and the other heirs of Padmabati Das, if there be any are not found to be necessary parties in the present suit.

24. The defendants in their written statement took the stand that the plaintiff could not succeed in the suit without impleading Sreemati Monica Borah and Sreemati Nalini Bala Choudhuri who were also the legal heirs of late Padmabati Das. Their case in the written statement was that the plaintiff along with some others were the legal heirs of Padmabati Das and therefore the suit was not maintainable. Since Padmabati Das became the absolute owner of the suit properties by virtue of the will left by her husband and the plaintiff became the absolute owner of the same by virtue of the decree in T. S. No. 3/49, the other heirs cannot be said to have any interest in the suit properties.

25. The 1st defendant obtained the lease of the suit properties from Padmabati Das by Ext. 16. Under Ext. 16, the lease was to continue for 12 years; the lease would have expired in 1963 only. It was therefore argued that the suit which was filed in 1959 was in any view of the matter premature. The 1st defendant claimed his leasehold right under Ext. 16 which was executed by Padmabati Das and therefore the 1st defendant cannot challenge the title of Padmabati Das in respect of the suit properties and he is estopped by Section 116, Indian Evidence Act,

[A tenant may however question derivative title of successor of the landlord ordinarily but when the title in the demised property devolves on a person by virtue of a lawful decree against the landlord, such derivative title cannot be questioned by the lessee so long as that decree stands as a valid decree. The plaintiff stepped into the shoes of Padmabati on 25-2-59 by virtue of the decree in Title Suit No. 3/49. Both the plaintiff and the 1st defendant claimed their right in the suit properties through Padmabati Das, and therefore the 1st defendant cannot challenge the title of the plaintiff who derived his title from the 1st defendant's landlady Padmabati Das by virtue of a lawful decree. The title of the plaintiff in the suit properties stand determined by the decree in T. S. No. 3/49. In that view, we hold that the plaintiff need not bring any separate title suit to get a decree in this suit for eviction, if he was otherwise entitled to get the ejectment decree. No doubt, Ext. 16 was for a period of 12 years and ordinarily the 1st defendant's leasehold right would have continued up to 1963, but by virtue of the decree in T. S. No. 3/49 the interest of Padmabati in the suit properties terminated on her death on 25-2-59 and it vested on the plaintiff. Hence, under the provisions of Section 111(c) of the Transfer of Property Act, the lease of the suit properties granted by Padmabati Das in favour of the 1st defendant terminated on 25-2-1959. The continuance of stay of the 1st defendant on the suit property after 25-2-1959 would be without authority unless he attorned to the plaintiff. The plaintiff alleged that he requested the 1st defendant to attorn to him in writing, but the 1st defendant refused to do so. Therefore the present suit for ejectment could not be said to be premature. On a consideration of the evidence and the facts and circumstances of the case, we are clearly of opinion that the present suit for ejectment is maintainable and the plaintiff has a right to sue and we affirm the findings of the learned trial Court in respect of Issues 2, 3, 4, 5 and 7.

26. The learned trial Court after considering the evidence on record found that a legally valid notice was served on the defendants and he decided issue No. 12 in favour of the plaintiff. We have considered the oral and documentary evidence regarding this issue and we are satisfied that the learned trial Court correctly held that a legally valid ejectment notice was served on the defendants.

27. This is an ejectment suit and the same has been valued on the annual rental together with arrear rent claimed. We therefore find that issue No. 6 has been correctly decided by the learned trial Court.

28. The instant suit is not for declaration of the lease deed, Ext. 16 as invalid on the ground of fraud and misrepresentation. That apart, there is no definite allegation and proof of fraud etc. In the circumstances, we agree with the finding of the learned trial Court regarding issue No. 8.

29. Issue No. 9 was decided against the plaintiff by the learned trial Court which held that there was no subletting as alleged in the plaint. The lease was taken by the 1st defendant. He deposed that the 2nd defendant is a registered private limited company and he was Managing Director of the 2nd defendant. It is therefore clear that defendants 1 and 2 are different persons in the eye of law. However, there is no proof from the plaintiff's side that the 2nd defendant paid any rent to the 1st defendant. We, therefore, hold that the plaintiff failed to prove any subletting by the 1st defendant. We affirm the finding of the learned trial Court regarding this issue.

30. We have considered the evidence regarding Issues Nos. 10 and 11 and we hold that the learned trial Court decided those issues correctly.

31. Issue No. 13 is whether the 1st defendant is a defaulter under the Assam Urban Areas Rent Control Act. The plaintiff's case is that the 1st defendant defaulted payment of rent since March 1954. In the instant suit, the plaintiff claimed arrear rent for three months from May to July 1959 after the death of Padmabati Das. In Rent Suit No. 3/59 we have discussed the evidence regarding the plea of payment of rent taken by the 1st defendant and we have found that the 1st defendant paid up rent up to March 1955. In any view of the matter the defendants did not attorn to the plaintiff after he became the absolute owner of the suit properties on the death of Padmabati Das on 25-2-1959, on which date the lease in favour of the 1st defendant determined. There was valid ejectment notice on the defendants. There was no payment of rent since April 1955. In the circumstances, the defendants are liable to be evicted.

32. The last question to be considered is whether the defendants are protected under the provisions of Assam Act XII of 1955. Ext. 16 is the lease of the dwelling house and the premises of the landlady at Khaliamari, Dibrugarh within the municipal area of Dibrugarh. It is not a lease of land to which Assam Non-Agricultural Urban Areas Tenancy Act is applicable, which is clear from Section 2(1) (c) of the said Act. From Ext. 18 also, it is found that Padmabati rented her house at Dibrugarh to the 1st defendant by a deed of agreement. Thus it is clear that the said Act is not at all applicable to the instant case and the question

of protection under Section 5 of the said Act does not arise. The learned trial Court misconceived the whole matter in discussing and deciding Issue No. 17. In the circumstances, we set aside the finding of the learned trial Court that the defendants are protected from eviction under Section 5 of the Assam Act XII of 1955.

33. In the circumstances, the plaintiff's suit stands decreed both for ejectment and compensation of Rs. 600/- for use and occupation. The appeal is allowed with costs and the cross-objection is dismissed.

34. In the result, F. A. 25/63 is dismissed with costs and F. A. 44/66 is allowed with costs and the cross-objection is dismissed.

35. S. K. DUTTA, C. J.:— I agree.
Order accordingly.

AIR 1970 ASSAM AND NAGALAND 111 (V 57 C 25)

S. K. DUTTA, C. J. AND
M. C. PATHAK, J.

Sagar Chaudhury and others, Appellants v. Nabin Ch. Chaudhury and others, Respondents.

First Appeal No. 18 of 1967, D/- 28-8-1969.

(A) Succession Act (1925), Ss. 264 (1), 2 (bb) — "District Judge" — Meaning of — Additional District Judge has jurisdiction to grant probate of Will under Section 264 (1).

There are indications in the Succession Act that when the term "District Judge" is used it has reference not to a persona designata but to a Court, and that Court is the Principal Civil Court of original jurisdiction. In Assam, there is no separate class of Court of Additional District Judge. The Additional District Judge appointed in that area under S. 6 (1) of the Bengal, Agra and Assam Civil Courts Act must therefore be deemed to be a division Court of the Court of District Judge and not a separate and distinct Court of its own. Consequently, the probate and letters of administration under Succession Act which can be issued by the Court of District Judge can also be issued by the Additional District Judge in Assam. AIR 1949 Nag. 408, Rel. on; AIR 1956 SC 391, Explained. (Para 17)

(B) Succession Act (1925), S. 264 (1) — Grant of probate or letters of administration — Propounder must dispel all doubts regarding execution of Will from mind of Court — Even execution of Will is proved Court can still refuse to grant probate or letters of administration when reasonable doubt regarding genuineness of Will exists. (Para 22)

BN/CN/A699/70/RGC/M

Cases Referred: Chronological Paras
(1956) AIR 1956 SC 391 (V 43) =
1956 Cri LJ 781, Kuldip Singh v.
State of Punjab - 11, 16, 17
(1949) AIR 1949 Nag 408 (V 36) =
ILR (1950) Nag 145, Ganpat v.
Mahadeo 17

Dr. J. C. Medhi, B. K. Goswami and S. C. Das, for Appellants; J. Choudhuri, B. K. Sarma and B. C. Sarma, for Respondents.

PATHAK, J.:— This appeal is directed against the judgment and decree passed by the learned Additional District Judge, L.A.D., Gauhati.

2. The plaintiff's case is that Anandiram Choudhuri who died a natural death on 18-4-1963 at village Jiakur in Mouza Dakhin Sarubongshar, P. S. Chhaygaon within the jurisdiction of the District Judge, L.A.D. at Gauhati, left a will dated 27-3-63. No executor was appointed by the said will and the plaintiff was the only legatee entitled to the Letters of Administration under it. He filed an application in the Court of the Subordinate Judge No. 1, L.A.D., Gauhati, praying for letters of administration. Notices were served on the relatives of the deceased and defendants Nos. 1, 2 and 3 filed an objection to the issue of letters of administration. The matter being contentious, the Subordinate Judge returned the petition for filing it in proper Court. Accordingly the plaintiff filed the petition before the District Judge impleading the three objectors as well as Mustt. Pahibala Choudhuri, step mother of the deceased, as defendants. The petition before the District Judge was treated as a plaint and numbered as Probate Title Suit No. 39 of 1963. The learned District Judge transferred the suit to the Additional District Judge, Gauhati, on 23-11-1964, for favour of disposal and it was renumbered as Probate Title Suit No. 3/65.

3. Defendants 1, 2 and 3 filed a joint written statement and contested the suit. They alleged that the testator did not execute the will, and it was forged in collusion with the writer of the will. During the pendency of the suit, defendant No. 3 Nakul Chandra Choudhuri died and his legal heirs were substituted. The minor legal heirs were represented by their mother Srimati Harimati Choudhuri.

4. The following issues were framed on the pleadings of the parties:

1. Whether the probate suit is maintainable in the present form?

2. Whether the will in question was at all executed by late Anandi Choudhuri and if executed whether it was validly executed?

3. Whether the will in question as well as the signature thereon was forged?

4. Whether the petitioner (plaintiff) is entitled to a probate as prayed for?

5. To what relief, if any, are the parties entitled?

5. Evidence was adduced by both the parties and the learned Additional District Judge, on a consideration of the evidence on record, decreed the suit on contest and directed the issue of letters of administration to the plaintiff with a copy of the will annexed, holding that the will was a genuine one and the signature in the will was that of the testator.

6. Dr. Medhi, the learned counsel appearing for the Appellants, submitted that the Additional District Judge, L.A.D., Gauhati had no jurisdiction to entertain and decide the instant suit. The learned counsel submitted that under Section 270 of the Indian Succession Act, probate of the will or letters of administration to the estate of the deceased person might be granted by the District Judge only and not by the Additional District Judge.

7. Section 270 of the Succession Act reads as follows:—

"Probate of the will or letters of administration to the estate of a deceased person may be granted by a District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter provided, of the person applying for the same that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode, or any property, moveable or immovable, within the jurisdiction of the Judge."

8. Section 264(1) of the Succession Act reads as follows:—

"The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district."

9. Section 2(bb) of the Succession Act defines 'District Judge' as follows:—

"'District Judge' means the Judge of a principal Civil Court of original jurisdiction."

10. The Notification in the Assam Gazette dated 13-2-63 by which Sri D. C. Sarma was appointed as Additional District Judge is as follows:—

"No. LJJ.78/61/80:— In exercise of the powers conferred by sub-section (1) of Section 8 of the Bengal, Agra and Assam Civil Courts Act 1887 and sub-section (3) of Sec. 9 of the Code of Criminal Procedure, 1898, the Governor of Assam is pleased to appoint Shri Dharendra Chandra Sarma, B. Com., Bar-at-Law, Advocate to officiate as Additional District and Sessions Judge, Lower Assam, Districts with headquarters at Gauhati with effect from the date he takes over as such, vice Shri Bhola Nath Sarma promoted."

Under the said Notification, Mr. D. C. Sarma has been appointed as Additional District Judge under Section 8(1) of the Bengal, Agra and Assam Civil Courts Act, 1887. Section 8(1) of Bengal, Agra and

Assam Civil Courts Act, 1887 (hereinafter referred to as Civil Courts Act) relates to Additional Judges. Section 3 of the Civil Courts Act is as follows:—

"There shall be the following classes of Civil Courts under this Act, namely:—

- (1) the Court of the District Judge;
- (2) the Court of the Additional Judge;
- (3) the Court of the Subordinate Judge; and
- (4) the Court of the Munsif."

11. It is submitted by Dr. Medhi that since Sri D. C. Sarma was appointed by the Government Notification under Section 8(1) of the Civil Courts Act, it must be held that he was appointed as Additional Judge which was a separate class of the civil courts, quite distinct from the court of the District Judge, and since Section 270 of the Succession Act empowered the District Judge only to issue probate or the letters of administration, the Additional Judge which was a separate class of courts from that of the District Judge had no jurisdiction to issue probate or letters of administration. In this connection Dr. Medhi referred to *Kuldip Singh v. The State of Punjab*, AIR 1956 SC 391, wherein the following passage occurs at page 399:

"When the Chief Justice of a High Court or the District Judge of a District Court makes an administrative allotment of work among the Judges of his Court, their jurisdiction and powers are not affected, and if work allotted to one Judge goes to another by mistake his jurisdiction to entertain the matter and deal with it is not affected. But that is not the scheme of the Punjab Courts Act and the mere fact that Mr. J. N. Kapur called himself the Additional District Judge and purported to act as such cannot affect the matter of his jurisdiction."

As the Punjab Courts Act does not contemplate the appointment of Additional Judges to the District Court, none can be appointed. The Court contemplated is the Court of the Additional Judge which is in the nature of a special tribunal set up for a special purpose and invested with the powers of a District Judge when dealing with the matters specially entrusted to its jurisdiction. We hold therefore that the Court of the Additional Judge is not a division Court of the Court of the District Judge but a separate and distinct Court of its own."

12. The point that arises for our consideration is whether the Court of the Additional District Judge in Assam is a separate and distinct Court of its own or it is a division Court of the Court of the District Judge.

13. Section 4 of the Civil Courts Act runs as follows:

"The State Government may alter the number of District Judges, Subordinate Judges and Munsifs now fixed."

provision of Section 4, 9, 11, 13 or 15 of the Act.

14. The aforesaid provisions of the Act indicate that the Act has been enacted with a view to make better provision for the administration of public religious and charitable trusts in the State of Madhya Pradesh. The object is sought to be achieved by appointing the Deputy Commissioner of respective districts as Registrar of public trusts situated within his jurisdiction. It requires the trustee of the public trust to make an application for registration of the public trust to the Registrar stating various details including as to how the trust has been created, what the trust properties are, what its income is and who are the trustees. Even if a trustee of a public trust has not applied for getting the trust registered, any person interested in the trust is entitled to move the Registrar to hold an inquiry as to whether the trust is a public trust. Not only that, but the Act has authorised the Registrar himself to initiate inquiry and the Registrar has then to decide whether the trust is a public trust or not. If he decides that it is a public trust, he has to record his findings as to its origin, as to what its properties are, who are the trustees and what is the mode of succession to the office of the trustee. He has further to make a permanent record of his findings in the register which he is required to maintain. In other words, the scheme is that the Registrar is enjoined with a duty to maintain a complete record about public trusts within his district and its properties. The administration of the trust remains with its trustees and the properties of the trust vest in the trustees only. The Registrar only exercises control over them by exercising his supervisory powers conferred on him in Chapter V of the Act.

15. Now, as regards the inquiry which the Registrar holds under Section 5 he is only performing the statutory duty cast on him. He neither represents the State Government nor the trust. The nature of the inquiry, as Section 29 will indicate, is judicial inquiry and the powers which he has in holding the inquiry are the same which a Civil Court has in holding an inquiry. After holding an inquiry, the Registrar has to record his finding stating reasons for those findings and he has further to make entries in the register in accordance with his findings. After he has done these things, as sub-section (2) of Section 7 would indicate, he becomes *functus officio* as regards those findings or the entries made. It is not within his power to change his decision or to alter the entries. Sub-section (2) of Section 7 in clear terms says that the entries so made shall, subject to the provisions of this Act and subject to any change recorded under any provision of this Act or a rule made thereunder, be final and conclusive. The manner provided in the Act to get the entries changed is on filing of a suit in a Civil Court under Section 8, by the person aggrieved, or by an intimation

under Section 8 of the change which has occurred in the situation subsequent to the inquiry and making of entries. Neither the State Government nor the Registrar is competent to give any relief to any person who feels aggrieved by the entries made by the Registrar. Thus the position is that there is no personal interest of the Registrar of the State Government in the trust property or the trust. It is also not within the competence of either the State Government or the Registrar to grant relief to a person aggrieved by making any change in the entries even if any error therein is brought to its or his notice. They are not competent to grant any relief. Thus, a relief which the plaintiff claims under Section 8 is not a relief personally asked against the State Government or against the Registrar. This being the position, in our opinion, Section 80 of the Civil Procedure Code has no application to the suit filed under Section 8 of the Act. As sub-section (2) of Section 8 itself indicates, the State Government is not even required to be joined as a party to the suit. It provides that after a suit has been filed the Civil Court shall give notice to the State Government through the Registrar and it is only if the State Government desires that it should be joined as a party to the suit, it should be joined. The provisions clearly indicate that the suit under Section 8 cannot be regarded as a suit against the Government.

16. The view taken by us finds support in the decision of the Calcutta High Court reported in *Mrs. Manilaxmi v. Hindustan Co-operative Insurance Society Ltd.*, AIR 1962 Cal 625. In that case the learned Judge held that Section 80 specifically provides that the person giving notice must state, *inter alia*, his cause of action and the relief which he claims. As no cause of action against the Government or against the public officer is stated and as no relief is claimed against them personally, notice under Section 80 of the Civil Procedure Code was not necessary. It may also be stated that certain observations of their Lordships of the Privy Council in *Revati Mohan v. Jatindra Mohan*, AIR 1934 PC 96 lend support to the view taken by us. In that case the matter arose out of a suit filed by a mortgagee to enforce his mortgage which had been executed by the manager of the estate appointed under the Bengal Tenancy Act. As monies were not paid a suit was instituted against the manager who was a public officer. No notice under Section 80 had been given to him. The view taken by the High Court was that notice under Section 80 was necessary. When the matter came before their Lordships they held that no notice was necessary and allowed the appeal. The rule laid down by their Lordships has been well summarized in the *placitum* in the following words:

"In a suit against a public officer it is only where the plaintiff complains of some act

purporting to have been done by him in his official capacity that notice is enjoined. But where a mortgagee sues upon a mortgage executed by the former manager under Section 95, Bengal Tenancy Act, and the mortgage imposes no personal liability upon the manager, but merely provides that if payment be not made the mortgagee would be entitled to realise his dues by sale through the Court and the mortgagee makes no claim against the manager personally such a suit is not within the ambit of Section 80 and no notice of suit is required."

Thus the test laid down by their Lordships is whether any relief is asked personally against the Government or a public officer and this is the test for determining whether notice under Section 80 is required to be given or not. If relief is asked personally against the Government or a public officer notice under Section 80 is necessary. If no relief personally against them was asked no notice is necessary. As already pointed out no relief is claimed personally either against the State Government or the Registrar in the suit under Section 8 of the Act and therefore no notice under Section 80 of the Civil Procedure Code was required to be given.

17. It is not necessary to deal in detail with the decision of the Division Bench of this Court and other two decisions which have taken the same view. In the case before the Division Bench, there was no dispute between the parties and the Division Bench proceeded on an assumption that notice under Section 80 was necessary in a suit filed against the respondent. The point has not been discussed nor any finding has been recorded that notice is required. In the decision of the Single Judge, the fact that the plaintiff is required to state the relief which he claims against the Government or a public officer and the object of Section 80 have not been considered. For reasons, stated above we hold that no notice under Section 80 of the Civil Procedure Code is required to be given to the State Government, or the Registrar, prior to the institution of a suit under Section 8 of the Act.

18. In the result, we answer the question framed in the negative. We allow the appeal with costs and set aside the judgment appealed against and send the case back to the Trial Court for disposal in accordance with law.

Appeal allowed.

AIR 1970 BOMBAY 306 (V 57 C 54)

K. K. DESAI, J.

The State of Maharashtra, Applicant v. S. B. Mahajani, Opponent.

Civil Revn. Appln. No. 690 of 1969, D/- 19-11-1969, against order of Civil J. Sr. Divn. Ahmednagar, D/- 13-3-1969.

DN/DN/B520/70/BDB/D

(A) Civil P. C. (1908), Order 11, Rule 13 — Production of documents — Privilege — Affairs of State — Privilege, claim of — Claim should be decided at the stage of recording of evidence — If decided earlier, decision is open to review at stage of recording of evidence. (Para 2)

(B) Civil P. C. (1908), Section 114 — Review — State claiming privilege in respect of certain documents — Decision by Court at stage of interrogatories is premature — Decision liable to review at stage of recording of evidence. (Para 2)

C. R. Dalvi, Asstt. Govt. Pleader, for Applicant; M. K. Patwardhan, for Opponent.

ORDER: It appears that, in connection with certain documents, the State Government being the defendant in the suit, at the stage of answers to interrogatories, raised a contention that the documents were privileged, and by the order dated March 13, 1969, the learned Civil Judge, Senior Division, Ahmednagar, held that the submissions made about the privilege claimed in the affidavit filed on behalf of the Government were insufficient. His order was: "I therefore disallow the prayer regarding the privilege." By a further order dated July 15, 1969, the learned Judge rejected the application (Ex. 37) made on behalf of the State Government for reconsidering the question of privilege. The submission on behalf of the State was that, in the fresh affidavit which was then filed, facts relevant to the question of privilege had been stated. The question should, therefore, be reconsidered. The learned Judge then held that, having regard to his previous order dated March 13, 1969, it would not be proper and just to review the question again raised at a later stage.

2. Now, Mr. Dalvi for the State Government is right in his submission that when a question of privilege is raised on behalf of the Government in any suit or proceedings, normally, that question must be decided at the hearing of the suit when in the course of recording of evidence a demand for document is made on behalf of a party to the suit and the State Government claims privilege and refuses to produce it. Ordinarily after permitting the Government to produce such material as it desires in support of its claim for privilege that only at that stage the Court should decide the question and either accept or reject the claim for privilege. It was somewhat abnormal and out of the ordinary for the lower Court to decide the question of privilege at the stage of interrogatories and/or disclosure of documents. Even if the claim for privilege is made and inspection of disclosed documents is refused on the ground of privilege at earlier stage, the question should never be decided at the stage at which the learned Judge below passed his order dated March 13, 1969. He should have directed that the normal practice and procedure was to decide the question when whilst

evidence is being recorded the Government claims privilege and refuses to permit the documents to be brought on record. The order dated March 13, 1969, was liable to be reviewed at the hearing of the suit. It was prematurely made without giving sufficient opportunity to the Government for making its appropriate submissions and tendering evidence in support of the claim for privilege.

3. Under the circumstances, the order dated March 13, 1969, and July 15, 1969, are set aside. The question of privilege, if raised by the Government at the hearing of the suit, will be decided afresh by the trial court.

4. Rule absolute. There will be no order as to costs.

Rule made absolute.

AIR 1970 BOMBAY 307 (V 57 C 55)

TARKUNDE AND NATHWANI, JJ.

M/s. Chunilal Rikhabchand and Co., Applicant v. The Union of India and another, Opponents.

Civil Revn. Applns. Nos. 247 and 649 of 1965, D/- 30-7-1969, against order of Addl. J., Small Cause Court, Poona, D/- 31-7-1964.

(A) Provincial Small Cause Courts Act (1887), Sections 15 and 16, Schedule second Articles (1) and (3) — Suit for compensation against railway for loss or injury to goods — Cognizance by Court of Small Causes not barred.

A suit for compensation for loss or injury to goods entrusted to a Railway as a carrier does not fall within the ambit of Article (1) or (3) of the second schedule of the Act and is cognizable by a Court of Small Causes. (Para 15)

A suit for compensation for loss or injury to goods entrusted to a Railway as a carrier is essentially a suit for damages for breach of contract. A breach of contract committed by a Railway Administration cannot be regarded as an "act done or purporting to be done by or by order of the Central Government", within the meaning of Article (1). In the first place, it is difficult to look upon a breach of contract as an act. Secondly, supposing it is an act, it cannot be held to be an act of the Central Government. If the language used in Article (1) is compared with the language in Article (3), it is clear that Article (1) applies to acts of the Central Government as such, and not to acts of an officer of the Central Government in his official capacity. (Paras 6 and 7)

Article (3) also does not cover a suit on a breach of contract by a Railway Administration because a breach of contract cannot be regarded as an act purporting to be done by an officer of the Central Government in

his official capacity. No specific act of an officer of the Central Government is required to be alleged by a plaintiff who files a suit for compensation for loss or injury to his goods entrusted to a Railway as a public carrier. (Para 8)

The Provincial Small Cause Courts Act was passed in 1887, prior to the General Clauses Act of 1897. The definition of the word 'act' in Section 3 (2) of the General Clauses Act, has therefore, no direct application in the interpretation of the word 'act' in Article (3) of the Second Schedule of the Provincial Small Cause Courts Act. Secondly, the word 'act' in Article (3) occurs in association with the word 'order' and hence it appears from the context that the word 'act' is used for a positive and distinct act, and not for a mere omission. Finally the filing of such suits in a Court of Small Causes is supported by old precedents and a uniform practice of long standing and it is not desirable to discard those precedents and disregard that practice in the absence of compelling reasons. (Para 10)

(B) Limitation Act (1908), Article 30 — Suit against railway for compensation for damages to goods delivered — Starting point of limitation — Burden of proof.

In a suit for compensation for loss or injury to goods entrusted to railway as a carrier burden is on the Railway Administration to establish that the injury to the goods had occurred more than one year before the institution of the suit. (Para 19)

Held that upon the material before the Court it was not possible to say that the suit was instituted beyond one year of the accrual of the cause of action. AIR 1962 SC 1879, Foll. (Para 20)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1879 (V 49) = 1963-2 SCR 832, Jetmull Bhojraj v. Darjeeling Himalayan Railway Co. Ltd. 19
(1940) AIR 1940 Oudh 245 (V 27) = 1940 Oudh WN 347, Sital Prasad Nigam v. United Provinces 14
(1934) AIR 1934 PC 96 (V 21) = 61 Ind App 171, Revati Mohan Das v. Jatindra Mohan Ghosh 9
(1914) AIR 1914 Mad 578 (I) (V 1) = ILR 37 Mad 533, Secretary of State for India v. A. Rambraman 13
(1905) ILR 28 Mad 213 = 15 Mad LJ 226, Mothi Rungaya Chetty v. The Secretary of State for India 12
(1890) ILR 17 Cal 290, Bunwari Lal v. The Secretary of State for India 11
C. R. A. No. 247 of 1965:—
S. C. Pratap, for Applicant; B. R. Naik, for Opponent No. 1.
C. R. A. No. 649 of 1965:—

U. R. Lalit, for Appellant; B. R. Naik, for Respondent.

TARKUNDE, J.:— The petitioners in these revision applications had filed suits in the Poona Small Cause Court against the Union

of India representing one or more of the Railway Administrations for damages caused by loss or injury to goods carried by railway. The suits having been dismissed by the Trial Court the petitioners have approached this Court in revision. When the revision applications reached hearing before Mr. Justice Abhyankar, the learned Judge felt some doubt on whether such suits could be entertained by a Court of Small Causes. The learned Judge, therefore, referred these revision applications for the decision of a Division Bench.

2. Before dealing with these revision applications on the merits, it is desirable to consider whether the suits were rightly entertained by the Poona Small Cause Court. The jurisdiction of the Court to try these suits was not questioned on behalf of the Union of India at the trial. To our knowledge suits of this nature have been always entertained by Courts of Small Causes when the suits lay within the Courts' pecuniary jurisdiction.

3. Section 32 of the Bombay Civil Courts Act, 1869 provides in sub-section (1) that no subordinate Court other than the Court of a Civil Judge, Senior Division, and no Court of Small Causes shall receive or register any suit in which the Government or any officer of the Government in his official capacity is a party. Sub-section (3) of Section 32, however, lays down certain exceptions to this rule. Sub-section (3) says inter alia that nothing in Section 32 shall be deemed to apply to a suit against the administration of a Government railway. Consequently, the question whether the present suits were rightly filed in the Poona Small Cause Court depends on whether they fell within the cognizance of that Court under the relevant provisions of the Provincial Small Cause Courts Act, 1887.

4. Section 15 of the Provincial Small Cause Courts Act lays down that a Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule of the Act. Section 16 of the Act provides that a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes. Since the suits before us lay within the pecuniary jurisdiction of the Poona Small Cause Court, they could be tried only by that Court unless they fell within the Second Schedule of the Act as suits excepted from the cognizance of a Court of Small Causes.

5. Articles (1) and (3) of the Second Schedule are the only articles which can possibly cover suits filed against the Union of India in respect of loss or injury to goods entrusted to one of the Railways as a public carrier. Articles (1) to (3) of the Second Schedule read as follows:

"(1) A suit concerning any act done or purporting to be done by or by order of the Central Government, the Government Representative or the State Government;

(2) a suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office;

(3) a suit concerning an act or order purporting to be done or made by any other officer of the Government in his official capacity, or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office."

6. A suit for compensation for loss or injury to goods entrusted to a Railway as a carrier is essentially a suit for damages for breach of contract. This is made clear by Section 77 (1) of the Indian Railways Act, 1890, which says that the Railway Administration shall be responsible as a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872, for the loss, destruction, damage, deterioration or non-delivery of goods carried by a railway within a period of thirty days after the termination of transit. The question is whether such a suit for breach of contract is covered by either Article (1) or Article (3) of the Second Schedule of the Provincial Small Cause Courts Act, 1887.

7. It does not appear to us that Article (1) of the Second Schedule covers a suit of this type. A breach of contract committed by a Railway Administration cannot be regarded as an "act done or purporting to be done by or by order of the Central Government." In the first place, it is difficult to look upon a breach of contract as an act. Secondly, supposing it is an act, it cannot be held to be an act of the Central Government. If the language used in Article (1) is compared with the language in Article (3), it seems clear that Article (1) applies to acts of the Central Government as such, and not to acts of an officer of the Central Government in his official capacity.

8. We are of the view that Article (3) also does not cover a suit on a breach of contract by a Railway Administration. This is because a breach of contract cannot be regarded as an act purporting to be done by an Officer of the Central Government in his Official capacity. No specific act of an officer of the Central Government is required to be alleged by a plaintiff who files a suit for compensation for loss or injury to his goods entrusted to a Railway as a public carrier.

9. Mr. B. R. Naik, who appeared on behalf of the respondents (the Union of India representing one or more of the Railway Administrations), argued that the word "act" in Article (3) of the Second Schedule means an act as well as an illegal omission and that therefore, Article (3) covers a suit for a breach of contracts. Mr. Naik relied on Section 3 (2) of the General Clauses Act, 1897, which lays down that the word "act", used with reference to an offence or a civil wrong, shall include a series of acts, and that "words which refer to acts done extend

also to illegal omissions". According to Mr. Naik a breach of contract amounts to an illegal omission on the part of the concerned officers of the Central Government and a suit for compensation of such a breach of contract falls within the ambit of Article (3) of the Second Schedule of the Provincial Small Cause Courts Act. Mr. Naik referred to Section 80 of the Civil Procedure Code which applies to suits instituted against the Government as well as to suits "against a public officer in respect of any act purporting to be done by such public officer in his official capacity." In *Revati Mohan Das v. Jatindra Mohan Ghosh*, 61 Ind App 171 = (AIR 1934 PC 96), the Privy Council observed that breach of contract committed by a public officer in his official capacity may amount to an "act" and may entitle the officer to a notice under Section 80, although their Lordships held in that case that the default of the officer concerned did not amount to an illegal omission and that the officer was, therefore not entitled to a notice. It was observed in the judgment:

"Their Lordships do not suggest that a claim based upon a breach of contract by a public officer may not in many cases be sufficient to entitle him to notice under the section, but they are unable, for the reasons already given, to agree, with the learned Judges that the omission by the first respondent to pay off the mortgage was such a breach".

10. We have carefully considered the above argument of Mr. Naik, but are unable to accept it. In the first place, the Provincial Small Cause Courts Act was passed in 1887, prior to the General Clauses Act of 1897. Section 3 of the General Clauses Act, which includes the definition of the word "act", says in terms that the section applies to words used in the General Clauses Act itself and "all Central Acts and Regulations made after the commencement of this Act". The definition of the word "act" in Section 3 (2) of the General Clauses Act has, therefore, no direct application in the interpretation of the word "act" in Article (3) of the Second Schedule of the Provincial Small Cause Courts Act. Secondly, the word "act" in Article (3) of the Second Schedule occurs in association with the word "order" and hence it appears from the context that the word "act" is used for a positive and distinct act, and not for a mere omission. Finally the filing of such suits in a Court of Small Causes is supported by old precedents and a uniform practice of long standing and it is not desirable to discard those precedents and disregard that practice in the absence of compelling reasons.

11. The oldest precedent is *Bunwari Lal v. The Secretary of State for India*, (1890) ILR 17 Cal 290. The case decided by a Division Bench of the Calcutta High Court in 1889, within two years of the passing of the Provincial Small Cause Courts Act, 1887.

There a suit was brought in a Small Cause Court against the Secretary of State for India for damages caused to an oil mill while it was being carried on a State Railway. Accepting the reference made by the trial Judge, the High Court held that the suit was not covered by Article (3) of the Second Schedule of the Provincial Small Cause Courts Act, and that it was cognizable by the Small Cause Court. The decision does not appear to have been questioned in any subsequent case.

12. In *Mothi Rungaya Chetty v. The Secretary of State for India*, (1905) ILR 28 Mad 213, the plaintiff had delivered a parcel to Postal authorities for transmission as a value-payable article. By the mistake of a clerk the parcel was delivered to the addressee without its value being collected from him. The suit was filed to recover the value of the article from the Government. An argument was addressed to the Madras High Court in revision that the suit was not cognizable by a Small Cause Court. The argument was rejected on the ground that the case was one of contract and not of tort.

13. In *the Secretary of State for India v. A. Rambraman*, ILR 37 Mad 533 = (AIR 1914 Mad 578) the plaintiff sued for an amount due to him under a contract with the Government. The plaintiff claimed that he had performed his part of the contract but was not paid the amount due to him. The suit was dismissed by the trial Court but was decreed in appeal. In a second appeal filed by the Secretary of State for India an objection was taken on behalf of the defendant that the amount sought to be recovered was less than Rs. 500/-, that the suit was of a small cause nature and that, therefore, the second appeal was not maintainable. The High Court upheld the contention and in doing so held that the suit was not covered by Article (3) of the Second Schedule of the Provincial Small Cause Courts Act and was, therefore of a small cause nature. Referring to Article (3) of the Second Schedule of the Provincial Small Cause Courts Act the Court said:

"The article applies to a suit relating to some distinct act done by an officer of Government. We do not think that a mere failure to carry out a contract can be regarded as such an act."

14. An illustration of a suit which was held to be covered by Article (3) of the Second Schedule of the Provincial Small Cause Courts Act and therefore to be outside, the cognizance of Small Cause Court, is provided by *Sital Prasad Nigam v. United Provinces*, AIR 1940 Oudh 245. The plaintiff in that case had tendered for the supply of grass to the jails of the United Provinces and had deposited some money by way of security for the performance of the contract. The Inspector-General of Prisons cancelled the acceptance of the tender and ordered forfeiture of the security amount. The plaintiff sued in a Small Cause Court for dama-

ges for the cancellation of the tender and for return of the security amount. It was held in appeal by the Oudh High Court that the suit was not maintainable. In doing so, the Court relied on a previous decision where it was held that the "act" mentioned in Article (3) of the Second Schedule must be "some particular act of some particular official". The suit was held to be covered by Article (3) of the Second Schedule because it concerned a specific act or acts of the Inspector-General of Prisons of the United Province.

15. It will be noticed that out of the cases mentioned above *Bunwari Lal Mookerjee v. The Secretary of State for India*, 17 Cal 290, dealt directly with a suit for compensation for damage caused to an article which was being carried on a State Railway. After that decision, the Provincial Small Cause Courts Act has been amended several times. The words of Article (3) of the Second Schedule of the Act have, however, remained unaltered. The word "act" in that article has been interpreted to mean a positive or distinct act of an officer of the Government and not a mere omission. To our knowledge, suits for compensation for loss, destruction, damage, deterioration or non-delivery of goods carried by Railways have been always filed in the Courts of Small Causes if they fell within the pecuniary jurisdiction of those Courts. There being no adequate reason to disagree with the precedents and to disapprove of the practices. We must hold that suits of this nature do not fall within the ambit of Articles (1) or (3) of the Second Schedule and are cognizable by a Court of Small Causes.

16. We will next turn to the merits of the two Civil Revision Applications.

Civil Revn. Appln. No. 247 of 1965.

17. The plaintiffs in this case were the consignees of 240 bags of gramdal which were despatched from Ashoknagar to the Poona Railway Station. The goods arrived at the Poona Railway Station on 25th May, 1962. The plaintiff's carting agent observed on that day that out of the 240 bags of Dal, 160 were wet and 4 were torn. The carting agent noted this observation in a letter (exhibit 29) and asked for an open delivery. Open delivery was given on 1st June, 1962 and the damages suffered by the plaintiffs were assessed. After giving the requisite notices, the plaintiffs filed the present suit on 30th July 1963 for recovery of the damages suffered by them. The learned Trial Judge framed issues on the pleadings of the parties, recorded evidence, but dismissed the suit by deciding only the first issue, which was whether the suit was within limitation. The learned Judge held that the suit was time barred.

18. For the purposes of limitation the suit is governed by Article 30 of the Indian Limitation Act of 1908. That article provided a period of limitation of one year from the time when the loss or injury to

the goods occurred. The suit would have been within limitation if the period was counted from 1st June, 1962 when open delivery of the goods was given to the plaintiff and the damage to the goods was assessed. The Learned Trial Judge, however, held that the damage to the goods had occurred on 25th May, 1962 when the carting agent of the plaintiffs observed that 160 bags of Dal were wet and 4 bags were torn. If the period of limitation commenced from 25th May, 1962, the suit was barred by time.

19. In holding that the suit was barred by time, the learned Trial Judge appears to have overlooked the principle that the burden was on the Railway Administration to establish that the injury to the goods had occurred more than one year before the institution of the suit. The principle is illustrated by the decision of the Supreme Court in *Jetmull Bhojraj v. Darjeeling Himalayan Railway Co. Ltd.*, AIR 1962 SC 1879. The facts of that case were very similar to the facts of the present suit. In that case, after the goods had reached the station of destination, the plaintiff wrote to the Railway on 21st December, 1946, that the consignment had arrived in "a very damaged condition" and requested that open delivery of the consignment should be given to him immediately. Open delivery was given to the plaintiff on 12th February, 1947. The plaintiff's suit, filed on 9th April, 1948, was within time if the period of limitation commenced from the date of open delivery (12th February, 1947), but was barred if the period commenced from the plaintiff's letter of protest (21st December, 1946). The majority of the Supreme Court referred to the principle that the burden lay on the Railway Administration to establish that the loss or injury occurred more than one year before the institution of the suit and went on to say:

"No attempt has been made on behalf of the D. H. Railway to show that the damage in fact occurred more than one year before the suit was instituted. All that is said on their behalf is that the appellant knew in December 1946 that the consignment appeared to be damaged."

Their Lordships then referred to the plaintiff's letter dated 21st December, 1946 in which he had stated that the consignment had arrived in "a very damaged condition" and their Lordships went on:

"This has reference to the outer covering or the package and not to the contents. Moreover, delivery was given nearly two months after this and it is not possible to say whether the damage which was noticed at that time had already been caused before December 21, 1946 or was caused thereafter. The D. H. Railway which had the custody of the goods could alone have been in a position to say, if at all, as to when the damage was caused. Upon the material before us it is not possible to say that the

suit was instituted beyond one year of the accrual of the cause of action. It is, therefore, not barred by time."

20. In the present case also the letter of the plaintiff's carting agent exhibit 29 merely referred to the external condition of the bags. It was stated in the letter that 160 bags were wet and 4 bags were torn. Nothing was said in that letter about the damage to the contents of the bags. No evidence was led on behalf of the Central Railway Administration to show that the damage had been caused prior to 25th May, 1962 and that it was not caused between that date and the 1st of June, 1962 when open delivery of the consignment was given. In the absence of any evidence by the Railway Administration, it must be held, following the above decision of the Supreme Court, that "upon the material before us it is not possible to say that the suit was instituted beyond one year of the accrual of the cause of action". On this question the learned Trial Judge observed in his judgment that it was "nobody's case" that the injury to the goods was caused between the period from 25th May to 1st June, 1962. This observation indicates that a wrong approach was adopted by the learned Judge. It was for the Railway Administration to prove that the damage to the goods had been caused prior to 25th May, 1962 and this the Railway Administration failed to do.

21. We, therefore, hold that the plaintiff's suit was within time. The decree passed by the learned Trial Judge dismissing the plaintiffs' suit is accordingly, set aside. The suit is remanded to the trial Court for giving findings on the remaining issues and passing an appropriate decree in accordance with those findings. The respondents will pay the costs of the petitioner in this Court.

Civil Revn. Appln. No. 649 of 1965.

22. The plaintiffs in this suit were the consignees of 24.8 tons of coal despatched from the Barkakana Station on the Eastern Railway to the Poona Station on the Central Railway. The goods arrived at the Poona Station on 21st November 1962. On 24th November, 1962, the plaintiffs' agent wrote to the Chief Goods Clerk of the Poona Railway Station that the consignment should be reweighed. By a letter of 29th November, 1962, the Chief Goods Clerk refused reweighment. By a subsequent letter dated 13th December, 1962, the Chief Goods Clerk asked the plaintiffs to take delivery and remove the goods from the Railway yard. The Chief Goods Clerk added that if the goods were not removed, they would be sold at the risk of the plaintiffs. The plaintiffs did not take delivery but the Railway, instead of selling the coal, transported it to Matunga and used it there. Thereupon, on 20th March, 1963, the plaintiffs filed the present suit for the value of the goods, after deducting therefrom the railway freight. It was found on the evidence

laid in the suit that the coal had been transferred from the wagon to another during the course of transit and that there was a shortage of 2.1 tons in the coal which was consumed by the Railway Administration after it was carried to Matunga.

23. The main findings given by the learned trial Judge in dismissing the plaintiffs' suit were that the plaintiffs had no right to claim reweighment of the coal before receiving delivery thereof and that the Railway Administration was entitled to call upon the plaintiffs to accept delivery without reweighment. We do not, however, find it necessary to consider whether any error of law was committed by the learned Trial Judge in giving these findings. It was not denied by Mr. Lalit that the goods were carried at owners' risk. It was also not denied that the plaintiffs led no evidence whatever, though the necessary issue was framed, to show that there was any negligence or misconduct on the part of the officers of the Railway Administration in dealing with the consignment. The plaintiffs, therefore, are not entitled to any damages for the shortage of the coal which, as observed above, was 2.1 tons.

24. Mr. Lalit for the plaintiffs argued that the Railway Administration is liable to the plaintiffs for the coal appropriated and consumed by it. In its written statement, however, the Railway Administration claimed that, apart from the freight charge of Rs. 871.20 it is entitled to receive from the plaintiffs Rs. 4.90 by way of demurrage and Rs. 1,449.80 by way of wharfage. Thus a total amount of Rs. 2,325/- and odd was claimed by the Railway Administration by way of set off to the plaintiffs' claim. In view of this claim of the Railway Administration, the learned trial Judge came to the conclusion that nothing was due to the plaintiffs. Mr. Lalit argued before us that no evidence was led by the Railway Administration to show that it was entitled to Rs. 4.80 by way of demurrage and Rs. 1,449.80 by way of wharfage. It is true that no evidence was led by the Railway Administration with regard to these items. Under the circumstances, we would have set aside the decree of the learned Trial Judge and remanded the case for recording the evidence in regard to the demurrage and wharfage claimed by the Railway Administration. We, however, adjourned the case to enable Mr. Lalit to find out whether the claim made by the Railway Administration by way of wharfage was a proper claim. After inquiry, Mr. Lalit informed us that the claim was proper and that no useful purpose would be served by setting aside the trial Court's decree and remanding the suit for further evidence.

25. In the result, we do not find it necessary to interfere with the decree passed by the Trial Judge. This Civil Revision Appli-

cation is, therefore, dismissed, Under the circumstances, there will be no order as to costs.

Orders accordingly.

AIR 1970 BOMBAY 312 (V 57 C 56)

VAIDYA, J.

Dr. Narayan Ganesh Dastane, Appellant
v. Mrs. Sucheta Narayan Dastane, Respondent.

A. F. A. D. No. 480 of 1968, D/- 24-2-1969, against decision of Fourth Extra Asst. J., Poona in Appeals Nos. 700 to 722 of 1965.

(A) Hindu Marriage Act (1955), Sec. 12 (1) (c) — Concurrent findings of lower court on construction of letters and on other evidence that consent of petitioner husband to marriage was not obtained by fraud — Finding is essentially of facts and are binding in second appeal — (Civil P. C. (1908), Section 100). (Para 11)

(B) Hindu Marriage Act (1955), Sec. 13 (1) (iii) — Schizophrenia — Finding of, is essentially one of fact — Concurrent findings on evidence cannot be challenged in second appeal — (Civil P. C. (1908), Section 100).

The question as to whether a person suffered at any time from schizophrenia is essentially a question of fact; and the concurrent findings recorded by the two Courts on a careful consideration of the evidence and of the circumstances of the case, are not open to challenge in second appeal.

(C) Hindu Marriage Act (1955), Sec. 13 (1) — Petitioner must establish firstly, that the respondent has been incurably of unsound mind and secondly, that she has been so for a continuous period of not less than three years immediately before the filing of the petition. (Para 14)

(D) Evidence Act (1872), Section 87 — Pamphlet on Schizophrenia published by charitable society in England interested in collecting fund for treating Schizophrenia — Authorship of pamphlet not established — Pamphlet cannot be treated as authoritative on Schizophrenia. (Para 14)

(E) Evidence Act (1872), Section 45 — Schizophrenia — Tests — No single test — Encyclopaedia of Medical Practice, p. 387, Referred — (Hindu Marriage Act (1955), Section 13 (1)). (Para 14)

(F) Hindu Marriage Act (1955), Section 13 (1) — Incurable disease — "Schizophrenia" — That it is incurable disease held not supported by authorities cited by counsel — Evidence Act (1872), Section 45. (Para 15)

(G) Evidence Act (1872), Sections 31, 4 — Admission — Conclusive proof. — Ignoring the provisions of Section 31 of the Evidence Act the Court cannot assume

that whatever is written down in the form of admissions is conclusive proof of the words and happenings mentioned therein. (Para 44)

(H) Hindu Marriage Act (1955), Secs. 10, 23 — Cruelty — What amounts to, for judicial separation — There must be apprehension in mind of petitioner, that it would be harmful for him to live with respondent.

The word cruelty in matrimonial law has not the same meaning as it has in an ordinary dictionary. The Court should apply its mind to the question as to whether the apprehensions of the petitioner be reasonable and whether he had condoned the alleged acts by cohabiting with the respondent. It is the duty of the Court to consider the provisions of Section 23. In view of the parity of status accorded to a woman under the Hindu Marriage Act, the wife has right to express any views about any of the matters even if the husband does not like that. The Court should consider carefully all the requirements of law under Section 10 and Section 23 and the principles laid down regarding the concept of legal cruelty in matrimonial law. (Paras 44 and 45)

Cruelty in matrimonial law may be of infinite variety. It can be subtle or brutal. It may be physical or mental. It may be by words, gestures or by mere silence, violence or non-violence. That is the reason why Courts have never tried to give an exclusive definition of cruelty as understood in matrimonial law.

Cruelty means legal cruelty as understood in English law, namely, injury, causing danger to life or limb or health or reasonable apprehension of such injury. (Paras 48, 49)

Where the acts complained of are expressions sometimes of rebuke, sometimes of remorse very often arising out of occasional ill tempers which are the ordinary wear and tear of married life, even the application made by the respondent-wife to the Ministry of Agriculture where the husband was employed which is, perhaps, the gravest of the acts attributed to the respondent cannot be considered as a cruel act, when it has not injured the status or health of the husband. It is in fact an act of an innocent wife who was placed in a pitiable position by her husband who charged her with insanity while she was pregnant and had to take the shelter of her parents. (Para 50)

Apart from this, what the Courts have to bear in mind when deciding these questions, is clearly indicated in Sections 10 and 23 of the Hindu Marriage Act. The acts, words, omissions or events alleged to amount to cruelty directed against the petitioner must be proved beyond reasonable doubt. This must be in accordance with the law of evidence. Second, it must be established that there is an apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other party. Even that is not enough, and the third requirement of law is

that the Court must be satisfied that this apprehension is reasonable having regard to all the facts and circumstances of the case. Moreover, even this is not enough to entitle the petitioner to relief, if the conduct of the petitioner himself disentitles him to any relief, because if the Court finds that the petitioner is taking advantage of his own wrong, it is the duty of the Court not to grant the relief. The fifth requirement, which is mentioned in Sec. 23 is that where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty.

(Para 51)

A perusal of the provisions of the Hindu Marriage Act, 1955, shows that it justifies breaking up of the matrimonial tie only when there are grave and weighty reasons which make it wrong to continue the matrimonial home. The Court cannot countenance ill conceived notions of an intemperate husband to shatter the legitimate hope of a virtuous wife for re-union.

(Para 61-A)

(I) Hindu Marriage Act (1955), Secs. 10, 13 (1) (iii) — Petition by husband for divorce on ground of incurable insanity — Acts alleged as instances of acts done in fit of insanity (Schizophrenia) — Same acts alleged as acts of cruelty — Wife establishing that she was not insane — Husband persisting in allegation — Husband bent on getting divorce than to prove cruelty and getting judicial separation — Husband held failed to establish legal cruelty — Pregnancy of wife at the time of parting, raised presumption of condonation of acts of cruelty committed till then — Presumption held not rebutted — Husband not entitled to any relief on ground of any act of cruelty before pregnancy — No subsequent act of cruelty alleged — Relief of judicial separation refused. Case law ref. (Paras 54, 55)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Bom 332 (V 55) = 44
70 Bom LR 80, Laxmibai v. Laxmichand
- (1964) 1964 AC 644 = (1963) 3 WLR 176, Gollins v. Gollins 50
- (1964) 1964 AC 698 = (1963) 3 WLR 215, Williams v. Williams 50
- (1938) AIR 1938 Bom 81 (V 25) = 39 Bom LR 1138, Cowasji Nuseerwanji Patuck v. Shehra Cowasji Patuck 49
- (1905) 7 Bom LR 602, Meherally Mooraj v. Sakerkhanubai 49
- (1876) 1 LR 1 Bom 164, Yamunabai v. Narayan 49
- (1866-67) 11 Moo Ind App 551, Moonshee Buzloor Raheem v. Shamsoonnissa Begum 49
- (1790) 1 Hagg Con. 37 = 161 ER 467, Evans v. Evans 49
- S. B. Bhasme, for Appellant; M. V. Paranjpe with N. D. Hombalkar, for Respondent.

relations between a modern educated husband and his wife in Hindu Society.

2. The appellant in this appeal is the husband Dr. Narayan Ganesh Dastane. The respondent is his wife Mrs. Sucheta Narayan Dastane. They were married according to Vedic rites on May 13, 1956 in Poona. A daughter Shobha was born on March 11, 1957, a second daughter Vibhavari was born on March 20, 1959, and before the third daughter Prabha was delivered, the husband and wife unfortunately fell out as it is undisputed that they have been living separately from each other since March 1961.

3. On February 19, 1962, the appellant filed the petition from which the present second appeal arises. In that petition the appellant prayed in the first instance for a declaration annulling the marriage under Section 12 (1) (c) of the Hindu Marriage Act on the ground that the consent of the husband for the marriage was obtained by fraud. According to the husband, the wife was suffering from schizophrenia and she was treated in the Mental Hospital Yeravda some time in the year 1954; but schizophrenia was an incurable and dangerous form of unsoundness of mind, being hereditary and recurring; and these facts were suppressed from the husband before he consented for the marriage. The husband alleged that the parents and the relatives of the wife had known or ought to have known that the respondent's disease was diagnosed as schizophrenia before her marriage was settled with the petitioner and that they had deliberately concealed this fact from the petitioner and his father and deliberately gave them to understand and made them believe that the nature of the illness was simply a sun-stroke and cerebral malaria. It is on this ground that the husband prayed for the decree of nullity of the marriage. In the alternative, the husband prayed for a decree of divorce under Section 13 (1) (iii) on the ground that the wife had been incurably of unsound mind for a continuous period of not less than three years immediately before the presentation of the petition. Finally, in the alternative, the husband prayed for a decree for judicial separation under Section 10 (1) (b) alleging that the wife treated him with such cruelty as to cause a reasonable apprehension in the mind of the husband that it would be harmful or injurious for him to live with her.

4. The wife in her written statement denied the allegations made in the petition and contended that she was and is always ready and willing to go and live with the petitioner.

5. The learned Civil Judge, Senior Division, by his judgment and decree dated July 31, 1965 while dismissing the claim of the husband for a decree for nullity of marriage and divorce ordered the husband to pay Rs. 400 per month as interim maintenance till the end of January 1965 and Rs. 280

JUDGMENT:— This second appeal raises novel and difficult points with regard to the

per month from February 1, 1965 till the date of the judgment under Section 24 of the Hindu Marriage Act and further directed that on full payment of arrears of interim maintenance as ordered, the petitioner was entitled to a decree for judicial separation under Section 10 (1) (b) of the Hindu Marriage Act against the wife. He also ordered that the petitioner should pay Rs. 280 per month as future maintenance to the respondent and children under Sections 25 and 26 of the Hindu Marriage Act and directed that the children of the petitioner and respondent should be in the custody of the respondent till they attained majority while at the same time ordering that in the interest of the children and the petitioner and the respondent, the petitioner must be given interview with the children once in a fortnight at a convenient place, preferably a public park or a residence of a common friend. The learned Judge ordered the parties to bear their own costs.

6. The wife filed Civil Appeal No. 700 of 1965 against the decree of judicial separation. The husband filed Civil Appeal No. 722 of 1965 against the decree refusing annulment of marriage and divorce. The two appeals were heard by the Fourth Extra Assistant Judge at Poona who by his judgment and decree dated January 3, 1968 allowed the wife's appeal and set aside the decree passed by the Civil Judge and dismissed the husband's appeal and ordered the husband to pay to the wife costs of the petition and of the two appeals as well as maintenance at the rate of Rs. 400 till the end of January 1965 and Rs. 280 per month from February 1, 1965 to the date of the judgment.

7. Feeling aggrieved by the said judgment and decree, the husband has filed the present second appeal.

8. The first ground urged in this appeal is that the Courts below erred in law in not granting a decree annulling the marriage under Section 12 (1) (c) of the Hindu Marriage Act notwithstanding that the husband established facts which show that his consent to the marriage was obtained by fraud. The relevant provisions of the Hindu Marriage Act are as follows:—

12. "(1) Any marriage solemnized, whether before or after the commencement of this Act shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

(a)

(b)

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or fraud; or

(d)

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage:—

(a) on the ground specified in clause (c) of sub-section (1), shall be entertained if—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered."

9. The finding of the trial Court on this question is that there was no fraud committed by the respondent or her parents or anyone else in getting the final consent from the petitioner to his marriage with the respondent. The trial Court held that the allegation of the husband in his petition that he came to know that the respondent suffered from schizophrenia on April 25, 1961 from a certificate of the entry in the register of the Mental Hospital at Yeravda dated April 10, 1961 was proved and that the husband came to know about the alleged fraud about respondent's disease being schizophrenia on April 25, 1961 after the receipt by him of the certificate Exhibit 208; and hence the petition filed by him on February 19, 1962 was not barred by limitation under Section 12 (2) (a). He, however, considered the evidence on the point and came to the conclusion that the petitioner had decided to marry the respondent after fully considering the facts about the mental illness of the respondent as communicated in her father's letters dated April 25, 1956 and April 27, 1956, in view of the admissions made by the petitioner himself and the contents of his own letter to the respondent's father dated April 30, 1956, Exhibit 567.

10. In appeal the learned Assistant Judge considered the entire evidence on the record on the point and found that the petitioner had failed to prove that his consent to the marriage was obtained by any fraud, holding that considering the contents of the letter addressed by the respondent's father and all the circumstances of the case, it was evident that the petitioner with open eyes gave the consent for his marriage by his letter dated 30th April, 1956, Exhibit 567, observing as follows:—

"Petitioner had seen the respondent before marriage, petitioner had talk with the respondent before marriage. Not only the petitioner, his father, his family members had a talk with the respondent. The respondent entered the kitchen of the petitioner's family, did some work in the family as recorded by the petitioner's father in his letter, Exhibit 566. It cannot be said that the consent of the petitioner for the marriage between the petitioner and the respondent was obtained by fraud."

11. Now, these concurrent findings on the question of fraud are essentially questions of fact. Mr. Bhasme, however, argued that this finding of fact is based on a misconstruction of the relevant letters which clearly

show that the petitioner and his family members were misled by the suppression of the disease from which the wife suffered in 1954 and a representation falsely made that she had an attack of sun-stroke. There is no merit in this contention because in his letter, dated April 25, 1956, Exhibit 394, the respondent's father had clearly informed the petitioner's father as follows:—

"My wife writes to me from Poona that you yourself, Shrimati Dastane and your son have approved of my daughter, Ch. Meera. I feel very happy about the approval.

But, before we proceed further in regard to the negotiations for marriage, I feel I ought to keep you informed that, while my daughter is undoubtedly as good as you have been pleased to consider she is, and as she actually is, she had a little misfortune before going to Japan, in that she had a bad attack of sun-stroke which affected her mental condition for some (sic). Happily by course of a treatment in the Yeravda Mental Hospital, she could be cured satisfactorily and you find her, as she is today. Dr. Mujawar, Head of the Yeravda Mental Hospital and Shrimati Malatibai Ranade of the Hospital, who know her very well since then may, if you consider necessary, be kindly consulted in the matter.

If, after taking this letter into account and making such enquiries, as you may deem proper, you reconsider the matter and thereafter, your approval of my daughter continues, my joy will know no bounds, and on hearing from you I shall ask my wife to continue negotiations regarding further details about the marriage or if I can get leave, I shall myself go to Poona for the negotiations. My going to Poona; however, for this purpose is not certain because Parliament is in session at present and I have been put in charge of Commerce and Industry Ministry's Parliamentary work since joining here on the 12th instant.

As father of the girl, I greatly value your approval of my daughter, but the sole object in writing this letter is to ensure that, if she is yours for good, you should not be in the dark about an important episode in her life, which, though unfortunate, has happily ended well."

I cannot imagine a more frank and fair disclosure from a father of a daughter about to be married. Nothing would have been easier for the petitioner, who was then a Research Officer of the Agricultural Institute at Arbhavi, belonging to the then Government of Bombay, and his father, who was a lawyer in Poona, to have a full enquiry to satisfy themselves about the details of the illness which affected the respondent in 1954 for which she was treated in the Yeravda Mental Hospital. In his letter, Exhibit 567, dated April 30, 1956 addressed to the respondent's father, the petitioner has referred to the above letter and categorically stated:—

"एकंदर सर्व परिस्थितीचा विचार करून मी कालच ती. सौ. कमलाबाईंना चि. मीराचे वास्त माझा पूर्ण होकार कळविला."

The petitioner himself in his deposition paragraph 41 has honestly stated:—

"On the day in which we gave our final approval, respondent and her mother were with us in our residence for about 1½ hour. I came to Poona on 29th April, 1956 at 1-00 p.m. After finishing meals at about 1-30 p.m. I phoned to Mental Hospital, Yeravada from the next house of our residence. We thought on reading letter from respondent's father dated 27th April, 1956, that proper inquiries have to be made with the Mental Hospital authorities about the exact malady from which respondent was suffering in that hospital. I had no discussion with my father before sending a phone call to the mental hospital on 29th April, 1956. On inquiry on phone I did not get information which I required. On phone I was asked to come with family doctor of respondent. So I went to Dr. Deshmukh also to inquire as to who was the family doctor. I had a talk with Dr. Deshmukh for about half an hour. Dr. Deshmukh told me, that he was the family doctor of respondent. I believed him. I had no acquaintance or knowledge about Dr. Deshmukh before I went to him. I did not ask as to how he could be the family doctor of respondent's family, when that family was residing in Delhi and Japan Dr. Deshmukh is a relation of respondent and so I thought it necessary to make some independent inquiry, but when he showed the certificate about the respondent of Dr. Mujawar and told me about the treatment in the hospital, I did not think it necessary to make any independent inquiry. I relied upon the word of respondent's father, mother and Dr. Deshmukh, being supported by the medical certificate of Dr. Mujawar. I did not know Dr. Mujawar before that I had not mind to find out whether she had any remnant disease from which she was suffering in the mental hospital as I was convinced about the normal nature of respondent and that is why I had no talk with her about that interval to find out whether there was any remnant in her of the former disease. My father also did not ask any question to respondent to verify as to whether there was any sign remaining of the disease from which she was suffering in the mental hospital."

This evidence, in my judgment, clearly shows that the concurrent findings of the two Courts below that the consent of the petitioner to the marriage was not obtained by fraud is right and hence the petitioner is not entitled to a decree for annulment of marriage under Section 12 (1) (e) of the Hindu Marriage Act.

12. The second ground urged by Mr. Bhasme, the learned Counsel for the hus-

band, is that the record clearly establishes the petitioner's case under Section 13 (1) (iii) that the wife had been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition and the lower Court erred in law in not granting divorce on this ground. Both the Courts below have carefully considered the oral and documentary evidence on the record including the evidence of the petitioner's witnesses Dr. Yeshwant Waman Kelkar, Psychiatrist, Mental Hospital, Yerawada and Dr. Hanumant Vidyadhar Sardesai, M. B. B. S., M. D., Bombay, M. R. C. P., Edinburgh, Neurologist practising in Poona as a Consulting Physician and Radiologist and came to the conclusion that the petitioner failed to prove that she never suffered from schizophrenia which is the only ground alleged for saying that the respondent was of unsound mind. The learned Judge in the trial Court held from the evidence of Dr. Kelkar and Dr. Sardesai that a mere entry at page 26 of the file, Exhibit 85 which is the history sheet of the respondent maintained in the Yerawada Mental Hospital where the word "Schizo" was recorded by Dr. Mujawar, was not sufficient to show that the respondent was in fact suffering from schizophrenia. He further found that the diagnosis of Dr. Mujawar that the respondent suffered from schizophrenia was not correct observing as follows:—

"Dr. Kelkar of the Mental Hospital who is Psychiatrist in that hospital also admits that when a person moves in society, as well dressed, passes examination and is in the Government service, he cannot call that person a patient of Schizophrenia, that if a patient is discharged as recovered in 1954 and has not relapsed upto 1964-65 he cannot also call that patient as a patient of Schizophrenia, that the column of diagnosis in the form as at page 26 of Exhibit 85 is filled up after all the data in the other columns is ready for consideration, that in the case of respondent no such data seems to have been taken and considered before writing the diagnosis as Schizophrenia that diagnosis of doctors are at times wrong and more so when prescribed dates are not taken, that Schizophrenic patients are not allowed to travel by sea. So on the statement of the expert of petitioner himself Dr. Kelkar, the diagnosis of respondent's disease as Schizophrenia in 1954 by Dr. Mujawar cannot be accepted as correct. There is no recurrence of the disease in the case of respondent for the last 11 years even though she has pre-pregnancies. She mixed in society and the family members of her husband's side and parents' side for those 11 years. She passed M. A. in February, 1964 and is now in the employment of the Central Government in Delhi. A number of letters written by respondent are produced and they show that she is an intelligent girl. So these facts read with the statement of

Dr. Sardesai and Dr. Kelkar lead me to hold the diagnosis of Dr. Mujawar that respondent suffered from Schizophrenia is not correct.

This finding of the trial Court is confirmed by the Assistant Judge. The question as to whether the respondent suffered at any time from Schizophrenia is essentially a question of fact; and in view of these concurrent findings recorded by the two Courts on a careful consideration of the evidence and of the circumstances of the case, it is not open to the appellant to challenge these findings in second appeal. Dr. Mujawar was not examined as he was not available.

13. Mr. Bhasme has, however, contended relying on (1) certain passages from Henderson and Gillespie's Textbook of Psychiatry, (2) a pamphlet issued in 1961 by an organisation known as the Mental Health Research Fund having its office at 39, Queen Anne Street, London, (3) Volume 10, Encyclopaedia of Medical Practice, 2nd edition under the general editorship of Lord Horder, Extra Physician to Her Majesty the Queen and Consulting Physician to St. Bartholomew's Hospital, London in the year 1953, and (4) the behaviour of the respondent during the period of her cohabitation with the petitioner and thereafter, that the lower Courts ought to have held that the wife suffered from Schizophrenia not only in 1954 but all along and further that the finding of the two Courts that it was not an incurable disease was also wrong.

14. There is no substance even in this contention of Mr. Bhasme, Section 13 (1) of the Hindu Marriage Act in so far it is material is as follows:—

13. "Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party:—

(i)

(ii)

(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition."

It is clear from this that the petitioner has to establish firstly that the respondent has been incurably of unsound mind and secondly that she has been so, for a continuous period of not less than three years immediately before the filing of the petition on February 19, 1962. It may be that schizophrenia is a disease which renders the mind unsound, although this fact is also not established on the record. The pamphlet referred to above says:—

"About one person in every hundred born will suffer from schizophrenia. It is the largest of all causes of severe mental disablement — there are nearly 60,000 schizophrenic patients in hospital in England and Wales now. This is about four times the

number being treated for all forms of tuberculosis. Schizophrenia knows no frontiers whether of age, sex, social class, high intelligence, or special training. Among its victims are people of outstanding intellectual or artistic merit. But it is a disease especially of youth, and its cost to the community in human suffering and financial loss is incalculable."

The pamphlet goes on to say what is schizophrenia as follows:—

"Stated briefly, it is a disorder leading detachment from the world without, together with disruption of the world within. The patient shows abnormal ways of thinking: speech becomes broken up and one sentence seems to lose contact with the next, leading, at its most extreme, to a jumbled flow of apparently meaningless words. The schizophrenic is likely to hold false belief, often of persecutory type, convinced that he is the victim of malevolent plotters and that his thoughts are controlled by external forces such as radar or television. Delusions like this are unusually supported by hallucinations, especially of known or unknown voices, which may repeat his thoughts, threaten or abuse him, or make obscene comments. These voices, which may seem to come from inside or outside his body, are so real that the sufferer may talk back and, for this reason, the term 'split mind' is often used."

The authorship of this pamphlet is not disclosed. It cannot be relied upon as authoritative merely because it is issued by a charitable society which is interested in collecting funds for treating schizophrenics and carrying on research in England on the subject. Even assuming that what it states is correct, it must be said that there is no basis whatsoever on the record of this case to show that the wife in this case is schizophrenic except the cryptic word "Schizo" written by Dr. Mujawar on the Mental Hospital register and an article which is very strongly relied upon by the petitioner admittedly written by the respondent entitled

"मी अंतराळांत तरंगत असता" Exhibit 542

which the respondent had written after she recovered from her illness for which she was kept in the Mental Hospital and treated by Dr. Mujawar. So far as the entry made by Dr. Mujawar is concerned, no presumption can be made that what is stated in the entry is correct. Dr. Mujawar could not be examined and the petitioner's own witness Dr. Kelkar and Dr. Sardesai have rightly admitted that it is possible that Dr. Mujawar was wrong in his diagnosis. The diagnosis of schizophrenia and its classification as described in the Encyclopaedia of Medical Practice shows that it is a very complicated and difficult process. At page 387 it is stated:

"It will always be wise, even for the consultant psychiatrist, to see the patient on several occasions before ruling out schizophrenia, and his relatives, employers and

friends should be interviewed. A single interview may not disclose any abnormalities, but if he can be observed in hospital quite blatant signs may be recognised.

..... But there is no single test for schizophrenia the total clinical picture and the history of the development of symptoms must be studied."

There is no evidence in the case to show that any such study of the respondent was made in 1954. On the contrary, all the evidence in the case and the conduct of the respondent in the two Courts below as well as here shows that she is a normal person. In fact the trial Court who decided against her has observed:—

"It is true that respondent behaved in a dignified way befitting a housewife in a noble and respectable family throughout the 5-6 months' period of hearing of this matter in Court."

Surprisingly, however, he went on to observe and, in my opinion, not fairly:—

"But I am to judge her conduct with petitioner and not her conduct in Court. From that conduct it can only be decided that she is a lady who knows well as to how to behave in a society and in the public. No conclusion however can be drawn from that conduct in Court about her conduct with petitioner."

These remarks were made by him in the context of his findings regarding cruelty. But I think that what he has stated is enough to show that she behaved very well in the course of this trial in which she had to face an unfounded charge of unsoundness of mind. If she was a patient of schizophrenia alleged by the petitioner, I am sure that she could not have faced such a trial including a lengthy and gruelling cross-examination at the hands of the Counsel for the petitioner. Moreover, she could not have passed the M. A. examination and worked as an employee in the Government of India if she was schizophrenic. She has been so very reasonable in her attitude towards the petitioner throughout the seven years of litigation that even today, she is willing to go back to her husband. I cannot understand how, expert or no expert, any such wife can be considered to be schizophrenic. So far as the article written by the wife before her marriage was concerned, it is obviously on the childish assumption that what the doctor thought was schizophrenia was in fact schizophrenia. It will be clear from this article that she has been an extrovert eager to communicate to others her experience and moods of choice and pleasures, dreams and illusions. It is in that mood that she has written the article which reads very well and a perusal of the article will show that the author could never have been mad, although she was believing honestly on the basis of what she was told by Dr. Mujawar that she was a patient of schizophrenia.

15. Moreover, the argument that schizophrenia is an incurable disease is not sup-

ported by the very authorities which are cited by Mr. Bhasme. Henderson and Gillespie's Textbook of Psychiatry which is considered to be a standard authority on the subject has cautiously stated at page 288:—

"The more enthusiasm and staying power we bring to the treatment of schizophrenia, the better are likely to be our results: but complete success can not often be claimed for treatment. All our treatments are empirical and limited to their effects: we are frustrated by our very slight knowledge of the aetiology of the illness."

16. It is argued by Mr. Bhasme that a schizophrenic person can never be cured though he or she may recover. This may not be true. At least the pamphlet relied on by him shows:—

"Speaking generally, the chances of recovery are about equal; but how often is the return home of the recovered mental patient obstructed by relatives, friends and employers who are reluctant to accept him?" This means that it is possibly curable provided the relatives co-operate in treating the schizophrenic person as a normal person. Mr. Bhasme has relied on the following passage in the Encyclopaedia at page 389:—

"For anyone who has had a schizophrenic illness, there is an ever-present risk of another attack and, although a happy marriage may have a great stabilizing effect on the patient, the normal partner has shouldered a burden which may weigh heavily at times and can never be forgotten."

According to Mr. Bhasme, this shows that once a person becomes schizophrenic, he or she continues to be schizophrenic susceptible to frequent attacks at intervals. With great respect to all these authorities, common sense tells us that the medical science is still in its infancy regarding the diseases of the brain. What I am concerned with here is a common sense question as to whether the wife in the present case is suffering incurably from unsound mind. That is the expression which the Legislature in its wisdom has used and not 'schizophrenia'. With the advance in medical science, perhaps, more details about schizophrenia may be known. But everybody knows what is an unsound mind and I have no doubt that the respondent in this case has no unsound mind. Her mind has been always in the right place and there is nothing on the record to show that she ever suffered from unsound mind. In the result, I must hold that the petitioner is not entitled either to a divorce (sic) under Section 13 (1) (iii) or to a judicial separation (sic) under Section 12 (1) (c) of the Hindu Marriage Act.

17. The third and the most important ground on which Mr. Bhasme has challenged the decree passed by the Assistant Judge in this second appeal is that the Assistant Judge erred in law in setting aside the decree passed by the trial Court for judicial separation on the ground that the respondent

treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the respondent within the meaning of Section 10 (1) (b) of the Hindu Marriage Act, discarding the voluminous documentary evidence which contained admissions by the wife about the cruel treatment and torture inflicted by her on the husband.

18. Before discussing this point, it is necessary to refer briefly to the findings of the two Courts below on this aspect of the matter. In support of his allegations of cruelty by the wife, the petitioner relied principally on:—

(1) insults and abuses hurled by the wife to the petitioner and the members of his family,

(2) beating children mercilessly,

(3) a habitual disregard of household duties and indifference and disrespectful behaviour in the house in the presence of strangers.

(4) threats of violence to herself and to the household,

(5) addressing defamatory letters against himself to his superiors,

(6) conniving at writing of threatening letters and anonymous letters to the petitioner, and

(7) concealment of a medical examination report from the petitioner.

According to the husband the consequence of this cruelty was to make it impossible for him to live with her. Reliance is placed on a large number of documents admittedly signed by the wife in which we find the wife recording all the objectionable words uttered by her in the course of the day and apologising for the mistake committed by her and promising not to repeat them. It may be at once stated here that all this voluminous evidence was led by the petitioner principally to establish that the respondent was suffering from schizophrenia or unsoundness of mind and as a result of that, she committed so many acts right from the beginning of married life till they were separated and even thereafter.

19-42. (His Lordship went through the evidence relied upon by the two Courts below, and the findings arrived at by them. His Lordship then proceeded.)

43. In this second appeal Mr. Bhasme, the learned Counsel for the husband, has challenged the findings of the appellate Court on the ground that the Assistant Judge erred in holding that, in spite of the admissions of the respondent recorded in the various writings, those writings were obtained by force. He submitted that even the admitted writings disclosed the cruel conduct of the respondent from which the petitioner had reasonable apprehension that in would be harmful or injurious for him to live with her. Ordinarily the proof of acts or omissions complained of by the petitioner would be pure questions of fact;

but, according to Mr. Bhasme, the correspondence and writings produced in the case establish beyond any doubt that the petitioner's endurance was exhausted and right from the beginning of the marriage till they separated, the respondent behaved cruelly towards him and the members of his family. He contended that the Assistant Judge was wrong in assuming that the abuses and insults given by the respondent, as admitted by her in her various writings, were not at all abuses which were commonly known as abuses. He further urged that the learned Assistant Judge was in error in considering the petitioner's behaviour as unjustified or unreasonable when it was not at all the case of the respondent that he behaved in any unreasonable manner. He also contended that several documents and other evidence on the record were completely ignored by the Assistant Judge. According to him, the final act of cruelty inflicted by the wife on the husband was the representation made by her on May 19, 1961 to the Ministry of Agriculture jeopardizing his very continuance as a Class I Officer of the Government of India; and the Assistant Judge refused to consider it as of any consequence and completely ignored it and this was not justified in law.

44. I think that both the Courts have failed to apply the correct principles of law in determining the issues of cruelty in this case in the light of the evidence before the Court. The trial Court ignored the provisions of Section 31 of the Indian Evidence Act and assumed that whatever was written down by the respondent in the form of admissions was conclusive proof of the words and happenings mentioned therein and these amounted to cruelty. The trial Court was grossly in error further in ignoring the provisions of Sections 10 and 23 of the Hindu Marriage Act and in dealing with the whole matter as if the word 'cruelty' in matrimonial law had the same meaning as it had in an ordinary dictionary, disregarding completely the principles laid down in Sections 10 and 23. The trial Court did not even apply its mind to the question as to whether the apprehensions of the petitioner were reasonable, and whether he had condoned the alleged acts by cohabiting with the respondent from the time of the marriage till February 21, 1961. The trial Court proceeded with the matter as if Section 23 of the Hindu Marriage Act did not exist and completely ignored the conduct of the petitioner towards the respondent, though it was the duty of the Court to consider the provisions of Section 23 (see *Laxmibai v. Laxmichand*, 70 Bom LR 80 = (AIR 1968 Bom 332). The principles laid down by the Act for the guidance of the Court when dealing with the matrimonial offence of cruelty were not at all borne in mind by the trial Court. What is unfortunate is that even as late as 1965, the learned Judge thought that a Hindu wife

could not express herself freely about her domestic affairs notwithstanding that we are living in a society in which equality of status and opportunity is given to a woman and she enjoys the liberty of expression, faith, belief and worship. If the husband can express his views about the wife and her relations how can a wife be prevented from expressing her views? But the learned trial Judge appears to have assumed that in spite of the parity of status accorded to a woman under the Hindu Marriage Act, the wife had no right to express any views about any of these matters if the husband did not like that.

45. Similarly, the appellate Court has also approached the case, though not as erroneously as the trial Court, yet not in accordance with the settled principles of law. The Assistant Judge has wrongly excluded all the documents assuming that they were executed under force forgetting that he was not dealing with a confession in a criminal trial but with admissions in a civil trial. He wrongly assumed that merely because the abuses and insults were not commonly regarded as abuses, they could never amount to acts of cruelty. He further wrongly assumed and blamed unnecessarily the husband and his parents thinking that they were an orthodox lot from Poona and because of this orthodoxy, the husband could not put up with the wife who was brought up under less orthodox surroundings in Delhi. The Assistant Judge did not consider carefully all the requirements of law under Section 10 and Section 23 and the principles laid down regarding the concept of legal cruelty in matrimonial law.

46. Hence I allowed Mr. Bhasme to take me through the entire oral and documentary evidence which according to the petitioner, established the alleged cruelty on the part of the respondent. Mr. Bhasme strenuously urged that the writings in which the respondent had admitted her abuses and insults to the husband showed the modus operandi used by the respondent for torturing the petitioner. According to him, the modus operandi consisted of abuses, insults, admissions, apologies, promises and again abuses and so on repeated from time to time. He urged that the respondent was persisting in her mental torture of the petitioner in even resisting his petition for judicial separation at this stage because she takes pleasure in the mental torture thereby caused to the petitioner.

47. To repel these arguments of Mr. Bhasme, Mr. Paranjpe, the learned Counsel for the wife, stated that his client had still hopes of reconciliation with the husband and he would, therefore, restrain himself from saying all that he wanted to say or could say on the evidence, but the least that he had to say, not on the instructions of his client but purely as a matter of argu-

ment on the evidence, was that the petitioner had dishonestly adopted the plea of cruelty because his real intention in filing the petition was to get a divorce on the basis that the respondent was of unsound mind and suffering from schizophrenia. He contended that although the Assistant Judge might not have adopted the correct ratio decidendi in assessing the conduct of the parties and the consequences, he had arrived at the correct conclusion and rightly held that the petitioner was not entitled to judicial separation.

48. In view of these contentions, it is first necessary to state, as far as it is possible, the meaning of the word 'cruelty' in matrimonial law as a ground for judicial separation. Cruelty may be of infinite variety. It can be subtle or brutal. It may be physical or mental. It may be by words, gestures or by mere silence, violence or non-violence. That is the reason why Courts have never tried to give an exclusive definition of cruelty as understood in matrimonial law.

49. Before the Hindu Marriage Act, 1955, the Indian Courts generally applied the principles followed by the English Courts in deciding this question in so far as they were applicable to conditions in Indian Society. In *Moonshee Buzloor Ruheem v. Shamsunnissa Begum*, (1866-67) 11 Moo Ind App 551, the parties were Muslims, but the Privy Council adopted the exposition of the law regarding cruelty as prevailing in England more than a hundred years ago and observed:

"The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:— "There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it," "The Court", as Lord Stowell said *Evans v. Evans* (1 Hagg. Con. Rep., 37, et seq.) "has never been driven off this ground." In *Yamunabai v. Narayan*, (1876) ILR 1 Bom 164 in which the husband and wife were Kokanastha Brahmins Mr. Justice Melvill and Mr. Justice West, following the above decision adopted the principles followed by English Courts. In *Meherally Mooraj v. Sakerkhanobai*, (1905) 7 Bom LR 602, Mr. Justice Batchelor followed the same principle in a case in which the parties belonged to the Khoja community. The march of the Indian Courts with the English Courts in expounding the concept of cruelty is illustrated in *Cowasji Nuseerwanji Patuck v. Shehra Cowasji Patuck*, 39 Bom LR 1138 = (AIR 1938 Bom 81) in which Mr. Justice B. J. Wadia after referring to the above Privy Council case stated:

"The word 'cruelty' has not been defined in the Act, but there is no doubt that it means legal cruelty as understood in Eng-

lish law, namely, injury, causing danger to life or limb or health or reasonable apprehension of such injury".

He approved of the following passage in *Evans v. Evans*, (1790) 1 Hagg Con 35:—

"Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve."

50. It is, therefore, necessary to consider the question of cruelty in the light of the exposition of that law for the time being in force in England which is consistently and precisely stated in *Tolstoy's Divorce and Matrimonial Causes*, Sixth Edition, 1967 at page 61 as follows:—

"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such a danger." The learned author further goes on to say:—

"In 1963 the meaning of cruelty was interpreted by the House of Lords in *Gollins v. Gollins*, [(1964) AC 644] and *Williams v. Williams*, [(1964) AC 698] and previous decisions must be read in the light of these two cases. Intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty; the question in all cases is whether the respondent's conduct was cruel, rather than whether the respondent was himself or herself a cruel person.....

There are no limits to the kind of conduct which might constitute cruelty, but, whatever the conduct it must be grave and weighty and which can properly be described as cruelty in the ordinary sense of the term. Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health.....

Since 1964 AC 644 and 1964 AC 698 there are two tests which must be satisfied for cruelty to be established: first, is the conduct complained of sufficiently grave and weighty to warrant the description of being cruel and, secondly, has the conduct caused injury to health or reasonable apprehension of such injury."

Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can be considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law. The acts complained of are expressions sometimes of rebuke, sometimes

of remorse very often arising out of occasional ill-temperers which are the ordinary wear and tear of married life. Even the application made by the respondent to the Ministry of Agriculture which is, perhaps, the gravest of the acts attributed to the respondent cannot be considered as a cruel act. It has not injured the status or health of the petitioner. It was in fact an act of an innocent wife who was placed in a pitiable position by her husband who charged her with insanity while she was pregnant and had to take the shelter of her parents.

51. Apart from this, what the Courts have to bear in mind when deciding these questions is, in my judgment, clearly indicated in Sections 10 and 23 of the Hindu Marriage Act, the relevant provisions of which are as follows:—

“10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act may present a petition to the District Court praying for a decree for judicial separation on the ground that the other party—

(a)

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

23. (1) In any proceeding under this Act, whether defended or not if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in Clause (f) of sub-section (1) of Section 10, or in Clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.” The Parliament in enacting these provisions has clearly indicated what are the tests to

be followed by the Courts in India. First, the acts, words, omissions or events alleged to amount to cruelty directed against the petitioner must be proved beyond reasonable doubt. This must be in accordance with the law of evidence. Second, it must be established that there is an apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other party. No doubt, every petitioner will say that he apprehends such harm or injury. But he must be able to establish that what he apprehends is real harm or injury. Even that is not enough; and the third requirement of law is that the Court must be satisfied that this apprehension is reasonable having regard to all the facts and circumstances of the case including the physical, mental and social condition of the parties concerned; their status, perhaps social, economic and physical; the nature of the differences between the spouses; the welfare of the children, if any, of the marriage; the conduct of the parties towards each other during coverture and thereafter, including the conduct of the parties in the course of the prosecution of the matrimonial petition, if necessary, depending on the nature of each case; and possibly what the Court ought to regard as the prevailing notions regarding the conduct and relation between husband and wife. Moreover, the Parliament has considered that even this is not enough to entitle the petitioner to relief, if the conduct of the petitioner himself disentitles him to any relief, because if the Court finds that the petitioner is taking advantage of his own wrong, it is the duty of the Court not to grant the relief. Hence the fourth requirement laid down by the law is that the petitioner must satisfy the Court that he is not in any way taking advantage of his or her own wrong or disability for the purpose of the relief. The fifth requirement, so far as the present case is concerned, which is mentioned in Section 23 is that where the ground of the petition is cruelty, as in the present case, the petitioner has not in any manner condoned the cruelty.

52. In my judgment, the petitioner in this case must fail even assuming that all that he has established amounts to cruel treatment by the wife to him, because the present petition was filed against the respondent as a person of unsound mind. Attempt was made to appoint a guardian for this alleged lunatic. The wife established that she was not a lunatic and the petition proceeded on the footing that she was not a lunatic. In spite of this, the husband has persisted in contending in all the three Courts that she was suffering from schizophrenia and that alone is the explanation for all that she said and did during their coverture. I have already held above that this charge against the respondent is entirely baseless. It was utterly wrong on the part of the husband and his parents and his relations

in Poona to subject the respondent to the inhuman indignity of being examined as an insane person while she was taking meals in the house.

53. Moreover, a perusal of the pleadings and the evidence led in the case shows that the petitioner was more particular about getting a divorce than to prove cruelty and get a judicial separation; and the alleged instances of legal cruelty were trotted out ad nauseam to establish that she was schizophrenic, in which attempt the husband has miserably failed in all the three Courts now.

54. Besides, it is common ground that the husband and wife cohabited till February 27, 1961 at Arbhavi, Poona and Delhi and the last daughter born, Pratibha, was delivered in August 1961. In my judgment, this clearly establishes that the husband himself had condoned all the alleged so-called acts of cruelty by his wife. It is a well-settled principle in matrimonial law in general that condonation involves forgiveness confirmed or made effective by reinstatement, as stated by Lord Chancellor Simon in *Henderson v. Henderson*, 1944 AC 49. Normally, sexual intercourse is evidence of both forgiveness and reconciliation and raises a presumption of condonation in the case of either spouse. It may be rebutted by evidence sufficient to negative the intent to forgive.

55. The moral virtues of the wife in this case are not challenged by the husband. It must be said to his credit that in spite of his obsession that his wife was suffering from schizophrenia, he has not made any remark against the chastity or against the moral character of the wife. In these circumstances, as the husband and wife parted when the wife was pregnant, it must be held that till the date of parting whatever happened between the husband and wife was condoned by the husband. The wife was reinstated to her position. The husband is not entitled to any relief on the ground of any of the acts committed by her during coverture till February 27, 1961. For reasons which will be stated below, I hold that the husband has failed to prove that the wife did anything which amounted to treating the petitioner with cruelty after that date. On this ground alone, the petition is liable to be dismissed.

56. Moreover, I have carefully considered the oral and documentary evidence regarding the alleged acts of cruelty. They are not specifically and clearly mentioned as such in the petition filed by the petitioner. The parties have led oral or documentary evidence regarding the alleged acts (although mainly in the context of schizophrenia). The lower Courts have discussed them. The trial Court was not prepared to believe the petitioner's uncorroborated testimony regarding them and relied on the so-called admissions in the respondent's writings. The Assistant Judge in appeal while

excluding many of these writings as secured by force referred to the others and found that none of them showed any acts of cruelty. As already stated by me, the trial Court appears to have erroneously assumed that admissions in the writings were conclusive proof of the matters in issue and the Assistant Judge wrongly excluded many of them applying the law of confession. I, therefore, went through all the relevant writings and letters in which the respondent admitted the words which she used, apologised for them and promised to come up to the standard required by her husband.

57. In my judgment it is wrong to rely on these admissions as conclusive proof of acts of cruelty because the words of abuse or insult or provocative remarks or retorts contained therein are all stated without reference to the context. They could not have been addressed in vacuum. Every abuse, insult, remark or retort must have been probably in exchange for remarks and rebukes from the husband. Mr. Bhasme argued that such is not the case of the respondent. Her case is that she was forced to give all these writings and Mr. Bhasme submits that no such case of force was made either in the written statement or at any time before she gave evidence. That is true. But a Court is bound to consider the probabilities and infer, as I have done, that they must have been in the context of the abuses, insults, rebukes and remarks made by the husband, and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impossible, to draw inferences against the wife.

58. I have read all that the wife wrote from 1956 to February 27, 1961 on which day, she was practically abandoned as schizophrenia in a callous manner by her husband in Poona. I find that most of the words and sentences and acts were sallies of ill-temper or retorts exchanged for the rigid expectations and rebukes by the husband. They were the result of the delicate and sometimes turbulent interplay of the personalities of the husband and wife. The husband with a brilliant academic career, a Class I Government of India Officer and Assistant Professor in the All India Institute of Agriculture at Poona expected his wife to yield to the norms set up by him in his household. The wife also a Science graduate at the relevant time (she passed M. A. examination of Delhi University in 1964 during the pendency of the litigation) tried her best to come up to the meticulous standards set up by the husband. But the husband was not satisfied. He pulled on somehow in this unsatisfactory way from 1956 to February 27, 1961. He had two daughters from her and was expecting a third and then, unfortunately, in his relentless search for the causa causans of the failures and infirmities of his wife he hit upon

schizophrenia. He thought that he had discovered his wife completely. Perhaps in consultation with his father (a lawyer) and brother (a medical practitioner) he convinced himself that schizophrenia is incurable unsoundness of mind. He felt that the only way of getting rid of his marital troubles was to file a petition for nullity or divorce. All this was thoroughly wrong on the part of the husband. But somehow he nursed and cultivated an invincible repugnancy to the company of his wife which he cannot shed even after seven years of litigation in the Courts mainly because he perhaps still thinks that his wife is suffering from schizophrenia. He sees every act and omission of his wife in this frame of mind and apprehends that he cannot live with her. He may not be dishonest in his belief, as suggested by Mr. Paranjpe, learned counsel for the wife. He is certainly unwise and unreasonable in sticking to that belief despite the just and proper decisions of the two Courts below holding that his wife is not schizophrenic.

59. It is in this background of the husband's conduct and attitude that all the allegations made against the wife by him must be considered. Apart from the fact that all the facts and words prior to February 27, 1961 were condoned by him, there is nothing in them which can be considered as cruel. They do amount to reactions and expressions, occasional abuses and insults about what she felt about the household, her husband and his family. For instance, when the husband wrote that he would prefer to stay with snakes without teeth and scorpions without poison rather than stay with a wife like her, she replied that she would like her teeth to be extracted by him, so that she could live with him like snakes. What is cruel about this? The husband is a Deshastha Brahmin. The wife is a Kokanastha Brahmin. The wife wrote that if he did not like a Kokanastha Brahmin girl, he should have thought about it before marriage. This must have been in the context of some remark made by the Deshastha Brahmin husband against his Kokanastha Brahmin wife criticising the Kokanastha community. Such tactless remarks and retorts can never be considered as amounting to cruelty. Sometimes the wife said objectionable things for which she repented. As I have already referred to the important allegations while summarising the findings of the Civil Court above, I do not wish to repeat and discuss them in details. Although I am not prepared to agree with the Assistant Judge and say that she used no words of abuse and insults, I cannot agree with the trial Court and hold that they amount to cruelty as understood in matrimonial law. The tongue can undoubtedly pierce deeper than the sword. Injuries inflicted by the tongue may be deeper and may last longer. But what happened between the husband and wife in the present case cannot be con-

sidered as so grave and serious as to result in such injuries. Ill-temper, petulance of manners, rudeness of language, a want of civil accommodation, occasional sallies of wit and passion, frequent nagging were shared commonly by both husband and wife. Hence the husband cannot complain that the wife was cruel to him. Both must suffer it in silence or overcome it by prudent conciliation.

60. Mr. Bhasme argued that in any event the wife's conduct after February 27, 1961 firstly, in not caring to undergo the treatment in the Mental Hospital at Yeravda secondly, in not believing and leaving her husband unceremoniously on March 19, 1961 at Delhi, thirdly, in applying to the Ministry of Agriculture making allegations against him and his family, fourthly, in suppressing the certificate given to her by Dr. Roshan Master, fifthly, in persisting in this litigation, not to agree to judicial separation, although she herself stated in her application to the Ministry of Agriculture that she did not like to live with him and he and his family members were wicked, and lastly, in not allowing her children to meet their father for some months before the petition was filed—consisted of intolerable acts of cruelty on the part of the wife. This argument ignores the conduct of the husband—

(1) in abandoning the wife and children at Poona to the tender mercies of her parents and brother while she was pregnant baselessly assuming that the wife was a schizophrenic,

(2) in not providing for any expenses to the wife and children after they returned to Delhi in spite of notices, and

(3) in not caring to look them up even after the delivery of the third child.

In my judgment the wife was fully justified, in these circumstances, to make a representation to the Ministry of Agriculture and in not supplying the certificate of sound mind given to her by Dr. Roshan Master. The husband and his family suspected her sanity. She naturally described them as wicked. She lost faith for the time being in her husband's good faith. She did not intend to jeopardize his job. She wanted to preserve herself and her children. There is nothing unjustifiable even in her conduct and attitude in the course of this litigation. With all his faults, she loves and respects her husband, the father of her three daughters. She wants to live with him and make him happy if a chance is given to her. Her conduct and attitude have been rightly praised by the two Courts below. She has rightly insisted that her husband should not try to run away from his matrimonial obligations like a blind man groping on an unfamiliar road on the basis of an erring belief in schizophrenia. She is doing her best to win back her husband for herself and the father for the children.

61. Whether the alleged acts of cruelty are viewed singly or cumulatively, they are all humdrum, ordinary results of the shortcomings of both the husband and wife. The great Indian poet Kalidas gave a universal advice to young housewives through Shakuntala when he said "Do not go against the husband's wishes even if you are upset by anger".

(भुविर्विप्रकृतापि रोषणतया मास्म प्रतीपं गमः)

But how many housewives have been able to follow this wholesome advice? Marriage, which is otherwise very virtuous, as in the present case, cannot be broken up merely because the wife has common foibles shared by most women. No incident alleged by the husband viewed in isolation or in the background of all other incidents cumulatively can be considered so grave and weighty as to justify a finding of cruelty as required by matrimonial law.

61A. A perusal of the provisions of the Hindu Marriage Act, 1955 shows that it justifies breaking up of the matrimonial tie only when there are grave and weighty reasons which make it wrong to continue the matrimonial home. Mutual irritability, mutual incompatibility and even mutual consent are not considered sufficient under the Act to break up the matrimonial home by a decree of the Court. Marriage is still assumed to be a basic, vital and fundamental institution not only for the physical, mental, spiritual and social comforts of the spouses but for the maintenance, protection and education of the progeny. The Court cannot countenance ill-conceived notions of an intemperate husband to shatter the legitimate hope of a virtuous wife for re-union. It is true that the efforts made in the two Courts below and in this Court, as well as outside, to reconcile the husband and wife, who have not lived together since February 27, 1961, have completely failed on account of the unbending temper of the husband. But I am convinced that he has not done what a right-minded, reasonable, fair, practical, highly educated and wise husband ought to do.

62. Having regard to all these aspects of the matter and all the facts and circumstances of the case, I must hold that there is no substance in any of the grounds urged by the appellant in his petition and the petition must be dismissed with costs throughout. The law does not and cannot allow even by a decree of judicial separation breaking up of a marriage which has resulted in the birth of three innocent children in the manner wanted by the husband in the present case. His apprehension that he cannot live safely with his wife is, in my judgment, most unreasonable.

63. In the result, the second appeal is dismissed with costs throughout and for the reason stated above, the decree passed by the Assistant Judge is confirmed. The res-

pondent is given liberty to withdraw the amount deposited by the appellant in this Court.

Appeal dismissed.

AIR 1970 BOMBAY 324 (V 57 C 57)

VAIDYA, J.

M. R. Pillai, Petitioner v. M/s. Motilal Vrijbhukhandas and others, Respondents.

Criminal Revn. Appls. Nos. 282 to 284, 357 to 360 and 363 of 1969, D/- 24-4-1969.

(A) Constitution of India, Article 14 — Equality before Law — Collection of evidence against accused and filing charge-sheet — Discretionary with police — Prosecution of some accused and discharge of others on the basis of evidence collected by police — Not discriminatory.

The police have a discretion in collecting evidence against the accused and in filing a chargesheet. A court cannot compel the police to file a chargesheet if the police come and tell the Court that they are unable to prosecute some persons because they have no evidence. It cannot be said that they have discriminated against the other accused against whom they have collected evidence. Even if the police are wrong and the persons against whom the police did not collect evidence had also committed offences, it cannot be suggested that the police have discriminated against the accused because they have collected evidence against them. Similarly, if the police come to the conclusion that they cannot file charge-sheets against some of the accused because of certain opinion given to them, all that the Court can do is to discharge the accused and this cannot be said to be discrimination.

(Para 9)

(B) Forward Contracts (Regulation) Act (1952), Section 22A — Power to search and seize books of accounts or other documents — Section does not debar police from exercising powers under Section 165, Criminal P. C. AIR 1968 All 338, Diss. from.

(Para 15)

(C) Criminal P. C. (1898), Section 165 — Powers under — Section 22A, Forward Contracts (Regulation) Act (1952), does not debar police from exercising power. AIR 1968 All 338, Dissented from.

(Para 15)

(D) Forward Contracts (Regulation) Act (1952), Section 2 (1) — 'Ready delivery contract' — Merely because the word 'delivery' is written in some of the entries with a date, the contracts cannot become ready delivery contracts. AIR 1968 SC 653, Rel. on.

(Para 24)

(E) Forward Contracts (Regulation) Act (1952), Section 2 (c) — 'Forward Contract' — Court has to consider real nature of transactions and real intention of parties at the date of transactions from the contract as

DN/DN/B605/70/CWM/D

well as surrounding circumstances. AIR 1969 SC 9, Rel. on. (Para 25)
Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 9 (V 56) = 1968-2 SCR 565, Modi Co. v. Union of India 25
(1968) AIR 1968 SC 653 (V 55) = 1968 Cri LJ 661, State of Gujarat v. Manilal Joitaram 24
(1968) AIR 1968-All 338 (V 55) = 1968 Cri LJ 1325, Bullion and Agricultural Produce Exchange Pvt. Ltd. v. Forward Markets Commission, Bombay 11
(1965) AIR 1965 SC 1 (V 52) = 1965 (1) Cri LJ 100, Nilratnan Sircar v. Lakshmi Narayan Ram Niwas 16, 19
(1964) AIR 1964 SC 1300 (V 51) = 1965-6 SCR 1001, Dharendra Nath v. Sudhir Chandra 14
(1964) Cri Appl. Nos. 753, 797, 798, 799, 800 and 801 of 1963, D/- 6-4-1964 (Bom) 10
(1963) AIR 1963 SC 822 (V 50) = 1963 (1) Cri LJ 809, Radha Kishan v. State of Uttar Pradesh 13
(1962) AIR 1962 SC 63 (V 49) = (1962) 2 SCR 694 = 1962 (1) Cri LJ 106, Delhi Administration v. Ramsing 16
(1962) AIR 1962 SC 1694 (V 49) = 1963-1 SCR 98, Collector of Monghyr v. Keshav Prasad 14
(1960) AIR 1960 SC 210 (V 47) = 1960 Cri LJ 286, State of Rajasthan v. Rehman 13, 14
(1956) AIR 1956 SC 44 (V 43) = (1955) 2 SCR 925 = 1956 Cri LJ 140, Matajog Dobey v. H. C. Bhari 7
(1955) AIR 1955 SC 191 (V 42) = (1955) 1 SCR 1045 = 1955 Cri LJ 374, Budhan Choudhary v. State of Bihar 7
(1907) ILR 31 Bom 438 = 6 Cri LJ 60, Emperor v. Kaitan Duming Fernad 16, 19

Cri. Rev. Appls. Nos. 282 and 283 of 1969: G. A. Thakkar with Ashok Desai I/b M/s Malvi Ranchhoddas Ramesh Shroff and Co., for Accused; P. P. Khambata with Raghavendra A. Jahagirdar, Advocates, for Complainant; Raghavendra A. Jahagirdar, Honorary Asst. to Govt. Pleader, for State. In Cri. Rev. Appl. No. 284 of 1969:

Ashok Desai I/b M/s Malvi Ranchhoddas Ramesh Shroff and Co., for Accused; P. P. Khambata with Raghavendra A. Jahagirdar, for Complainant; Raghavendra A. Jahagirdar, Honorary Asstt. to Govt. Pleader, for State. In Cri. Rev. Appls. Nos. 357 to 360 and 363 of 1969:

K. D. Shah, Advocate, for Accused; Raghavendra A. Jahagirdar, Honorary Asst. to Govt. Pleader, for State.

ORDER: The above 8 applications are filed by the accused against whom 8 cases are pending in the Court of the Presidency Magistrate, 28th Court, Esplanade, Bombay.

The petitioners pray in these revision applications that the order passed on March 22, 1969 rejecting the application filed by the accused in case No. 957/P of 1968 and the charge framed by the Presidency Magistrate on March 25, 1969 against the respective accused in 8 cases should be set aside and the petitioners should be discharged. As these petitions involve common points and relate to common facts, they can be disposed of by one judgment.

2. The particulars of the charges framed against the petitioners in the 8 cases may be summarised and stated as in a tabular form as follows:—

(For Tabular Form see next page)

When the charges were framed against the accused, the accused pleaded not guilty and the hearing of the cases has been stayed by this Court after admitting the above revision applications filed by the accused.

3. The material common facts relevant for the purpose of disposing of these revision applications are as follows:—

On January 9, 1963, the Government of India issued a notification prohibiting forward contracts for sale or purchase of silver. On April 2, 1968 upon a complaint filed by the complainant, the Enforcement Officer of the Forward Markets Commission constituted under the Forward Contracts (Regulation) Act, 1952, Sub-Inspector of Police, Crime Branch (Drugs Control), C. I. D. Bombay suspecting that certain firms of bullion traders of Zaveri Bazar were conducting illegal forward trading in silver in contravention of Section 17 of the Forward Contracts (Regulation) Act, 1952 read with the aforesaid notification, raided the premises belonging to 8 firms suspected to be contravening the Act. During the raid, 47 persons including the petitioners were arrested, several documents found on the premises or with the persons arrested were seized and the accused were released on bail by the police. Thereafter the documents seized were scrutinised by the officers of the Forward Markets Commission and one Pradhan designated as Research Officer sent reports to the police alleging that the documents scrutinised disclosed that the firms of the petitioners were entering into forward contracts in contravention of Sec. 17 of the Forward Contracts (Regulation) Act, 1952. The rest of the persons arrested on the basis of the documents seized from them had merely settled their transactions entered into by them by payment of differences. On perusal of the reports submitted by the Research Officer Pradhan and all the papers and on recording the statement of Pradhan, the police filed 8 chargesheets against the petitioners on October 31, 1968. In the meanwhile, the police applied to the Court for extension of the period of bail of all the accused from time to time. After filing the aforesaid chargesheets, on November 15, 1968, an application was

No. of Criminal Revision Application	No. of the case in the Court of Presidency Magistrate.	Names of the accused (Petitioners)	Charges under what sections of the Forward Contracts (Regulation) Act, 1952	Brief Particulars of the Charge
1. 282 of 1969	957/P of 1968	1. Messrs. Motilal Vrijbhukhandas. 2. Shantilal Narayandas Sonawala. 3. Pushpavati Hariyantal Sonawala.	1. 21 (i), 21 (a) and 22. 2. 21 (1), 21 (c), 22	1. Between January 1968 and April, 2, 1968 owned or kept a place at 155, Shaikh Memon Street, Bombay 2, other than place of a recognised association and used for transacting forward contract in silver in contravention of section 17. 2. Accused Nos. 1, 2 and 3 managed or controlled the said place.
2. 283 of 1969	958/P of 1968	.do.	1. 20(e), 22 2. 20(e), 22	1. For entering into a prohibited forward contract in silver on Feb. 14, 1968 with Mahendra Champaklal for the purchase of 2 bars of silver at the rate of Rs. 522.25 per kg. 2. For entering into a prohibited forward contract in silver on Jan. 15, 1968 with Ishwarlal Kantilal for the purchase of 2 bars of silver at the rate of Rs. 539.44 per kg.
3. 284 of 1969	956/P of 1968	1. Shantilal Narayandas Sonawala. 2. Jayanti Kapurchand Shah. 3. Pranjivandas Shambharlal Bhatt. 4. Natverlal Mathuradas Shah.	21 (i) and 21 (f)	For all of them joining together at 155, Shaikh Memon Street, Bombay, 2 owned by Messrs. Motilal Vrijbhukhandas for entering into forward contracts in silver.
4. 357 of 1969	960/P of 1968	1. M/s. Rasiklal Mansuklal & Co. 2. Deoraj Kathoddbhai. 3. Chandrakant Deorajbhai. 4. Shyamsunder Shivprasad Kabra.	1. 21 (i), 21 (a), 22 2. 21 (i), 21 (c) and 22	1. For using 95, Shaikh Memon Street, for transacting forward contracts in silver between January 1968 and April 2, 1968. 2. Partners accused Nos. 2, 3 and 4 and their firm accused No. 1 controlled and kept the above place.

No. of Criminal Revision Application.	No. of the case in the Court of Presidency Magistrate	Names of the accused (Petitioners)	Charges under what sections of the Forward Contracts (Regulation) Act, 1952	Brief Particulars of the Charge.
5. 858 of 1969	962/P of 1968	-do-	1. 20 (a), 22 2. -do-	1. For entering into <i>Teji</i> option with Moti Vrijbhukhan for 25 units of silver between March 24, 1968 and April 1, 1968. 2. For entering into <i>Mandi</i> option with Divan during the same period.
6. 859 of 1969	963/P of 1968	1. M/s. Jamnadas Talkchand. 2. Thakordas Gordhandas. 3. Bhagwandas Gor. dhandas. 4. Vallabhadas Gor. dhandas.	1. 20 (e), 22 read with 19 2. 20 (e), 22 read with 19 3. 20 (e), 22 read with 19	1. For entering into 'Jota' option with V. Navnit for 2 units of silver on February 29, 1968. 2. For entering into 'Jota' option with Sunder Tulsi for 2 units of silver on February 19, 1968. 3. For entering into 'Jota' option with Keshav Chunilal for 2 units on February 19, 1968.
7. 860 of 1969	961/P of 1968	1. M/s. Rasiklal Mansuklal & Co. 2. M/s. Deoraj Kathedbhair. 3. Chandrakant Deorajbhair. 4. Shyamsunder Shivprasad Kabra.	S. 20 (e) and 22	For entering into forward contract with Jethibai Pattodia on March 4, 1968.
8. 863 of 1969	959/P of 1968	1. Devraj Kathedbhair. 2. Gordhandas Khatedbhair. 3. Ramnarayan Ramdhan Karamji. 4. Badrinarayan Heeralal.	S. 21 (i) and S. 21 (f)	For joining together on April 21, 1968 at 95, Shaikh Memon Street, an unauthorised place, for transacting forward contracts.

made on behalf of the police to discharge 38 of the 47 accused on the ground that there was no sufficient evidence to substantiate any charge against them. The learned Magistrate immediately discharged the said 38 persons.

4. On March 5, 1969, the accused in criminal case No. 958/P of 1968 who are also the accused in case No. 957/P of 1968 filed an application for discharging the ac-

cused firstly on the ground that neither the prosecution nor the Court could discriminate between the 38 persons who were already discharged and the present petitioners who were all arrested in connection with the same kind of offences at the same time and place, secondly on the ground that the search and the seizure of the documents in the case were made without proper authority of search warrants under Section 22A

of the Forward Contracts (Regulation) Act, 1952 and hence all proceedings consequent upon that search were illegal, and thirdly on the ground that the allegations and charges made in the chargesheets were groundless. It was also prayed in the said applications that the questions raised by the accused were important questions of the validity of the prosecution in view of Part III of the Constitution of India and hence the case should be referred to the High Court under Section 432 of the Code of Criminal Procedure. The application was supported by Counsel appearing for all the accused in all the other cases and it was treated as an application common to all the petitioners by the learned Magistrate.

5. By his order passed on March 22, 1968 the learned Presidency Magistrate rejected the application filed by the accused and proceeded to frame charges in 8 cases. On March 25, 1969, he framed charges in the 8 cases against the respective accused, the particulars of which are briefly stated above, for contravening the provisions of the Forward Contracts (Regulation) Act, 1952.

6. The very contentions which were urged before the learned Presidency Magistrate are urged in the above revision applications challenging the said order dated March 22, 1968 and praying for quashing the charges framed against the accused.

7. The first contention raised is that the prosecution of the petitioners in the aforesaid 8 cases after the discharge of the 38 persons referred to above is hit by the vice of discrimination prohibited under Art. 14 of the Constitution. Apart from any authorities, it is clear that Article 14 of the Constitution of India requires the State not to deny any person equality before the laws or equal protection of laws in the territory of India. It is difficult to appreciate how the petitioners who are being prosecuted under the Forward Contracts (Regulation) Act can contend that they are denied equality before the law or equal protection of the law merely because some other persons are not prosecuted. Reliance was placed, however, on the decision of the Supreme Court in *Budhan Choudhary v. State of Bihar*, (1955) 1 SCR 1045 = (AIR 1955 SC 191) where the scope of the protection afforded by Article 14 was discussed in the context of an attack on Section 30 of the Criminal Procedure Code which empowered the State Government in certain areas to invest any District Magistrate, Presidency Magistrate or Magistrate of the first class with power to try as a Magistrate all offences not punishable with death and it was held by the Supreme Court that Section 30 of the Code of Criminal Procedure did not infringe the fundamental right guaranteed by Article 14 of the Constitution after laying down the test of permissible classification for purposes of legislation. Their Lord-

ships did observe in that case at p. 1049 (of SCR) = (at p. 193 of AIR).

"It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

Counsel for the accused also relied on *Matajog Dobey v. H. C. Bhari*, (1955) 2 SCR 925 = (AIR 1956 SC 44) in which the question of the validity of Section 197 was challenged on the basis of discrimination and once again the Supreme Court considered the scope of the protection afforded by Article 14 and held that Section 197 of the Criminal Procedure Code could not be challenged on the ground that it violated Article 14 of the Constitution of India and it was held further that Article 14 did not render Section 197 of the Code of Criminal Procedure ultra vires as the discrimination on the part of the Government to grant sanction against one public servant and not against another was based on rational classification.

8. In the instant cases, in my opinion, no question of discrimination arises because the 38 accused who were discharged cannot be said to be similarly placed or situated as the petitioners. The Police had not filed any charge-sheet against those 38 persons. In their application for discharge of those 38 persons the police stated that there was no evidence on the basis of which they could be prosecuted. That is not the case so far as the petitioners were concerned. The police have not only filed the charge-sheets and supplied the statements and documents on which they relied but contended that the present petitioners ought to be prosecuted. It is argued, that in their application for discharging the 38 accused it was stated as follows:—

"It is ascertained that some of the accused mentioned in the margin have entered into weekly delivery contracts in silver and settled them by payment of differences instead of actual delivery. It was contended that this type of contract amounted to forward contract. On the other hand it was opined by the Attorney General of India that a ready delivery contract cannot be said to be forward contract only because it is not settled by actual delivery. On this point the Forward Markets Commission followed the opinion of the Attorney General of India and advised the police to act accordingly. The papers were then sent to the Chief Police Prosecutor for opinion and we have been advised to hold that the charge under Section 20 (e) cannot be substantiated under these circumstances."

The case of the accused is that the papers relied on by the prosecution against the petitioners revealed only weekly delivery contracts and settlement by payment of differences instead of actual delivery. The accused submitted that the conditions and terms on which those contracts were entered into were identical with the conditions

and terms on which the 38 discharged persons entered into contracts and hence the accused were similarly placed with the other 38 persons and the police could not discriminate against the petitioners by prosecuting them and discharging the 38 persons who had entered into similar contracts.

9. There is no merit in this contention. It is not correct to state that the contracts which the petitioners entered into were weekly delivery contracts settled by payment of differences. The allegations of the police in the chargesheet are that the contracts which the accused entered into were forward contracts and not ready delivery contracts. The police have a discretion in collecting evidence against the accused and in filing a chargesheet. It is now settled that a court cannot compel the police to file a chargesheet if the police come and tell the Court that they are unable to prosecute some persons because they have no evidence. It cannot be said that they have discriminated against the other accused against whom they have collected evidence. Even assuming that the police were wrong and the 38 persons against whom the police did not collect evidence had also committed offences, it cannot be suggested that the police have discriminated against the present accused because they have collected evidence against them. Similarly, if the police come to the conclusion that they cannot file chargesheets against some of the accused because of certain opinion given to them, all that the Court could do was to discharge the accused and this cannot be said to be discrimination. Merely because the police stated their inability to prosecute the said 38 persons, they cannot be prevented from prosecuting the present accused on the basis of the evidence which they have collected. The learned Presidency Magistrate was, therefore, right in overruling the contention raised by the petitioners and in holding that no question of interpretation of Article 14 arose in this case.

10. The second contention raised on behalf of the petitioners is that the prosecution of the petitioners is based on evidence collected during the raid carried out on April 2, 1968 and this raid and search of the papers belonging to the accused was illegal because the police had not applied for a search warrant under Section 22A of the Forward Contracts (Regulation) Act, 1952. The learned Presidency Magistrate overruled this contention following an unreported judgment dated April 3/6, 1964 by Mr. Justice Chitale and Mr. Justice Palekar in Criminal Appeals Nos. 753, 797, 798, 799, 800 and 801 of 1963 (Bom) in which the conviction of the accused under Sections 20 (e) (i) and 21 (f) of the Forward Contracts (Regulation) Act, 1952 was challenged inter alia on the ground that the search made by the police without a warrant issued by the Presidency Magistrate

was illegal. On this question Mr. Justice Palekar observed:—

"It was, however, contended on their behalf that the search itself was illegal, because there was no search warrant issued by the Presidency Magistrate as required by Section 22A of the Act. It is true that under Section 22A of the Act, any Presidency Magistrate or a Magistrate of the first class is empowered by warrant to authorize any police officer not below the rank of Sub-Inspector to enter upon and search any place and seize books of accounts and other documents relating to options in goods. It is also not disputed that the officers who raided the place did not have any warrant issued by the Presidency Magistrate. It is, however, to be noted that the particular offences with which these respondents have been charged were cognizable offences under Section 23 of the Act, and, therefore, when a complaint was filed before the investigating officer with regard to the commission of the offence, the investigating officer was entitled under Section 165 of the Code of Criminal Procedure to search any place for anything which the investigating officer had reasonable ground for believing that it was necessary for the purpose of investigation. We do not, therefore, think that the search conducted by the police officers in this case after information was given of a cognizable offence was a search unauthorised by law." With respect, I am bound by this decision. Apart from that, I am fully in agreement with the view expressed by Mr. Justice Palekar. Section 5 (2) of the Code of Criminal Procedure lays down that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the provisions, of the Code of Criminal Procedure, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 23 of the Forward Contracts (Regulation) Act, 1952 is as under:—

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, the following offences shall be deemed to be cognizable within the meaning of that Code, namely:—

(a) an offence falling under sub-clause (ii) of Clause (a) of Section 20 in so far as it relates to the failure to comply with any requisition made under sub-section (3) of Section 8;

(b) an offence falling under Clause (d) of Section 20;

(c) an offence falling under Clause (e) of Section 20 other than a contravention of the provisions of sub-section (3A) or sub-section (4) of Section 15;

(d) an offence falling under Section 21. The offences charged against the petitioners in the present cases are, under Section 23, cognizable. There is no provision in the Forward Contracts (Regulation) Act regu-

lating the manner or place of investigating of the offences by the police.

11. It is, however, contended by Mr. Thakkar, the learned Counsel appearing for the petitioners in Criminal Revision Application No. 282 of 1969, by Mr. Desai, the learned Counsel for the petitioners in Criminal Revision Application No. 283 of 1969, and by Mr. Shah, the learned Counsel appearing for the petitioners in the other cases, that the police officer cannot exercise his powers under Sections 157 and 165 of the Criminal Procedure Code and search the place of offence without the authority of a warrant issued under Section 22A. Now, Section 22A is as under:—

“(1) Any Presidency Magistrate or a Magistrate of the first class may, by warrant, authorise any police officer not below the rank of sub-inspector to enter upon and search any place where books of account or other documents relating to forward contract or options in goods entered into in contravention of the provisions of this Act, may be or may be reasonably suspected to be and such police officer may seize any such book or document, if in his opinion, it relates to any such forward contract of option in goods.

(2) The provisions of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to any search or seizure made under sub-section (1) as they apply to any search or seizure made under the authority of a warrant issued under Section 98 of the said Code.”

The contention raised on behalf of the defence is sought to be supported by a decision of a single Judge of the Allahabad High Court in *The Bullion and Agricultural Produce Exchange Pvt. Ltd. v. Forward Markets Commission, Bombay*, AIR 1968 All 338 where the learned Judge dissented from the aforesaid decision of Mr. Justice Chitale and Mr. Justice Palekar on the ground that the matter was not discussed in detail and he was unable to endorse the view point expressed by this Court. With utmost respect, the learned Judge was not right when he said that the matter was not discussed. The passage from the judgment quoted above shows that this Court has discussed the contention and arrived at its conclusion after taking into consideration the provisions of the Criminal Procedure Code and the Forward Contracts (Regulation) Act.

12. Apart from that, in my opinion, the view expressed in the Allahabad decision is not only contrary to the plain terms of Section 5 (2) of the Code of Criminal Procedure but is inconsistent with the aim and object of the Forward Contracts (Regulation) Act in making certain offences under that Act cognizable. The enactment of Section 22A in that Act was clearly intended to enable a Magistrate to issue a search warrant authorising any police officer not below the rank of a Sub-Inspector to enter

upon and search any place where books of account and other documents relating to forward contracts or options in goods entered into in contravention of the provisions of that Act may be or may reasonably be suspected to be. But for this section, a Magistrate could issue a search warrant only under the provisions of Section 96 or 98 of the Criminal Procedure Code which perhaps, would not cover a case of a place where books of account or other documents relating to forward contracts or options in goods might be or might reasonably be suspected to be. Section 22A must be harmonised with Section 23 which makes the offences mentioned therein cognizable, which means that not only can the police arrest the accused without warrant but investigate the offences under Chapter XIV of the Criminal Procedure Code. In the absence of any specific provisions in the Forward Contracts (Regulation) Act preventing the police from exercising their powers of search under Section 157 or 165 of the Criminal Procedure Code and in the absence of any other provision regulating the manner of investigation by the police, contained in the Act, I find it impossible to agree with the view expressed in the Allahabad case.

13. Moreover, Mr. Justice Satish Chandra who decided that case, with utmost respect, appears to have assumed that Section 22A is a specific provision relating to the search of places by the police, which it is not. As stated above, Section 22A is only an enabling provision enabling the police to arm themselves with a warrant from the Magistrate if the police consider it necessary to avoid allegations being made against them. It confers a power on the Magistrate to issue a warrant which he could not have perhaps issued under the provisions of the Criminal Procedure Code. The learned Judge has referred to a decision of the Supreme Court in *State of Rajasthan v. Relman*, AIR 1960 SC 210 in which the accused was acquitted because he was prosecuted after a search which was in contravention of the provisions of Section 165 of the Criminal Procedure Code and that acquittal was confirmed by the Supreme Court. A contention was raised before the Supreme Court that the breach of the provisions of Section 165 was merely an irregularity and not an illegality. But that contention was not allowed to be raised because it was not raised in the two Courts below. (See para. 10 at p. 213.) In *Radha Kishan v. State of Uttar Pradesh*, AIR 1963 SC 822 a larger Bench of the Supreme Court held that a search in contravention of the provisions of Section 103 and 165 of the Code of Criminal Procedure could be resisted by the person whose premises were sought to be searched and because of the illegality of the search, the Court may examine carefully the evidence regarding the seizure, but beyond these two consequences, no further consequences ensued.

14. It is difficult to appreciate how the decision of the Supreme Court in AIR 1960 SC 210 could be relied on for the conclusion of the learned Judge that Section 165 of the Criminal Procedure Code was not available for an investigation by the police of an offence under the Forward Contracts (Regulation) Act, 1952. The learned Judge has further referred to Collector of Monghyr v. Keshav Prasad, AIR 1962 SC 1694 and Dhirendra Nath v. Sudhir Chandra, AIR 1964 SC 1300 which lay down the principles of interpretation of statutes regarding the question as to whether certain provisions are mandatory or directory in the context of the words like 'shall' or 'may' and has held that although the word 'may' is used in Section 22A of the Forward Contracts (Regulation) Act, 1952, it should be construed as a mandatory provision. With the greatest respect, I must say that I cannot follow how this conclusion can be arrived on the basis of the two decisions of the Supreme Court relied upon by the learned Judge.

15. In my view, therefore, Section 22A of the Forward Contracts (Regulation) Act does not debar the police from exercising the powers under Section 165 of the Criminal Procedure Code.

16. Mr. Thakkar further argued that the decisions of the Supreme Court in Nilratan Sircar v. Lakshmi Narayan Ram Niwas, AIR 1965 SC 1, Delhi Administration v. Ram-sing, (1962) 2 SCR 694 = (AIR 1962 SC 63) and decision of this Court in Emperor v. Kaitan Duming Fernad, (1907) ILR 31 Bom 438 = (6 Cri LJ 60) supported his contention that Section 22A excluded the operation of Section 165 of the Criminal Procedure Code.

17. Now Nilratan's case, AIR 1965 SC 1 was under the Foreign Exchange Regulation Act under which the Director of Enforcement was entitled to retain articles seized by him under Section 19A and it was held that the Magistrate cannot exercise his powers under the Criminal Procedure Code in connection with properties seized under sub-section (3) of Section 19 of the Act. There is a clear and specific provision under Section 19A with regard to the manner of dealing with articles seized by the Director of Enforcement; and in view of Sec. 5 (2), of the Criminal Procedure Code, it was patent that this specific provision excluded the powers of the Magistrate to order disposal of the articles under the Criminal Procedure Code.

18. In the Delhi Administration's case, 1962-2 SCR 694 = (AIR 1962 SC 63) the Court was concerned with the investigation by the special police officers under the Suppression of Immoral Traffic in Women and Girls Act, 1956, which contains special mandatory provisions regarding the investigation of the offences under that Act and hence it was held that the ordinary police

officer could not exercise the powers under the Criminal Procedure Code and investigate the offences under that Act.

19. In (1907) ILR 31 Bom 438 = (6 Cri LJ 60), the question was whether the presumption under the Bombay Prevention of Gambling Act was properly raised and this depended on the question as to whether the search was made in accordance with the provisions of that Act which contained a special provision with regard to the search of places where gambling was going on or where gambling was suspected to be going on.

20. All these cases are, in my opinion, easily distinguishable because in these cases there were special provisions under the respective special enactments which would override the general provisions of the Criminal Procedure Code. That is not the case under the Forward Contracts (Regulation) Act, 1952 which lays down that certain offences are cognisable which necessarily implies that the police can investigate those offences under Chapter XIV of the Code of Criminal Procedure; and there is no provision made in the Act regulating the manner of investigation by the police. Hence the contention of the petitioners that the prosecution of the petitioners is illegal because no warrant was issued under Section 22A of the Act must be rejected.

21. The third contention strenuously urged by the Counsel for the petitioners is that under Section 251A (2) of the Criminal Procedure Code, it was the duty of the Magistrate to discharge the petitioners as the charges levelled against them in the respective chargesheets were groundless. It was contended that under Clause (3) of Section 251A a charge could be framed by the Magistrate if on a consideration of all the documents referred to in Section 173 and such further examination being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate was of the opinion that there was a ground for presuming that the accused had committed offences under the Forward Contracts (Regulation) Act, 1952. But in all these cases, the only documents that were filed along with the chargesheet under Section 173 were the statement of the Research Officer and reports submitted by him with annexures and these reports and annexures of statements of accounts according to the Counsel for the accused, did not afford any ground for prosecuting the accused. Mr. Thakkar drew my attention to these statements of accounts and contended that there was nothing therein from which the Court could infer or presume that the accused had entered into forward contracts in contravention of the Act. He submitted that the statement of the complainant at whose instance the search was carried out was not supplied to the accused and there was no material other than the report of the Research Officer relied upon by the police in

filing the chargesheet. He further contended that even the Research Officer in his report had stated that the entries in the accounts which were seized showed the delivery dates in respect of the contracts and in view of that, it could not be said that the contracts that were recorded in the statements of accounts were a forward contracts. With reference to the inference made by the Research Officer that merely because the delivery of silver was not made or payment of the price was not made within 11 days and the transactions were carried forward by cross transactions, it does not cease to become a forward contract, he argued that it could not be necessarily argued on the basis of these facts that the contracts were forward contracts. Mr. Desai further contended that the inference of the Research Officer that the transactions were carried forward was itself not correct as they appeared to be independent transactions. It was submitted that in any event, the Court would not be justified in framing a charge merely relying on the opinion of a Research Officer which, according to them, would not be relevant or admissible under Section 45 of the Indian Evidence Act or under any other provision of law.

22. There is no substance in any of these contentions. It is not possible at this stage to decide finally whether the contracts which are recorded in the statements of accounts annexed to the reports made by the Research Officer are forward contracts or ready delivery contracts as defined by Forward Contracts (Regulation) Act, 1952. It is true that the charges appear to have been framed relying on the statement of the Research Officer and the reports as well as the statements of accounts. Now "forward contract" is defined in Section 2 (c) of the Act to mean a contract for delivery of goods at a future date and which is not a ready delivery contract. "Ready delivery contract" is defined in Section 2 (i) of the Act as follows:—

"Ready delivery contract" means a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in respect of any goods, the period under such contract not being capable of extension by the mutual consent of the parties thereto or otherwise."

According to the prosecution, the statements of accounts annexed to the report of the Research Officer do not show that any delivery of the silver or payment of the price was to be made within 11 days after the date of the contract because the course of transactions revealed by these statements of accounts shows that the price of the silver bars or units sold and bought were never

credited or debited. What were credited and debited were merely the quantity of silver and the price or the rate; and further at no time were the contracts settled by payment of the price or the delivery of the goods. The petitioners only settled the differences to be paid or received and hence although in some of the statements of accounts delivery dates are indicated, the contracts were not ready delivery contracts as they neither provided for the delivery of goods nor the payment of price therefor either immediately or within a period not exceeding 11 days after the date of the contract.

23. Mr. Thakkar, however, on the other hand, repelled these contentions on the ground that merely because delivery was not made or price was not paid or only differences were paid and the contracts were carried forward, it could not be said that they were not ready delivery contracts as defined under the Act. He submitted that what the Court has to consider is whether the contracts provided for the delivery of goods and the payment of price therefor either immediately or within such period not exceeding 11 days after the date of the contract and the fact that the quantity is mentioned along with the price and it is credited or debited was enough to show that the payment of the price was contemplated and the fact that the delivery date was admittedly mentioned in these statements of accounts further showed that delivery of goods was also contemplated. Mr. Desai supplemented this argument by further urging that merely because subsequent to the date of the contract the parties have entered into new contracts and settled the rights and liabilities under the old contracts by payment of differences would not justify the Court in imputing an intention to the parties to enter into a forward contract on the date of the contract.

24. All these contentions deserve to be considered carefully when the prosecution has led evidence and the defence statements or evidence, if any, are recorded in support of their contentions. At present I am only concerned with the question as to whether the learned Presidency Magistrate was justified in framing the charges against the accused on the basis of the documents, statements and papers before him filed with the chargesheets and I have no doubt that he was fully justified in framing the charges and enquiring further into the matter giving an opportunity to both the parties to lead evidence in accordance with law. Although there are 8 cases, the charges framed are substantially based on the entries in the Sauda books and other books seized from the respective accused at the premises and the presence of the accused at the two premises situated at 155 Memon Street and 95 Shaikh Memon Street. I have carefully considered all the entries and I find that the learned Magistrate was right in holding

that there was ground for presuming that the accused had committed offences charged against them. At present, apart from the contention of the accused that the contracts were ready delivery contracts, there is nothing on the record which would justify the Court in holding that the contracts were ready delivery contracts, because none of these entries shows prima facie, that delivery and payment were contemplated within 11 days from the date of the contract. Merely because the word 'delivery' is written in some of the entries with a date, the contracts cannot become ready delivery contracts. In *State of Gujarat v. Manilal Joitaram and Co.*, AIR 1968 SC 653 the Supreme Court considered certain transactions on paper in the context of the provisions of Section 18 of the Forward Contracts (Regulation) Act and Section 20 (1) and Mr. Justice Hidayatullah, as he then was observed:

"It is also clear that the contracts, although they appeared to be non-transferable specific delivery contracts were not intended to be completed by delivery immediately or within a period of 11 days from the date of the contract. In fact week after week contracts were cancelled by cross-transactions and there was no delivery. Instead of payment of price, losses resulting from the cross-transactions were deposited by the operators in loss with the Association. Further, on the due date also, there was no delivery but adjustment of all contracts of sales against all contracts of purchase between the same parties and delivery was of the outstanding balance. Even this delivery was often avoided by entering into fresh contracts at the rate prevailing on the due date, as part of the transactions in the next period. There is evidence also to establish this. In other words the transactions on paper did seem to comply with the regulations but in point of fact they did not and the Association arranged for settlement of the entire transactions (barring an insignificant portion, if at all) without delivery."

In view of these facts and circumstances, the Supreme Court set aside an order of acquittal passed by the Gujarat High Court and convicted the accused in that case under Clauses (b) and (c) of Section 21.

25. With respect, these principles of finding out the real nature of the transactions have to be applied to the facts of the present case and the learned Presidency Magistrate will have to find out what is the true nature of the transactions in the statements of accounts which are annexed to the reports of the Research Officer filed along with the chargesheet. It is open to the accused to point out and, if necessary, to lead evidence to show that whatever has been recorded by them relate only to ready delivery contracts. It is also open to the prosecution to prove in accordance with law that all the entries made were relating to the transactions prohibited under the For-

ward Contracts (Regulation) Act. The Court will have to consider the real nature of the transactions and the real intention of the parties at the date of the transactions from the contracts as well as all the surrounding circumstances. See *Modi Co. v. Union of India*, AIR 1969 SC 9.

26. For these reasons, I find that the orders passed by the learned Presidency Magistrate are proper and in accordance with the law and dismiss all the revision applications. The stay granted by this Court is vacated and the rule is discharged. Record and proceedings to be sent down immediately.

Order accordingly.

AIR 1970 BOMBAY 333 (V 57 C 58)
CHANDRACHUD AND GATNE, JJ.

Sholapur Municipal Corporation and another, Petitioners v. Ramkrishna V. Relekar and another, Respondents.

Criminal Revn. Appln. No. 824 of 1967,
D/- 15-2-1968.

(A) Municipalities — Bombay Provincial Municipal Corporations Act (59 of 1949), Sch. Chap. VIII, R. 29 (1) (d) — Offence of importing goods without paying octroi duty — Municipal Commissioner has no power to compound offence either under Criminal Procedure Code or under the Act — AIR 1954 Bom 427, Rcf. (Para 7)

(B) Criminal P. C. (1898), Sch. II, second part — Offences against laws other than Penal Code — Are non-compoundable.

(Para 3)

(C) Municipalities — Bombay Provincial Municipal Corporations Act (59 of 1949), Section 481 (1) (b) — Power of Municipal Commissioner to compound offences under the Act — Extent of.

The power conferred by Sec. 481 (1) (b) is a qualified power and the nature of that power is that if an offence under the Act is capable of being compounded under any law, as for example, the Code of Criminal Procedure, the Commissioner may compound that offence. But if the offence cannot be legally compounded under any law for the time being in force, the Commissioner would have no power to compound the particular offence. (Para 4)

(D) Criminal P. C. (1898), Section 345 — Compounding offences — Scheme of section is that offences not specified in sub-sections (1) and (2) cannot be compounded in view of sub-section (7) of Section 345.

(Para 5)

(E) Municipalities — Bombay Provincial Municipal Corporations Act (59 of 1949), Section 393 — Section has nothing to do with composition of offences under Act — Question of compounding of offence has to

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be decided by reference to Sec. 481 (1) (b).

(F) Criminal P. C. (1898), Sections 1 (2) and 5 (2) — Combined effect of.

The conjoint effect of Section 1 (2) and Section 5 (2), Criminal P. C. is that all offences, whether under Penal Code or under any other law, have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, unless there be an enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences in which case such an enactment will prevail over the Code of Criminal Procedure, and that the provisions of special or local law will prevail over those of the Code of Criminal Procedure unless there is a specific provision to the contrary. (Para 9)

Cases Referred: Chronological Paras

(1954) AIR 1954 Bom 427 (V 41) =

56 Bom LR 264, Trikamdas Udeshi

v. Bombay Municipal Corpn. 11

Prakash S. Shah, for Petitioners; Raghvendra A. Jahagirdar, Hon. Asstt. to Govt. Pleader, for State (Respondent No. 2).

CHANDRACHUD, J.: This revision application raises a question of some interest and importance. Stated briefly the question is whether the Commissioner for the Municipal Corporation of Sholapur has power to compound an offence committed by the 1st respondent under Rule 29 (1) (d) of Chapter VIII of the Schedule to the Bombay Provincial Municipal Corporations Act, 1949, (hereinafter called "the Act"). The 1st respondent brought a scooter within the limits of the Municipal Corporation on the 6th February 1967 without paying the octroi duty. On the 15th of March, 1967, the Municipal Corporation filed the present complaint against the 1st respondent, charging him of the offence of importing the scooter without the payment of duty. The Municipal Commissioner compounded the offence on the 29th of May 1967, presumably in the purported exercise of the power conferred upon him by the bye-laws of the Municipality. The 1st respondent then filed a petition before the learned Magistrate that the offence was compounded and, therefore, the complaint should be disposed of after recording the composition. By his order dated 24th of July, 1967, the learned Magistrate has held that the Commissioner has no power to compound the offence and, therefore, the composition cannot be recorded. The correctness of this order is challenged in this revision application. The matter had come up for hearing before Wagle J. who has referred it to the Division Bench.

2. For a proper decision of the question whether the Commissioner has the power to compound the offence, it would be necessary to consider the relevant provisions of the Criminal Procedure Code and of the Act, Section 1, sub-section (2) of the Crimi-

nal Procedure Code provides, to the extent it is material, that in the absence of any specific provision to the contrary, nothing in the Code shall affect any special or local law for the time being in force. Section 5, sub-section (1) of the Code provides that all offences under Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code. Sub-section (2) of Section 5 provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Section 345 of the Code which deals with composition of offences consists of seven sub-sections. Sub-section (1) provides for the composition of certain offences under the Indian Penal Code by the persons mentioned in the table. Sub-section (2) provides for the composition of certain other offences under the Indian Penal Code with the permission of the Court. Sub-section (7) provides that no offence shall be compounded except as provided by Section 345. Sub-sections (3) to (6) are not relevant for our purpose.

3. Two schedules were originally appended to the Code of Criminal Procedure, but the first schedule was repealed by Act No. X of 1914. The second schedule contains a Tabular statement of Offences and one of the columns of the Table, viz., Column No. 6, prescribes whether the particular offence is compoundable or not. The schedule can be roughly divided into two parts, the first part dealing with the offences under the Indian Penal Code and the second part with offences against laws other than the Indian Penal Code. The second part which is headed "Offences against other laws" provides in effect that no offence against any law other than the Indian Penal Code can be compounded. The second part deals with offences of four different categories. The first category relates to offences punishable with death, imprisonment for life or with imprisonment for seven years or upwards. The second category deals with offences punishable with imprisonment for three years and upwards but less than seven years. The third category deals with offences punishable with imprisonment for one year and upwards but less than three years. The fourth category deals with offences punishable with imprisonment for less than one year or with fine only. The sixth column in respect of all the four categories says that the offence is "not compoundable." All offences from those punishable with the sentence of fine only to offences punishable with the sentence of death are exhausted by the four categories of the second part of the second schedule and since such offences are made non-compoundable no offence against

any other law, that is to say, a law other than the Indian Penal Code, is capable of being compounded. Now, turning to the provisions of the Act, S. 481 provides by cl. (b) of sub-section (1) that the Commissioner may "compound any offence against this Act or any rule, regulation or by-law which under the law for the time being in force may legally be compounded". Section 393 of the Act, which is the only other provision of the Act which requires to be noticed, provides briefly that contravention of certain provisions mentioned in the table contained in the section will amount to contravention of the corresponding sections of the Indian Penal Code as specified in the table.

4. It is urged by Mr. Shah, who appears on behalf of the petitioners, that the Municipal Commissioner has got the power to compound all offences under the Act, in view of the provisions contained in Section 481 (1) (b) of the Act. We find it impossible to accept this submission. The provision on which Mr. Shah relies says that the Commissioner may compound any offence against the Act if the offence may be legally compounded under the law for the time being in force. The very language of the provision shows that it was never intended to confer an absolute power on the Commissioner to compound any and every offence against the Act or against the rules, regulations or by-laws under the Act. The power conferred by Clause (b) of sub-section (1) of Sec. 481 is a qualified power and the nature of that power is that if an offence under the Act is capable of being compounded under any law, as for example, the Code of Criminal Procedure, the Commissioner may compound that offence. It is patent that if the offence cannot be legally compounded under any law for the time being in force, the Commissioner would have no power to compound the particular offence.

5. The real question, therefore, is not whether the Commissioner has got the power to compound the particular offence under clause (b), but whether as contemplated by that clause there is any law for the time being in force under which the offence may be legally compounded. The only other law which in this behalf would be relevant is the Code of Criminal Procedure. Now, in order to determine whether an offence of the present nature, viz., importation of the goods without the payment of octroi duty, can be legally compounded under the Code of Criminal Procedure, it is necessary to bear in mind the scheme of Section 345 of the Code. The scheme is that offences specified in sub-sections (1) and (2) can alone be compounded and that too by the persons who are specified in the sub-sections as being entitled to compound the offences. The additional limitation on the power of composition is that the offences specified in sub-section (2) of Section 345 can be compounded with the permission of the Court only. Under sub-

section (7) of Section 345, no offence can be compounded except as provided by the section and, therefore, it is clear that the scheme of Section 345 is that offences which are not specified in any of the sub-sections of Section 345 cannot be compounded. The scheme of Section 345 is not that all offences can be compounded except those which are specified. This aspect is important for the reason that, in view of the provisions contained in Section 345, an offence can be legally compounded under the Code only if the Code specifically provides that the offence can be compounded.

6. That takes us to the second part of the second schedule of the Code, the provisions of which have been set out by us already. It is clear from those provisions that no offence against a law other than the Indian Penal Code can possibly be compounded, because in respect of offences of all categories under the other laws the express provision made in column 6 of the second schedule is that the offences are "not compoundable".

7. It is thus clear that an offence against the Act, being an offence under any other law, cannot be legally compounded under the Code. Apart from the Code, there is no enactment permitting the composition of such offences and, therefore, it must follow that the Commissioner has no power to compound the offence.

8. Mr. Shah says that this construction would render clause (b) of Section 481 (1) nugatory, for what is given by one hand shall have been taken away by the other. We do not agree with this submission. What clause (b) gives is itself a qualified power. The qualification subject to which the Commissioner may exercise his power to compound an offence is that the offence must be capable of being legally compounded under any law for the time being in force. The intention of the Legislature, therefore, was not to confer a blanket power on the Commissioner to compound offences of all kinds and types, but to retain intact his power, if any, to compound offences under any other law for the time being in force. As the power conferred by clause (b) is itself limited, it would, in our opinion, not be correct to say that to hold that the power is limited is to render nugatory the power itself. Mr. Shah has drawn our attention to Section 393 of the Act which provides that offences under certain sections of the Act, like Sections 194, 319 and 477, shall be deemed to be offences under Sections 277, 188 and 177 of the Indian Penal Code respectively. Now, the offences under these three sections of the Indian Penal Code are non-compoundable and the argument of Mr. Shah is that the Legislature has given in Section 393 a clue to its intention that all offences against the Act except offences against the sections mentioned in the table to sub-section (1) of Section 393 should be deemed to be compoundable. This interpretation, in our opi-

nion, is too far-fetched. In the first place, Section 393 has nothing to do with the composition of offences and if Mr. Shah is right that sub-section (1) of that section furnishes any clue to the intention of the Legislature, such a clue could only be that offences under the sections mentioned in the table are clearly not compoundable. There is nothing in Section 393 from which to infer that for the reasons that offences under certain sections of the Act have been equated with offences under certain sections of the Indian Penal Code which are non-compoundable, offences against other sections of the Act would become compoundable. Whether an offence under any of the sections of the Act is compoundable or not is a question which must be decided by reference to the language of Section 481 (1) (b) and that provision leaves no doubt that the power of the Commissioner to compound such an offence is subject to the qualification that the offence is capable of being legally compounded under any law for the time being in force. If this test is not satisfied and if this condition is not fulfilled, the Commissioner would have no power to compound the offence.

9. It is really not necessary, in view of the specific provision of Section 481 (1) (b) of the Act, to consider the implication of Section 1 (2) or Section 5 (2) of the Code of Criminal Procedure, but Mr. Shah has relied on those provisions also and we might, therefore, briefly discuss those provisions. Under sub-section (2) of Section 1, the provisions of the Code cannot affect the provisions of any special or local law unless there is any specific provision to the contrary. Under sub-section (2) of Section 5 offences under laws other than the Indian Penal Code are required to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, subject to any enactment regulating these matters. Now, the conjoint effect of these provisions is:—

(1) That all offences, whether under the Penal Code or under any other law, have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code.

(2) This rule is subject to the qualification that in respect of offences under other laws, that is to say, under laws other than the Indian Penal Code, if there be an enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, such an enactment will prevail over the Code of Criminal Procedure, and

(3) The provisions of special or local law will prevail over the provisions contained in the Code of Criminal Procedure unless there is a specific provision to the contrary.

10. Now, applying these principles, there can be no doubt that the Municipal Commissioner has no power to compound offences under the Act because by reason of the

specific provision contained in the second part of the second schedule to the Criminal Procedure Code, such offences cannot be compounded at all. If there were a provision in the Act itself to the effect that the offences under the Act could be compounded, it would have been possible to uphold Mr. Shah's argument that such a provision in the special law would prevail over the provision contained in the Code of Criminal Procedure. As we have, however, indicated earlier, the provision contained in Section 481 (1) (b) of the Act itself gives a place of precedence to the provisions contained in other laws, for what it says is that the Commissioner may compound offences under the Act if such offences can be legally compounded under any law for the time being in force. Thus, even if the provisions contained in Sections 1 (2) and 5 (2) of the Code of Criminal Procedure were taken into consideration, the same result would follow.

11. Before concluding, we might refer to a decision of Chief Justice Chagla in the case of Trikamdas Udeshi v. Bombay Municipal Corp., 56 Bom LR 264, to which the learned Assistant Government Pleader has drawn our attention. A person who was found travelling by a tram-car in Bombay without a ticket was called upon by a Traffic Supervisor to pay a sum of Rs. 5/- by way of penalty, which was truly in the nature of composition. He paid the penalty and then filed a suit against the Bombay Municipal Corporation to recover the amount as having been paid under coercion. His contention was that the Municipality had no power to compound the offence, for the offences against the Bombay Municipal Corporation Act, 1888 were non-compoundable. The learned Chief Justice held that the offence which was committed by the plaintiff in travelling by the tram-car without purchasing a ticket was non-compoundable and that, therefore, the Traffic Supervisor had no power to compound the offence, with the result that the petitioner was entitled to recover the amount paid by him under the threat of prosecution. Now, the Bombay Municipal Corporation Act contains in Section 517 (1) (b) a provision analogous to that contained in Section 481 (1) (b) of the Act, and though the language of the two provisions is slightly different, the difference is without a distinction. It is true that the various provisions of the Criminal Procedure Code have not been referred to by the learned Chief Justice, but it is clear from the judgment that the power to compound offences under the relevant provision was not even canvassed.

12. The result may perhaps be unfortunate, for if the petitioner who had evaded the octroi duty is willing to pay the duty and a small penalty in addition, it would be possible to avoid subjecting him to the harassment of a criminal trial. It would, however, appear that under clause (a) of sub-section (1) of Section 481 of the Act, it

Supreme Court was concerned with a proceeding against the company in liquidation taken in pursuance of the L. I. C. Act, which is undoubtedly a legal enactment, and yet the Supreme Court held that no leave of Court under Section 446 (1) of the Companies Act, 1956 was necessary in respect of the said proceeding. Similarly in the case of proceedings against the company under the provisions of the Industrial Disputes Act which again is a legal enactment, the Courts have decided in cases noted earlier, that leave of Court is not necessary. Also in the case reported in AIR 1933 Cal 433 (2), a Division Bench of this Court held that no leave of Court was necessary in respect of a proceeding against the Liquidator under Section 145 of the Criminal P. C. which is also a legal enactment. The decision of the Supreme Court is binding on all the Courts and the decision of the Division Bench of this Court is binding on me. In view of the said decisions and for reasons already stated, I regret, with great respect to Vimadlal J. my inability to agree with the view expressed by him. It is also important and interesting to note in this connection that even in Shiromani's case before the Federal Court assessment proceeding had commenced and concluded after the company had gone into liquidation. The winding up petition had been presented on the 26th of November, 1941, a Provisional Liquidator had been appointed on the 7th of December, 1941 and finally the company was ordered to be wound up on the 17th of April, 1942. The order for assessment was not made until the 25th of February, 1943 and as Federal Court itself notices that, "It will be noticed therefore that the company had been ordered to be wound up a considerable time before the assessment was made." The notice of demand was served on the Liquidator on the 10th of March, 1943. As far as can be gathered from the facts stated in the judgment, it does not appear that any leave had been obtained to commence or continue the assessment proceeding against the company. It also does not appear that any objection had been raised with regard to the assessment or its validity. If assessment was not permissible without leave of Court, this aspect of the matter would also undoubtedly have been raised before the Court and it is reasonable to expect that this aspect of the matter would also have been considered by the Court while dealing with the question of the validity of the recovery proceeding, as there could be no question of any recovery if the assessment itself was bad and illegal for want of leave. I am, therefore, of the opinion that the decision of the Federal Court in Shiromani's case, AIR 1946 FC 16, cannot be so construed as to cover the question involved in the present proceeding.

43. The question, therefore, that requires consideration is whether an assess-

ment proceeding under the Income-tax Act can be said to be a legal proceeding within the meaning of 'other legal proceeding' referred to in Section 446 (1) of the Companies Act, 1956. This question, to my mind, relates essentially to the interpretation of Section 446 (1) of the Companies Act, 1956. In construing Section 171 of the Companies Act, 1913 which is similar to Section 446 (1) of the present Act the Federal Court in Shiromani's case, AIR 1946 FC 16, observed at page 21—

"Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer to Section 232, Section 232 appears to us to be supplementary to Sec. 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to 'distress' indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law. Moreover, the scheme and the application of the company's property in the *pari passu* satisfaction of its liabilities, envisaged in Sec. 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are 'outside the winding up' in the sense indicated by Lord Wrenbury in his speech in 1923 AC 647, at page 671), are subjected as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, no narrow construction should be placed upon the words 'or other legal proceeding' in Section 171. In our judgment, the words can and should be held to cover distress and execution proceedings in the ordinary Courts. In our view, such proceedings are other legal proceedings against the company as contrasted with ordinary suits against the company."

44. The Supreme Court while interpreting the said Section 171 in the case of AIR 1955 SC 604, referred to and relied on the said observations of the Federal Court and the Supreme Court has held at pp. 609-610:

"It may be observed in this connection that Section 171 enacts a general provision with regard to suits or other legal proceedings to be proceeded with or commenced against the company after a winding up order has been made and lays down that no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose.

This general provision is supplemented by the supplemental provisions to be found respectively in Sections 229 and 232 (I) of the Companies Act. Section 229 speaks of the application of insolvency rules in winding up of insolvent companies and Sec. 232 (I) speaks of the avoidance of certain attachment, executions, etc., put into force without the leave of the Court against the estate or effects of the company and also of any sale held without the leave of the Court of any of the properties of the company and after the commencement of the winding up."

45. The Supreme Court had occasion to consider and construe the position under the present Act and Section 446 (I) of the Companies Act in the case of *Damji Valji Shah*, AIR 1966 SC 135. In interpreting Section 446 of the Companies Act, 1956 the Supreme Court observed at page 139—

"Sub-section (1) of Section 446 of the Companies Act provides that when a winding up order has been made or the Official Liquidator has been appointed as Provisional Liquidator, no suit or other legal proceeding shall be commenced or, if pending at the date of the winding up order, shall be proceeded with against the company except by leave of the Court and subject to such terms as the Court may impose. Sub-section (2) provides, inter alia, that the Court which is winding up the company shall, notwithstanding anything contained in any law for the time being in force, have jurisdiction to entertain or dispose of any suit or proceeding and any claim made by or against the company. Sub-section (3) provides that any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court."

Then the Supreme Court proceeds to lay down at the same page—

"It is in view of the exclusive jurisdiction which sub-section (2) of Section 446 of the Companies Act confers on the company Court to entertain or dispose of any suit or proceeding by or against a company or any claim made by or against it that the restriction referred to in sub-section (1) has been imposed on the commencement of the proceedings or proceeding with such proceedings against a company after a winding up order has been made. In view of Section 41 of the L. I. C. Act, the company Court has no jurisdiction to entertain and adjudicate upon any matter which the Tribunal is empowered to decide or determine under that Act. It is not disputed that the Tribunal has jurisdiction under the Act to entertain and decide matters raised in the petition filed by the Corporation under Section 15 of the L. I. C. Act. It must follow that the consequential provi-

sion of sub-section (2) of Section 446 of the Companies Act will not operate on the proceedings which may be pending before the Tribunal or which may be sought to be commenced before it."

46. These decisions, to my mind, establish:—

(1) Section 446 (I) of the Companies Act, 1956 should be construed with reference to other sections of the Act and the general scheme of administration of the assets of the company in liquidation.

(2) No narrow construction should be placed upon the words 'other legal proceeding' in Section 446 (I) and leave of Court will generally be necessary in respect of any proceeding against a company in liquidation, if the proceeding itself is directed against the estate or effects of the company in liquidation, unless it is, otherwise, specifically provided.

(3) If the proceeding against the company in liquidation be such as not to affect by itself the assets and properties of the company in liquidation and be of such a nature which the Court, notwithstanding the exclusive jurisdiction conferred on it by sub-section (2) of Section 446, is not in a position to entertain or dispose of, leave of Court under Section 446 of the Companies Act will not be necessary to commence or continue such proceeding against the company in liquidation; and such proceedings cannot be construed to be included within 'the other legal proceeding' referred in Section 446 (I) of the Companies Act 1956:

The notices in question and the proceedings to which the same relate, are proceedings for assessment of the company under the provisions of the Income-tax Act. Any proceeding in relation to assessment, at and during the entire stage of assessment till completion, cannot be said to affect the assets or properties of the company and cannot, by itself, be said to be directed against the estate or effects of the company. There will be no valid debt payable to the Government till assessment in accordance with the provisions contained in the Income-tax Act is completed and a notice of demand is served on the basis thereof. The question of recovery by the Department can only arise when there is any valid demand or debt upon conclusion of the assessment proceeding and till a debt validly arises upon conclusion of the assessment proceeding, the Department does not become and cannot be considered to be a creditor of the company. It is only at the recovery stage of the claim, if any, payable to the Department by the company on a proper assessment that the question of the assets of the company being affected and the scheme of administration of the assets of the company being interfered with, may arise. If a valid debt arises, the Department may seek to prove its claim in liquidation and will rank equally in respect of its claim amongst the same class of credi-

tors. The Department may also seek to have recourse to recovery proceeding under the provision of the Income-tax Act and in that case, the Department must obtain prior leave of Court. The Court while granting such leave, may impose necessary terms and conditions which will prevent the Department from gaining any undue or preferential advantage over the creditors of the same class who are to rank equally with the Department. At and during the stage of assessment of any company, there can, therefore, be no question, to my mind, of any interference with the assets and properties of the company in liquidation or with any scheme of administration thereof.

47. It is a duty of the Income-tax Officer to assess persons which include companies and make no exception in favour of any company in liquidation. This duty is cast upon the Income-tax Officer under the Income-tax Act; and under the provisions thereof, the Income-tax Officer is the only authority competent to make an assessment and the jurisdiction as to assessment is vested exclusively in the Income-tax Officer. The Court has no power or jurisdiction to entertain or dispose of any assessment proceeding or to make any assessment by itself. Under the provision of sub-sections (2) and (3) of Section 446 of the Companies Act, 1956, it is not possible or permissible for the Court to entertain or dispose of any assessment proceeding or to transfer any assessment proceeding to its own record for disposal and to make any assessment by itself, dealing with any such assessment proceeding. Apart from the question of feasibility of any assessment proceeding being entertained by Court and the Court proceeding to make any assessment, it is not open to the Court to entertain or dispose of any assessment proceeding and the Court has no power or jurisdiction to entertain the same, notwithstanding the provisions contained in sub-sections (2) and (3) of Section 446 of the Companies Act, 1956, in view of the exclusive jurisdiction conferred on the Income-tax Officer in the matter of such assessment by the Income-tax Act which is a special Act and makes specific provision as to how any assessment is to be made; and any assessment, if ever sought to be made by Court, will not be any valid assessment and will not give rise to any liability or create a valid debt, in view of the particular provisions of the Income-tax Act as to how a liability or debt for payment of taxes may be validly created. Bearing in mind the interpretation of the expression 'other legal proceeding' in Section 171 of the Companies Act of 1913 and in Section 446 (1) of the Companies Act, 1956, enunciated by the Federal Court and the Supreme Court in the decisions which I have already noted and the observations of the Supreme Court in particular in Damji Valji's case, AIR 1966 SC 135, which I have already quoted, I have to hold that

no leave of Court is necessary in respect of any assessment proceeding which does not affect the properties of the company and which the Court is not in a position to entertain or dispose of, notwithstanding the provisions contained in sub-sections (2) and (3) of Section 446 of the Companies Act. In this connection I have to note that Vimadalal J. while dealing with the decision of the Supreme Court in Damji Valji's case, AIR 1966 SC 135, in his judgment in Colaba's case, reported in (1968) 67 ITR 399 (Bom), observed at page 410—

"It appears to me that the word 'exclusive' which is to be found in the above passage in the judgment in Damji Valji's case, AIR 1966 SC 135, has occurred there per incuriam, in so far as Section 446 (2) is an empowering provision which confers an overriding controlling power on the Court which is winding up a company, so that liquidation proceeding cannot be impeded or delayed in any manner and so as to ensure a fair and equitable distribution of the assets of the company."

With due respect to the learned Judge I regret my inability to agree with the view expressed by him that the word 'exclusive' which is to be found in the judgment of the Supreme Court in Damji Valji's case, has occurred there per incuriam. It is stated in Art. 1687 at page 800 in Halsbury's Laws of England (Third Edition) Vol. 22—

"A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords."

A decision may also be given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the Court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority."

48. The Supreme Court was considering Section 446 of the Companies Act, 1956 in Damji Valji's case and was construing the said section. Although Section 446 (1) of the present Companies Act corresponds exactly to Section 171 of the Companies Act, 1913, yet in the Companies Act of 1913, there were no provisions similar to the provisions contained in sub-sections (2) and (3) of Section 446 of the present Act. The Supreme Court in the case of AIR 1955 SC 604, had referred

to and considered the decision of the Federal Court in Shiromani's case. I do not think it will be proper for me to come to any conclusion that the Supreme Court, while dealing with Damji Valji's case in which Section 446 of the present Act was directly in question, acted in any ignorance of the provisions of the statute or of its own earlier decision or the decision of the Federal Court. To my mind, the decision of the Supreme Court in Damji Valji's case, does not appear to be, in any way, in conflict with the decision of the Federal Court in Shiromani's case, AIR 1946 FC 16; or of the decision of the Supreme Court in Ranganathan's case, AIR 1955 SC 604. In any event, the decision of the Supreme Court in Damji Valji's case being a later pronouncement on the question and a direct decision on the construction of Section 446 of the present Act, must necessarily be followed by all the Courts while interpreting the said Section 446 of the Companies Act, 1956.

49. There is another aspect of the matter, the consideration of which, to my mind, leads also to the conclusion that no leave of Court is necessary in respect of any assessment proceeding. The duty of assessment is cast upon the appropriate Officer of the Department under the provisions of the Income-tax Act. Income-tax Act has been enacted in the larger interest of the country, although the provisions thereof may affect the interests of individuals. Income-tax Act is a special Act, containing specific provisions relating to assessment in the larger interest of the country as a whole and the larger interests transcend the interests of the creditors and the members of the company. Income-tax Act, 1961 is also a later enactment than the Companies Act of 1956. To my mind, a duty imposed by a statute on any appropriate authority in the larger interest of the nation, should not be considered to be subject to the control of the winding up Court. In my opinion, it is not reasonable to hold that the statutory duty imposed on the Income-tax Officer under the Income-tax Act in the larger interests of the country, should be subjected to the control of the winding up Court, as in the event of any such control by Court, there arises a possibility that the Income-tax Officer may not be in a position to discharge the duty entrusted to him by the statute, if the Court, for some reason or other, chooses not to grant leave in exercise of its control. In such a case, there may be no assessment at all, although the company under the Income-tax Act may be liable to be assessed and taxed.

49a. Assessment proceedings and recovery proceedings, although both are proceedings under the Income-tax Act, do not, to my mind, stand on the same footing in so far as leave under Section 446 (1) of the

Companies Act, 1956 is concerned. So long as the duty of assessment is not performed, the right to recover does not arise at all. Assessment validly done in accordance with the provisions of the Income-tax Act is the only way of creating a debt in favour of the Department and does not affect the assets and properties of the company or the scheme of administration thereof or the winding up of the company in any way. When any debt for payment of taxes arises on an assessment, it is open to the Department to prove the debt in liquidation, claim payment thereof and the debt of the Department will be paid in the same manner as the debt of other creditors of the same class. It may also be open to the Department to seek to enforce its right of recovery of the debt in accordance with the provisions of the Income-tax Act. But the right to enforce recovery by taking recourse to recovery proceeding against the assets of the company in liquidation is and cannot be an unfettered right. This right to recover in enforcement of the recovery proceedings under the Income-tax Act is controlled by Section 446 (1) of the Companies Act, 1956 and is subject to necessary leave of Court, not merely because the recovery proceeding may affect the estate and effects of the company and interfere with the scheme of administration thereof, but also because the Department may otherwise get an undue preference over the other creditors of the same class in violation of the provisions of the Companies Act, 1956. There is nothing in the Income-tax Act which gives any prerogative, privilege or priority to the Department, which may entitle the Department to realise its dues in preference to the creditors of the same class. Section 530 of the Companies Act, 1956 provides for preferential payments of taxes payable by a company in liquidation amongst various other preferential payments to be made by the company. All preferential creditors of the company form a class and rank equally in the matter of payment and no particular preferential creditor of the same class is to receive any discriminatory treatment or payment. To allow the Department to have an unfettered and uncontrolled right to have recourse to recovery proceedings in accordance with the provisions of the Income-tax Act to realise its dues from a company in liquidation, will result in giving the department a prerogative or privilege and preference, not warranted by the provisions of the Income-tax Act, over the other creditors of the company of the same class in clear violation of the scheme and provisions of the Companies Act, 1956 which postulate and lay down that all creditors of the same class, except those who are outside the scope of winding up, must rank equally and not be discriminated against. Both the Acts, in my opinion, should be so construed as will lead to harmonious and smooth working of

the provisions of the respective Acts and will not create any conflict between the two. This principle of harmonious construction of the two Acts, namely, the Income-tax Act and the Companies Act, indicates, to my mind, that leave of Court is necessary by the Department in respect of any recovery proceeding and no leave of Court is necessary by the Department in respect of any assessment proceeding of the company.

50. I have to note that the decision of the Supreme Court in the case of AIR 1964 SC 1154, referred to and relied on by the Official Liquidator is not of any assistance in considering the question involved in the present case. The said decision does not lay down that an Income-tax Officer constitutes a Court in respect of every proceeding before it and is no authority, in my opinion, for the proposition that every proceeding before the Income-tax Officer is a legal proceeding within the meaning of Section 446 (1) of the Companies Act, 1956. In this case the Supreme Court was concerned with the question whether the proceeding before an Income-tax Officer under Section 37 of the Indian Income-tax Act, 1922 (No. XI of 1922) could be said to be a proceeding in any Court within the meaning of Section 195 (1) (b) of the Code of Criminal Procedure and the Supreme Court by a majority held that Section 37 (4) of the said Act made the said proceedings before the Income-tax Officer judicial proceedings under Section 193, I. P. C. and the judicial proceedings must be treated as proceedings in any Court for the purpose of Section 195 (1) (b), Criminal Procedure Code.

51. This application, therefore, fails and is dismissed. There will be no order as to costs. The Liquidator will, however, retain his own costs of this application out of the assets of the company in his hands.

Application dismissed.

AIR 1970 CALCUTTA 373 (V 57 C 68)
BIJAYESH MUKHERJI AND SALIL
KUMAR DATTA, JJ.

Sree Kalimata Thakurani of Kalighat and another, Appellants v. Ram Chandra Chatterjee and others, Respondents.

F. M. A. No. 170 of 1965, D/- 20-8-1969.

(A) Civil P. C. (1908), Section 92 — Settlement of scheme for administration of religious or charitable trust by Court — Necessity of modification in scheme owing to change of circumstances — Procedure.

A Court, which has sanctioned a scheme for administration of a religious or charitable trust, is competent from time to time to vary and amend the scheme as the exigencies of the case may require. (Para 7)

When the Court has seisin of a case the correct, appropriate and speedy remedy would be by way of an application rather than the cumbrous procedure of a suit in case a modification is required in the scheme owing to change of circumstance. (Para 7)

(B) Civil P. C. (1908), Sections 96, 92, 2 (2) and 115 — Suit under Section 92 (1) — Settlement of Scheme by Court — Order allowing an application for varying and altering scheme is decree and as such appealable. AIR 1965 SC 231, Foll. — Contrary view expressed in Mukherjee's Tagore Law Lectures that propriety of such order can be challenged by way of revision under Section 115 held to be no longer good law in view of the Supreme Court decision in AIR 1965 SC 231. (Paras 10, 11)

(C) Civil P. C. (1908), Sections 96, 2 (2) and 92 — Suit under Section 92 (1) for proper management of seva puja of deity and for proper management of debatter properties — Settlement of scheme by Court — Application for setting aside election of certain persons as members of temple committee and also for amendment or modification of scheme — Court upon consideration of material on record rejecting application — There has thus been final adjudication on the issues and matters have been conclusively determined — Such determination embodied in formal expression of the order rejecting the application is decree and as such appealable. (Para 12)

(D) Civil P. C. (1908), Order 32 and Section 92 — Order 32 does not in terms apply to representation of deity in suits under Section 92 — Removal of a next friend already appointed, under the provisions of Rule 4 sub-rules (1) and (2) of Order 32 of the Code, is not necessary before permitting the secretary of the temple committee to represent the deity. (Para 22-A)

(E) Civil P. C. (1908), Order 1, Rule 8 and Section 92 — Public Endowment — Election to the body of management of such endowment — Person interested in the endowment has locus standi to challenge election — He need not be a candidate or elector for the election — Doctrine of Representation of the People Act (1951) cannot be applied — Representation of the People Act (1951), Section 81. (Para 23)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 231 (V 52) =
(1964) 5 SCR 270, Venkata Janki
Rama Rao v. Board of Commrs.,
for Hindu Religious Endowments,
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(1964) AIR 1964 SC 107 (V 51) =
(1964) 2 SCR 647, Ahmad Adam
v. M. E. Malkhi 35
(1962) AIR 1962 SC 1329 (V 49) =
Sree Sree Kalimata Thakurani v.
Jibandhan Mukherjee 2
(1961) AIR 1961 SC 1206 (V 48) =
(1961) 3 SCR 930, Raje Anandrao

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ILR (1949) 2 Cal 587, Iswari Kali-
mata v. Manager Bijni Raj Court of
Wards Estate.

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73 Cal LJ 532, Srijib Nyayatirtha
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(1936) AIR 1936 Cal 744 (V 23)=
64 Cal LJ 379, Prasanna Deb v.
Bengal Duars Bank Ltd.

(1930) AIR 1930 Cal 180 (V 17)=
50 Cal LJ 382, Panchanan Banerjee
v. Surendra Nath Mukherjee

Nalini Ranjan Bhattacharyya, for Appel-
lants; Samarendra Krishna Deb (for Nos. 1-7
and 9-12); Dwijendra Nath Lahiri (for No.
8), Arun Prokash Chatterjee (for No. 13),
Narayan Chandra De (for No. 15), Tarak
Nathi Roy (for No. 16), for Respondents:

SALIL KUMAR DATTA, J.— This is an
appeal by Ranada Kanta Das, a worshipper
of Sree Sree Kalimata Thakurani, for self
and as the next friend of the said deity,
against an order passed by the District
Judge of 24-Parganas on May 12, 1964.

2. The appeal arises in connexion with
Title Suit No. 85 of 1949 instituted on
December 5, 1949, under Section 92 of the
Code of Civil Procedure, for proper manage-
ment of the seva puja of Sree Sree Kalimata
Thakurani and her associated deities and
for proper management of the Debatter pro-
perties. The District Judge, in whose Court
the suit was instituted, settled a scheme re-
garding the aforesaid matters, and, on ap-
peal, the High Court made some amendments
to the scheme. An appeal, however, was
taken to the Supreme Court by the deity
Sree Sree Kalimata Thakurani, and the
Supreme Court, while dismissing the appeal,
by its judgment dated November 1, 1961, in
Sree Sree Kalimata Thakurani v. Jibandhan
Mukherjee, AIR 1962 SC 1329, made some
modifications in the scheme and gave speci-
fic directions to the High Court for incorpo-
ration of the said modifications in the
scheme. The High Court again by its judg-
ment dated February 19, 1962, finally fram-
ed the scheme in the light of the directions
of the Supreme Court.

3. On November 30, 1962, Ranada Kanta
Das, the appellant No. 2 in this appeal,
filed an application before the District Judge
in the said suit for setting aside the elec-
tion of three persons namely, Probhat Kumar
Mukherjee, Chhenu Lal Ganguly and Amiya
Kumar Halder as members of the Kalighat
Temple Committee and also for certain
amendments to the scheme. The said ap-
plication was opposed by Probhat Kumar
Mukherjee, Chhenu Lal Ganguly and others.
On May 25, 1963, an application was filed on
behalf of the deity represented by the
Kalighat Temple Committee for granting
leave to one Gebinda Das Banerjee alias
Prokash Chandra Banerjee, the then Secre-
tary of the Kalighat Temple Committee, to
represent the deity after striking out the

name of the next friend Manikkal Banerjee
who so long represented the deity as her
next friend. The said application was allow-
ed by the District Judge by Order No. 215
dated June 5, 1963. Thereafter on Febru-
ary 10, 1964, an objection to the aforesaid
application of the appellant was filed on
behalf of the deity, by Prokash Chandra
Banerjee, Secretary of the Kalighat Temple
Committee, while other objections were also
filed by some of the shebaites even before.
On March 31, 1964, the appellant filed an
application of "preliminary objection" for
vacating the aforesaid Order No. 215 dated
June 5, 1963, on a finding that the said
Prokash Chandra Banerjee had no locus
standi to represent the deity in the said
proceedings. The said application was
directed by Order No. 251 dated May 6,
1964, to be heard on May 20, 1964, while
the main application of the appellant was
taken up for hearing on that very date and
was also heard on May 7, 1964. By Order
No. 253 dated May 12, 1964, the said ap-
plication filed by the appellant on Novem-
ber 30, 1962, was dismissed on contest with
costs. The application of the appellant dated
March 31, 1964, was taken up for hearing
on July 15, 1964, and by Order No. 264
dated July 17, 1964, the said application
was also dismissed on contest.

4. The appellant preferred this appeal in
this Court on July 25, 1964, and, along
with the memorandum of appeal, an appli-
cation was also filed on the same day, for
appointment of the petitioner as guardian
ad litem (next friend?) of the deity and for
permission to prosecute the said appeal. This
appeal was filed as an appeal against an ori-
ginal order and was admitted by this Court
under Order 41, Rule 11 of the Code of
Civil Procedure. The appeal with the appli-
cation has now come up before us for hear-
ing.

5. Mr. Samarendra Krishna Deb, the
learned Counsel for some of the respondents,
raised a preliminary objection as to the
maintainability of the appeal on the follow-
ing grounds:

(a) No appeal lies against the order dis-
missing the application of the appellant
Ranada dated November 30, 1962.

(b) The application for setting aside the
election of three persons under clause 17
sub-clause (A) of the Scheme, to the Kali-
ghat Temple Committee has become infruc-
tuous in view of the subsequent elections to
the said Committee.

(c) The appellant Ranada is not compe-
tent nor has he any right to represent the
deity in this appeal.

6. Elaborating his arguments, Mr. Deb
contended that the order dated May 12,
1964, in his appeal, rejecting the
application for amendment of the
scheme, not being a decree nor having the
effect of a decree, is not appealable. In sup-
port of such contention, Mr. Deb relied on
the following observations of Dr. B. K.

Mukherjea in his Tagore Law Lectures — 1936 (delivered in August, 1951) on the Hindu Law of Religious and Charitable Trust — Second Edition 1962 — (hereinafter referred to as Dr. Mukherjea's Tagore Law Lectures) at page 436:

"An order amending a scheme cannot, strictly speaking, be treated as one under Section 47, C. P. Code. There is authority in support of the view that under certain circumstances it might have the effect of a decree and be appealable as such. The better view seems to be that the order amending the scheme is not appealable and its propriety can only be challenged by way of revision under Section 115 of the C. P. Code."

7. There is no dispute to the proposition that a Court, which has sanctioned a scheme for administration of a religious or charitable trust, is competent from time to time to vary and amend the scheme as the exigencies of the case may require. In fact, provision has been made in the scheme settled by the High Court in accordance with the directions of the Supreme Court, for alteration or modification of or addition to the scheme by application to the District Judge. Clause 56A of the scheme bears:

"56A. The provisions of the scheme may be altered, modified or added to by application to the District Judge, Twenty-Four Parganas."

There is also no dispute to the proposition that when the Court has seisin of a case relating to charitable and religious trust involving the framing of a scheme, the correct, appropriate and speedy remedy would be by way of an application rather than the cumbrous procedure of a suit in case a modification is required in the scheme owing to change of circumstance. It was also observed by Dr. Mukherjea in his "Tagore Law Lectures" page 436 as follows:

"The power of the Court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision which makes the scheme alterable by the Court in future. If the scheme is amended subsequently by the Court within the limits laid down by the decree itself, the Court is really giving effect to its own decree rather than amending it."

8. Mr. Nalini Ranjan Bhattacharjee, the learned Counsel for the appellant Ranada, has contended that it is now settled law that an appeal lies against any order allowing an application for varying and altering a scheme, and the same principles will apply even when such application is rejected as in the instant case. In support of his contention he relied on clause 57 of the scheme which bears:

"57. Orders passed by the District Judge, 24 Parganas in respect of matters directed

orders passed by the District Judge in continuation of the proceedings of the original suit under Section 92 of the Code of Civil Procedure."

9. Mr. Bhattacharjee in support of his contentions also referred to the decision in Srijib Nyayatirtha v. Dandy Swami Jagannath Ashram, AIR 1941 Cal 618, where it was held on earlier authorities as also on a concession that any order modifying a scheme is an order in the suit which is kept pending under the scheme for the purpose and such order determining rights of the parties in the proceedings, viz., the mahant and the Committee, would have the effect of a decree and as such appealable. Mr. Bhattacharjee also relied on the decision in Raje Anandrao v. Shamrao, AIR 1961 SC 1206 where it was held, accepting the Calcutta view, that it is

"both appropriate and convenient that a scheme should contain a provision for its modification, as that would provide a speedier remedy for modification of the manner of administration when circumstances arise calling for such modification than through the cumbrous procedure of a suit."

It was also held that Section 92 (2) of the Code does not bar an application for modification of a scheme in accordance with the provisions thereof, provided such a provision is made in the scheme itself.

10. Mr. Bhattacharjee then referred to the decision in Venkata Janaki Rama Rao v. Board of Commrs. for Hindu Religious Endowments, Andhra Pradesh, AIR 1965 SC 231, in which case it was held as follows:

"..... The scheme-decree itself might have contained a provision granting liberty to a party to the decree to move the Court by an 'application' for the modification of the scheme in stated contingencies. If in pursuance of such liberty reserved an application were made to amend the scheme-decree, the resultant order though passed on an 'application' would certainly be an amended decree against which an appeal would lie under Section 96 of the Civil Procedure Code. We need only add that the legality of such a reservation of liberty has recently been upheld by this Court. If the reservation of power or the liberty in the decree would produce such a result and render the amendment of the scheme an amended decree so as to satisfy the definition of a decree within Section 2 (2) of the Civil Procedure Code, it appears to us that it makes no difference that such a liberty to move the Court to modify the decree is conferred not by the scheme-decree but by an independent enactment such as the Act now before us. In the circumstances we consider that the appeal by the Board to the High Court was competent and that the learned Judges had jurisdiction to entertain and deal with the appeal."

11. The decision of the Supreme Court, holding the order on an application modifi-

pealable, is the law of the land and the observations of Dr. Mukherjee in his Tagore Law Lectures that the better view is that such order is not appealable and its propriety can be challenged by way of revision under Section 115 of the Code of Civil Procedure appear, therefore, to be no longer good law.

12. Even then a question has been raised about the maintainability of the appeal in view of the dismissal of the application by the District Judge. A decree is defined in Section 2 sub-section (2) of the Code as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint

.....
In this case the propriety of certain elections in the Kalighat Temple Committee as also the suggestion for amendments of the scheme have been the matters in controversy and the District Judge upon consideration of the materials on record has thought it fit to reject the contentions of the appellant Ranada Kanta Das. There has been thus a final adjudication on the issues raised by the said appellant, and, in so far it goes, the matters have been conclusively determined. Such determination embodied in the formal expression of the order, in our view, is a decree as contemplated under provisions of Section 2 sub-section (2) of the Code and as such appealable. The preliminary objection, on this point, must therefore be overruled.

13. In view of our conclusion, as stated above, an appeal against the order passed on an application for amendment or modification of a scheme, settled in a suit under Section 92 (1) of the Code of Civil Procedure, must be held to be an appeal from the original decree. Accordingly, the provisions of Article 17 (VI) of Schedule II of the Court-fees Act (VII of 1870), as amended in its application to West Bengal, will be applicable. The appellant's memorandum of appeal bears a court-fee of Rs. 5/-. But, in the view we take, a balance court-fee of Rs. 10/- is payable, in respect of the appeal, the total court-fee payable being Rupees 15/- only. We have been assured by Mr. Bhattacharjee that his client Ranada Kanta Das is ready and willing to deposit further court-fee as may be directed. And we direct, as Mr. Bhattacharjee wants us to do, that the said amount of court-fee i.e., Rs. 10/- be put in by the appellant Ranada within one week from today.

14. The next preliminary objection of Mr. Deb relates to the maintainability of the appeal in the events that have happened since the filing of the application by Ranada on November 30, 1962. Mr. Deb's contention is that while this appeal is concerned with

the election of three named persons in the Kalighat Temple Committee in or about 1962, there have been subsequent elections of shebais to the Kalighat Temple Committee on or about April 5, 1964, April 10, 1966, and March 31, 1968. The appeal in view of the said elections has become infructuous and the question of the validity of the election of the three persons to the Kalighat Temple Committee in 1962 is now only of academic interest.

15. Mr. Bhattacharjee's contention is that this point was not taken in the trial Court and must be deemed to have been waived. More, his client in his application of November 30, 1962, has contended that the said three persons are not shebais, at all and cannot be elected as members to the said Committee. Under provisions of clause 17 of the scheme, finally settled, 5 persons are to be elected from the Council of Shebais to the Kalighat Temple Committee. If the Court finds that the said three persons have no right to be shebais or to be included within the Council of Shebais they will never have the right to be elected as members of the Kalighat Temple Committee at any time. So the subsequent elections to the Kalighat Temple Committee cannot render the appeal infructuous, when the right of the said persons to be shebais has been assailed.

16. On a consideration of the submission of the respective parties, we are of opinion that there is much force in the contentions of Mr. Bhattacharjee. In view of the issues involved, that is, the right of the said three persons to be shebais of the Kalighat Temple, thereby to be included in the Council of Shebais, who in turn elect five members to the Kalighat Temple Committee, we are not in a position to say that the subsequent elections of shebais to the Kalighat Temple Committee have rendered the appeal infructuous. For, the appeal will be concerned with the determination of their claim as shebais, on the basis whereof only, they can be elected to the Kalighat Temple Committee. The second preliminary objection must also therefore be overruled.

17. The last preliminary objection of Mr. Deb is that the appellant Ranada Kanta Das cannot act as the next friend to Sree Sree Kalimata Thakurani of Kalighat, or represent the deity without an order of the Court appointing him as such. In support thereof, he relied on the following passage in Dr. Mukherjee's Tagore Law Lectures at p. 250:

"Where the joinder of the idol is necessary or desirable, there is a difference of opinion as to whether the provisions of Order 32 of the Civil Procedure Code could, by analogy, be applied to such a suit, and whether it is open to a person to constitute himself as the next friend of the idol and institute the suit on its behalf. The better opinion is that the provisions of Order 32 cannot be extended to a suit on behalf of

the idol, as there is no real analogy between an infant and an idol, that a suit by a person other than the shebait could be instituted on behalf of the idol only when the Court grants permission therefor, and that such permission should, as a rule, be given only after hearing the persons interested." Mr. Deb has strongly relied on the above passage and has contended that in absence of any permission by the Court, granting permission to Ranada Kanta Das, the appellant, to act as the next friend of the deity, the appeal at least on behalf of the deity is incompetent.

18. There is no doubt, and it has not been disputed either, by Mr. Bhattacharjee, that, in view of the position at law as stated above, it is not competent for any person to constitute himself as the next friend of the deity for institution of a legal proceeding except with the permission of the Court granting him leave to represent the deity in such proceeding. Mr. Bhattacharjee draws our attention to the application filed on July 25, 1964, the same day on which the present appeal was presented by Ranada Kanta Das the appellant No. 2, praying, *inter alia*, that he be appointed as the next friend of the deity for prosecuting the instant appeal on her behalf. The said application came up for hearing before the Registrar of this Court, who, by his order dated 22-3-1965, directed that the application along with the connected affidavits be placed before the Court at the time of hearing of the appeal. This application was thus pending, and was heard along with the appeal, on merits. This preliminary objection, in the aforesaid circumstances, appears to be without substance.

19. Before we deal with the appeal itself, we shall deal with the application filed on July 25, 1964, by the appellant No. 2 along with the appeal. It appears that under the scheme as finally settled, a Committee known as Kalighat Temple Committee has been constituted. In such Committee there are to be eleven members, five of them to be appointed from public, by different public bodies and one to be nominated by the District Judge of 24 Parganas, while five others are to be elected from the Council of Shebait. Under clause 36 of the Scheme the Committee will have a Secretary and under the authority conferred on such Committee by Clause 41 of the Scheme, the Committee shall have powers to institute or defend all suits and proceedings relating to Debattar estate and to manage and control the affairs of the endowment. As will appear from the memorandum of the appeal, the Kalighat Temple Committee has been rightly impleaded as Respondent No. 15, represented in this appeal by the learned Counsel, Mr. Narayan Chandra De. In this state of affairs, we consider that the deity has been duly and sufficiently represented

rally look after her interest in this appeal, to the extent necessary. Accordingly we do not consider it necessary or proper to grant leave to Ranada Kanta Das to represent the deity in this appeal. We, therefore, reject the application filed by the said appellant for grant of leave and to prosecute the appeal on behalf of the deity.

20. In the normal course, in view of the rejection of the application of the appellant No. 2 to represent the deity, we would have made the deity a respondent in the appeal and ensured her proper representation in this proceeding before the decision in the appeal was given. As we have already stated, we find that the Kalighat Temple Committee under the scheme finally settled by the Supreme Court is the real and only authority given powers thereunder to institute or defend all suits and proceedings relating to Debattar estate and also to take all necessary steps to implement the scheme and manage and control affairs of the endowment. Accordingly we are of opinion that interest of the deity is sufficiently represented in this proceeding by the Kalighat Temple Committee through its Secretary and there is no necessity for any separate representation of the deity in this appeal which will only involve unnecessary delay.

21. Mr. Bhattacharjee has also made a grievance that on May 25, 1963, an application was filed by the Kalighat Temple Committee for permission to represent through its Secretary the deity Sree Sree Kalimata Thakurani in the connected proceedings in place of the next friend Sri Maniklal Mukherjee, who, it appears, is not a member of the said Committee, but represented the deity in the earlier proceedings culminating in the appeal before the Supreme Court and thereafter in the High Court finally settling the scheme. The said prayer was allowed by the District Judge by his Order No. 215 dated June 5, 1963, and the Kalighat Temple Committee through its Secretary was permitted to represent the deity, the name of Maniklal Mukherjee as the next friend of the deity having been directed to be struck out. Ranada Kanta Das filed an objection to the same on March 31, 1964, for vacating the said order, the main objection being that the Secretary Govindadas Banerjee alias Prokash Chandra Banerjee was personally disqualified for such appointment, because of his interest being adverse to the deity and of the necessity of compliance with the mandatory provisions of Order 32, Rules 3 and 4 of the Code of Civil Procedure, before any appointment could be made.

22. The Committee also filed an objection to the same and the said application filed by Ranada Kanta Das was directed to be heard on May 20, 1964, while the main application of Ranada Kanta Das dated November 30, 1963, was taken up for hearing and heard on May 6, 1964, and also heard on May 7, 1964. No objection was

application was being heard, to the effect that his application filed on March 31, 1964, being a preliminary objection as contended, should have been heard earlier before the disposal of his main application. This subsequent application was heard on July 15, 1964, and was rejected on July 17, 1964.

22A At its highest, the action of the District Judge in taking up on July 15, 1964, and not before the hearing of the main application the application filed by Ranada Kanta Das on March 31, 1964, may be irregular, but, again, there was no justification for Ranada in filing his application so late as on March 31, 1964, for vacating the Order No. 215 passed on June 5, 1963, and in not raising an objection when his main application was being heard, while the hearing of his other application was deferred by the Court to a subsequent date. The said Order No. 215 dated June 5, 1963, has also been challenged in this appeal on the above grounds, and we, on our part, find nothing wrong with the order. Order 32 of the Code of Civil Procedure does not in terms apply to the representation of the deity in suits, under Section 92 of the Code, (see Dr. Mukherjee's Tagore Law Lectures pp. 249-50) so that the question of the removal of a next friend already appointed, under the provisions of Rule 4 sub-rules (1) and (2) of Order 32 of the Code, is not necessary before an appointment is made. In the scheme framed by the Court, as already stated, the Kalighat Temple Committee has been constituted and the said Committee has been given the power and authority to institute and defend the proceedings relating to the debattar estate and to manage and control the affairs of the endowment. The said Committee is acting through its Secretary in the proceeding and is the only body to represent the deity in such proceeding in which the Court is considering the proposed amendments to the scheme relating to the debattar estate. There are no specific allegations or any allegations of any breach of duty on part of the Committee in the application filed on November 30, 1962, and the allegations personally against the Secretary and the Committee in the latter application are too vague and indefinite to merit any consideration. Further such appointment of the Kalighat Temple Committee as the next friend of the deity again cannot be challenged collaterally as is sought to have been done by the appellant Ranada Kanta Das.

23. Coming now to the appeal, we find that the appeal has two distinct issues which have been agitated before the District Judge and also before us. The one relates to the election of three members who claim to be shebaites to the Kalighat Temple Committee and the other concerns certain amendments to the scheme. We shall first deal with the objections of the appellant Ranada to the elections to the Kalighat Temple Committee. Mr. Dwijendra Nath Lahiri,

the learned Counsel for the respondent No. 8, Probhat Kumar Mukherjee, has contended that the appellant Ranada has no locus standi to challenge the elections to the Kalighat Temple Committee. According to Mr. Lahiri, the election could be challenged by any candidate at the election or any elector i. e. any member of the Council of Shebaites. In support he referred to Section 81 of the Representation of the People Act, 1951 (Act XLIII of 1951), and contended that Ranada is neither a candidate to the impugned election nor an elector. Mr. Bhattacharjee opposing the said contentions, has submitted that his client being interested in the endowment and a party to the proceedings, has the inherent right to challenge such elections ultimately to the Kalighat Temple Committee which is entrusted with the management of Seva Puja of the deity and also of the properties. On our part, we also think that the procedure of the elections to Loka Sabha and State Legislatures provided in the Representation of the People Act, 1951, can have no comparison to the elections to the Kalighat Temple Committee and the principles and procedures of election laid down in the said Act should not be extended to the elections under consideration in this appeal. It must also be remembered that the shebaites form only a small section of worshippers while the votaries to the deity are the Hindus all over India and beyond India too. The Hindu public cannot be kept away from challenging elections to the body of management of a public endowment in appropriate cases on the doctrine of the Representation of the People Act, 1951.

24. On merits, Mr. Bhattacharjee has contended that order No. 75 dated February 20, 1957, including the names of the three persons in the Council of Shebaites, was void, passed as it was when the Court had no longer any jurisdiction over the matter. The District Judge by his judgment and decree dated March 3, 1955, in Title Suit No. 85 of 1949, disposed of the suit itself, approving a scheme, and thereafter the matter went up in three appeals in the High Court. The High Court again by its judgment and decree dated December 21, 1956, allowed the appeals in part, making certain amendments to the scheme and the scheme was approved under Section 92 of the Code of Civil Procedure. An appeal, as already stated was taken to the Supreme Court by the deity but it does not appear from the records as to whether the application for certificate of fitness for appeal to the Supreme Court was pending on February 20, 1957, when the impugned order was passed.

25. There is no dispute that Title Suit No. 85 of 1949 is to be deemed to be continuing for the purpose of implementing and working out the scheme. At or about the time, the impugned order was made,

the District Judge was in seisin of the suit, and in absence of any order restraining him from passing orders impugned herein, it cannot be said that the District Judge was functus officio, while passing the order. On March 11, 1964, Chennu Lal Ganguly, by his petition of objection, stated that as his name was omitted from list 'C', he was moving the Court for inclusion of his name in the list of the shebait. And after perusing relevant papers and documents, the District Judge, by his Order No. 75 dated February 20, 1957, directed inclusion of his name in the list of shebait Schedule 'C'. The said order was never assailed by any one until the application by Ranada bearing date November 11, 1962. There is nothing to show that it was a case of inclusion of name by devolution of interest on the death of a shebait. And, at this belated stage, there is no scope for interference with the order, whereby Chennulal Ganguly was included in Schedule 'C' raised collaterally in connexion with the election of the Kalighat Temple Committee.

26. Mr. Bhattacharjee has also contended that the application for inclusion of the name of Chennu Lal Ganguly in List 'C' was not maintainable, as only applications relating to matters of administration and management of the Debatter estate, and not applications relating to other matters, could be made in the said suit. It appears, however, to be clear that the matter of inclusion of a person in List 'C' is, as in the instant case, ultimately connected with the election of shebait to the Kalighat Temple Committee which under the scheme manage and administer the Debatter estate. That being the position, it cannot be said that such application for inclusion of name in List 'C' has nothing to do with matters of administration or management of Debatter estate. However, at this belated stage, as already indicated, we are not inclined to interfere with the said order, which has become final, conclusive and binding, challenged as it has not been in a manner warranted by law.

27. Mr. Bhattacharjee's most formidable contention is that the shebaiti right in this public endowment is only the right to office and not any right to property. Accordingly there could be no devolution or transfer of interest of shebaiti right of a shebait to his heirs or any other person. It is further contended that list of shebait in Schedule 'C' was inviolable and there could not be further additions or substitutions in the said list.

28. The contention of Mr. Bhattacharjee is completely belied even by the provisions of the scheme finally settled by the Supreme Court. Clause 3 of the scheme is one such provision:

"3. All the Shebait and Paladars shall for the time being constitute the Council of Shebait. Such of the Shebait as are minors

or are of unsound mind shall be represented by his or her natural or certificated guardian."

Clause 6 of the scheme is another:

"6. A register of the Shebait and Paladars will be maintained under the direction of the council at the office giving their names and addresses described under five branches as at present. For the election to the First Temple Committee, the District Judge, 24 Parganas, will take such steps as are deemed necessary to prepare the register of Shebait.

Under the direction of, and the Rules framed by, the Council, necessary amendments in the register in case of death or devolution of offices etc., will be made in the register. No transfer except one sanctioned by law will be mutated in the register."

Such provisions militate against the contention put forward by Mr. Bhattacharjee. We are informed that no rules have been framed by the Council of Shebait. But as Shebaitship is property, it devolves like any other property according to the ordinary Hindu Law of inheritance (Dr. B. K. Mukherjee's Tagore Law Lectures p. 199) and legal representatives of any Shebait, on his death automatically become Shebait of the deity.

29. The Supreme Court, dealing with the same arguments, as raised here, while settling the scheme, observed as follows:

"It is wrong to call Shebait as mere pujaris or archakas. A Shebait, as has been pointed out by Mukherjee, J. (as he then was), in his Tagore Law Lectures on Hindu Law of Religious and Charitable Trusts, is a human ministrant of the deity while a pujari is appointed by the founder or the shebait to conduct worship. Pujari thus is a servant of the shebait. Shebaitship is not mere office, it is property as well. The present body of shebait and their predecessors have been functioning as such without question, as already stated, for a long time. They have been in fact managing the property, that is, doing something which no pujari or archaka can claim to do. Therefore, they cannot be treated as mere pujaris or archakas even assuming that they are not de jure shebait."

The Supreme Court further observed:

"The second point is that shebait, whose turn it is to perform the worship, transfer their turns for consideration to others and that this is impermissible because shebaitship being an office is not transferable. He (Mr. Bhattacharjee who appeared for the appellant deity before the Supreme Court) also says that shebaitship terminates on death and is not heritable and that consequently appropriate directions in regard to these matters should have been made in the scheme. It is sufficient to say that these are not matters with respect to which any direction should be made in the scheme. The right of shebait, as already stated, is a right in property and if any person wants

to challenge the right of a person to act as a shebait it is open to him to pursue such remedy as may be available to him at law."

30. In view of the conclusion of the Supreme Court, there is no scope in this appeal for agitating the issue over again. It is obvious that the shebaiti right of the endowment is both property and office, and, Ranada Kanta Das having been a party to the proceedings, in any event, his application on this issue is barred by *res judicata*.

31. Mr. Bhattacharjee's further contention is: Chennu Lal Ganguly and Amiya Kumar Halder are not shebaiti at all, they are not parties defendants to the suit, nor their names have been included in the list of shebaiti in Schedule 'C' of the scheme settled ultimately by the Supreme Court, and there could therefore be no addition to list 'C' which was confirmed by the Supreme Court. Amiya Kumar Halder in his petition of objection stated that his father Jitendra Nath Halder was a shebait, his name having been included in list 'C', and, on his death on May 22, 1959, he along with other heirs of his father, became shebaiti of the deity.

32. It may be noted, however, that Clause 2 of the Scheme provides as follows:

"2. The persons who are now entitled to turns (palas) of Sheba and Puja of the deity are the Shebaiti and Paladars of the Goddess and the associated deities. A list of the present Shebaiti and Paladars are set out in the list enumerated herewith and marked Schedule 'C'. All Shebaiti and Paladars for the time being as in the register to be maintained as hereunder will be considered for the purpose of this scheme to be the shebaiti of the deity.

(a) The word "Shebait" wherever it occurs in this scheme shall be deemed to include "Paladar".

This clause was not altered in any manner by the Supreme Court. It is obvious therefrom that there cannot be any finality in the list of shebaiti and it was expressly provided that all Shebaiti and Paladars from the time as in the register to be maintained as provided in the scheme will be considered for the purpose of this scheme to be shebaiti of the deity. Clause 6 again, as already stated, provides for necessary amendments in the register in case of death or devolution of offices etc. subject to the only limitation that no transfer except one sanctioned by law will be mutated in the register. The observations apply with equal force to Chennu Lal Ganguly even if his case is one of succession by inheritance. The objections of Mr. Bhattacharjee against Chennu Lal Ganguly and Amiya Kumar Halder being shebaiti have no substance and must therefore be overruled.

33. Mr. Bhattacharjee has again contended that Probbhat Kumar Mukherjee has been consistently claiming his personal and secular title to lands within 595 bighas and 9

cottahs which belong to the Debattar estate as was adjudicated in the earlier proceedings. His personal interest thus clashes with his duties as trustee, thus making him unfit to hold the office of a trustee. In support thereof, he relied on the decision in *Iswari Kalimata v. Manager, Bijni Raj Court of Wards Estate*, AIR 1952 Cal 387 (2), where it was held that the said 595 odd bighas of land belonged to the deity. The Supreme Court considered the above decision, as also another decision, in which the High Court set aside the finding of the lower Court, declaring title of the deity to the said land, observing as follows:

".....It seems to us, however, that the provision made by the High Court in the scheme with respect to properties other than those described in Schedules A and B to the plaint is sufficient for that purpose.... As we have already stated the bulk of the lands are in the hands of transferees who are not parties to the proceedings under Section 92 of the Code of Civil Procedure and of course are not parties to the appeal either. Their inclusion in the schedules to the scheme as being debutter property will not affect the rights of those persons in any way and the fact that they are debutter properties will have to be established if and when appropriate proceedings are taken for obtaining their possession. We, therefore, decline to interfere with the direction made by the High Court in the scheme respecting the properties."

It is obvious that there was no adjudication in the said decision of the title of the deity to the said lands, which question was kept open by the Supreme Court, to be decided if at any time appropriate proceedings are taken.

34. There cannot be any dispute to the proposition, as submitted by Mr. Bhattacharjee, that under the Trusts Act, 1882 (II of 1882) or under the laws applicable to Hindu religious endowment, the action of a trustee setting up his title adverse to the trusts, amounts to a breach of trust and *prima facie* may justify his removal. In view of the aforesaid decision of the Supreme Court, which is conclusive, it cannot be said that Probbhat Kumar Mukherjee, by asserting his personal title to the said lands as alleged, assuming such allegation to be true, was, in any way, setting up adverse title against the deity, thereby disqualifying himself to be a member of the Kalighat Temple Committee, as the title of the deity to the said land was neither accepted nor established. The objection of Mr. Bhattacharjee on this score must, therefore, fail.

35. We shall now consider the proposed alterations to this scheme framed under the direction of the Supreme Court. On the basis of *Ahmad Adam v. M. E. Makhi*, AIR 1964 SC 107, Mr. Bhattacharjee's submission is that when any representative suit is brought by persons under Section 92 of

the Code of Civil Procedure and a decree passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and therefore are constructively barred by *res judicata* from reagitating the matters directly and specifically in issue in the earlier suit. The similar result follows if a suit is either brought or defended under Order 1, Rule 8 of the Code. It was further held that, while considering the propriety of the changes in the scheme, if the scheme is framed in a suit brought under Section 92, it should not be changed unless there are strong and substantial reasons so to do. It was also held that a scheme framed under direction of the Court should not be disturbed upon merely a speculative view, but upon substantial grounds and clear evidence, not only that the scheme has not operated beneficially, but that it can by alteration be made to do so consistently with the object of the foundation. Further, even when a scheme is framed in a suit properly instituted under Section 92, if supervening considerations justify its alteration or modification, the bar of *res judicata* cannot be pleaded against such alteration or modification.

36. Under the direction of the Supreme Court, only on February 19, 1962, the scheme was framed by this Court, and the present application was filed by the appellant on November 30, 1962. In fact, there has been little time given to examine the working of this scheme, far less to give it a fair trial. On top of that, in the application the appellant Ranada did not refer to any specific instance, nor is there any evidence that the scheme is not operating beneficially or that there has been any supervening consideration justifying any alteration or modification. It was stated that the alterations were necessary to avoid any inconsistency and complication, and also in the interest of the endowment and for good and smooth administration thereon. We are not impressed by the reasons which have been given for such alteration or modification, after so short a period of time that has elapsed in between. We shall, however, proceed to examine, on merits, the specific alterations suggested. Mr. Narayan Chandra De, appearing for the Kalighat Temple Committee, respondent No. 15, has contended that the proposed amendments are wholly unnecessary, other learned Counsel for the respondents adopting Mr. De's contention.

37. Mr. Bhattacharjee has submitted that after the words "Civil Court" in Cl. 30 of the scheme the following should be added:

"Or who has got any interest, direct or indirect, adverse to that of the deity," Clause 30 of the scheme runs:—

"30. No person shall be elected or nominated as a member of the Kalighat Temple

Committee who has not, at the date of election or nomination, attained the age of 35 years, or who is of unsound mind or who is a member of the salaried staff under the Kalighat Temple Committee or the Council of Shebais or who has been convicted by any criminal court of an offence which in the opinion of the District Judge, 24-Parganas involves moral turpitude or who was been adjudged an insolvent by a competent Civil Court. Any member who ceases to be a Hindu or incurs any of the disabilities during the term of his office shall cease to be a member of the Committee."

In agreement with the District Judge and accepting argument of Mr. De, we hold that there is sufficient provision in Clause 32 of the scheme for protection of interest of the deity and the proposed amendment is unnecessary. Clause 32 of the scheme bears:

"32. No member of the Kalighat Temple Committee shall, as a member, be present at the meeting when any matter in which he is either directly or indirectly concerned or interested is being considered or vote upon it. Such a member will not be deemed during the consideration of such a matter in the meeting to be present to be counted for the purpose of forming a quorum at the time of any such vote....."

38. The appellant Ranada next wants the word "immoveable property" in Cl. 42 of the scheme to be made more specific by adding thereafter "appertaining to the 595 Bighas and 9 cottahs of land mentioned in Mr. Heysham's list". Clause 42 of the scheme reads as follows:

"42. No immoveable property or Government Securities, Stocks and Shares belonging to the Debattar estate are to be sold or immoveable property leased out for a period exceeding 5 years, except with the express permission of the Court of the District Judge, at Alipore previously obtained." Mr. De has seriously contested the inclusion of these words as purporting to elucidate the immoveable property belonging to the deity. As we have seen, there is as yet no decision of any court in an appropriate proceeding that the said lands appertain to the Debattar estate and that the Supreme Court expressly declined to interfere with the directions made by the High Court in this scheme representing the said properties. The directions of the High Court approved by the Supreme Court are as follows:

"The first question which was raised on behalf of the deity and a few of the other shebais was that the properties described as Debattar property should be expanded. It appears from the records of this case as also the judgment of this Court at the previous stage that the total area of Debattar property was 595 bighas 9 cottahs in Mouza Kalighat. In course of the resumption proceedings started in 1859 the lands covering that area were released. Reference was also made to claims in 1797 for a revenue free

grant of a similar area. An attempt was made on the previous occasion to have the whole of that area declared as Debattar. This Court declined to make a declaration as a very large portion of that area was in the occupation of third parties who were not party defendants in that suit. A similar prayer has been made before us also. The present suit is one for preparing a scheme and not for going into the question of preparing an exhaustive list of all properties belonging to the deity. Certain properties were declared by the Court on the previous occasion as appertaining to the Trust. They are enumerated in Schedules A and B attached to the plaint on the present occasion. They are described in Schedules A and B of this judgment with some clarifications and modifications and they are declared to be the properties of the deity subject to what is mentioned in Clause 1 of the scheme. We have made it clear in the scheme that this description does not in any way affect the right of the deity to recover any other properties which may hereafter be found by a competent Court as properties in which her title subsists." In view of the above observations, approved by the Supreme Court, there is no scope for further addition of words in respect of the immovable properties as proposed by the appellant.

39. Mr. Bhattacharjee has next proposed that a new clause should be inserted after clause 42 as 42A as follows:

"42A. Any of the shebait violating any of the terms herein contained or committing breach of trust shall be liable to be removed from the shebaitship by application to the District Judge."

The proposed amendment, which is also opposed, is unnecessary, for, if a shebait is ever guilty of committing an act which renders him unfit to hold the office, he can always be removed from that office by an application made to the District Judge for the purpose.

40. Mr. Bhattacharjee has next submitted that on a misreading and misconstruction of Clause 48 of the scheme the Shebait and Paladars instead of taking one half of the cash offering left after reimbursement of the bhog rag and seva of the deity and the expenses of Kalighat Temple Committee are collecting one half of the total offering as their remuneration irrespective of whether the other half would be sufficient to meet the said charges, which, it is apprehended, will lead to the ruination of the endowment. More, Shebait and Paladars get a sum of Rs. 15 which is not warranted by this scheme. In the premises Mr. Bhattacharjee has submitted that after clause 48-A (a) the following words be added:

"After setting apart the portion thereof for the bhog rag and seva puja of the deity including the establishment charges of the institution."

41. The respondents, shebait as also the Kalighat Temple Committee, oppose the proposed amendment which, in their view, will cut down the remuneration of the shebait fixed by the High Court and approved by the Supreme Court. It is further contended that while Rs. 80 as costs of seva puja of the deity, after shebait have taken away their share, is always available, the same suggestions were also made before the said Courts in the earlier proceeding and the same were rejected.

42. The High Court while considering the question of Shebait and Paladars' share of offerings held as follows:

"The scheme which had been put forward on behalf of the shebait in the present case, was that the entire usufruct was available to them subject to the amount which was spent for the worship of the deity. That contention has been negatived. Considering the length of time during which a large body of shebait had got a portion of the usufruct we have to consider what should be reasonable and proper in the circumstances of this case. It is unquestionable that the entire income of the Debattar estate, including all offerings to the deities and the gifts belong to the deity absolutely. Out of the same some portion is to be set apart for the worship and for payment to the shebait for ministering to the deities. We have made two principal alterations in the directions given by the District Judge. No portion of the offerings in gold should go to the shebait. Further what amount will be required for the actual Bhog Rag per diem was fixed at Rs. 80. We have retained that figure, but we have omitted the maximum which had been put, leaving it to the Committee to decide what in changed circumstances the amount should be. Any variation in the payment to the shebait will have to be decided, according to the principles laid down by us, by the members of the Temple Committee. Increasing the rate will also require the approval of the District Judge.

43. The Supreme Court while dealing with this part of the scheme observed as follows:

"The present body of shebait and their predecessors have been functioning as such without question, as already stated, for a long time. They have been in fact managing the property, that is, doing something which no pujari or archaka can claim to do. Therefore, they cannot be treated as mere pujaris or archakas even assuming that they are not de jure shebait. They have, in fact, to bear the expenses for bhog rag and seva of Sree Sree Kalimata and are thus entitled to be reimbursed not only for the service they perform but for the expenses which they incur. The High Court, which must be cognisant of the local situation, was in a more advantageous position than this Court can be to judge what would be the proper measure of recompense for

the service rendered and expenses incurred by the shebait whose turn it is to perform the worship of the deity. In the circumstances we decline to interfere with the direction in this regard made by the High Court in the scheme."

44. In view of the above observations, there is no scope for agitating the question over again, as is sought to be done by Mr. Bhattacharjee, all the more so, as, in the course of his arguments, he concedes that the existing provisions are clear, but that he is after a little more clarification. At the same time, if there is any malpractice or the collections are insufficient to meet the charges of which there is no evidence, and the Kalighat Temple Committee is negligent in looking properly after the collections or the disbursement in accordance with the scheme or even in not implementing the scheme, the remedy in proper forum is available to any worshipper. The amendment of the scheme as proposed is no substitute for preventing the alleged practices for implementing the scheme.

45. Mr. Bhattacharjee has lastly contended that the poor attendance of members, particularly non-shebait members at the meeting of the Kalighat Temple Committee, is not conducive to the healthy administration of the endowment. For achieving the proper administration as also better supervision of the day to day administration of the endowment Mr. Bhattacharjee has proposed that the following words underlined (herein ' ') should be inserted before the existing provisions of Cl. 27 of the scheme.

"27. 'Any member failing to attend 3 consecutive meetings of the Committee shall cease to be a member thereof' and the vacancy caused as such and.' Any casual vacancy occurring by death, resignation or otherwise in the Kalighat Temple Committee will be filled up by the appointing authority within two months of the date of intimation and the person so chosen shall be subject to retirement on the footing that he had become member from the date of such appointment."

46. The Supreme Court while dealing with the constitution of the Kalighat Temple Committee, in modification of the scheme of the High Court which had 12 shebait and 6 persons from the public in a 18-member Committee provided a perpetual majority for the members of the public in a 11-member Committee with 5 shebait from 5 groups and 5 members from the public bodies and one member nominated by the District Judge. Further the District Judge's nominee is to be the Chairman of the Managing Committee who would have a casting vote in addition to his own vote.

47. We agree with the District Judge that strict enforcement of the proposed amendment, if incorporated in the scheme, would lead to unnecessary difficulties as renominations by public bodies will involve

delay and complications. The minutes of the proceeding of the meetings of the Committee which, at our direction, were produced in Court, show that the meetings were invariably presided over by the nominee of the District Judge, Sri Chandidas Chatterjee, a senior Advocate of the Alipore Bar and the Government Advocate. We hope that the persons who will be nominated by the public bodies to be members of the Kalighat Temple Committee will make it convenient to attend its meetings for ensuring the proper administration of the endowment of this ancient institution revered by the millions of the Hindu votaries of the country.

48. During hearing of the appeal, we called upon Mr. Tarak Nath Roy the learned Counsel appearing for the Council of Shebait, to produce the register of shebait and Paladars as required under clause 6 of the scheme. No register was produced before us but several lists of the shebait were reproduced instead. The said lists which are printed ones showed the names of shebait as amended and corrected up to particular dates e. g. the latest being March 8, 1968. We are told that no register of shebait is maintained nor any rules have been framed but amendments consequent on death or devolution of office of shebait are recorded in the minutes of the proceedings of the meetings of the Council of Shebait and, on the basis of resolutions passed at such meetings, lists of the shebait and paladars in the Council of Shebait are published from time to time. This system appears to us to be irregular and contrary to the provisions of the scheme. A register of the shebait of the Council of Shebait in our opinion should be maintained wherein should be recorded the amendments caused by death or devolution of offices etc. as required by Clause 6 of the scheme on the basis of the resolution of the Council of Shebait. For convenience of the shebait and paladars, the list may be printed from time to time, though not enjoined by the scheme. We also hope that the Council of shebait shall frame rules regarding inclusion of names in the list of the Council of Shebait consequent on death of its members or devolution of offices etc., as required by the Clause 6 of the scheme.

49. As the contentions raised by the appellants fail, the appeal is dismissed, but in the circumstances there will be no order as to costs. We record our appreciation for the assistance received from the bar.

50. BIJAYESH MUKHERJI, J.: I agree that the appeal fails.

51. The shebait qua property descends by inheritance in like manner as secular property. So considered, to make the list of shebait inviolable, as Mr Bhattacharjee seeks to do, is to defy the law of inheritance and to make the list self-defeating. Self-defeating, because none in the list of

sebaitis are immortal. So, when all of them die, the list becomes useless, doing no duty, and even when some of them die, the list fails the very purpose for which it is made. That apart, the inviolability, contended for, comes to a head on clash with the provisions of the scheme approved by the Supreme Court and, therefore, beyond any manner of an attack by any one. Clause 6 is one such provision, as pointed out by my learned brother,—a provision which clearly lays down that the register of sebaitis or list of sebaitis, call what you may, shall have periodic amendments, necessitated by death, devolution and transfer sanctioned by law. The transfer of sebaiti interest for consideration is no doubt void: *Prasanna Deb v. Bengal Duars Bank, Ltd.*, (1936) 64 Cal LJ 379 = (AIR 1936 Cal 744). But you cannot compel an unwilling sebait to continue as a sebait as held by Rankin, C. J. in *Panchanan Banerjee v. Surendra Nath Mukerjee*, (1929) 50 Cal LJ 382 = (AIR 1930 Cal 180). The transfer of sebaiti in favour of the remaining sebaitis or surrender thereof affects no policy of Hindu Law, as pointed out by Dr. Bijan Kumar Mukerjee: *Tagore Law Lectures on The Hindu Law of Religious and Charitable Trust* at page 235.

52. But that is not for which I am adding this little to the judgment just delivered by my learned brother. Why I am doing so is to meet the contention raised by Mr. Bhattacharyya that a view as this on heritability and the like contravenes Cls. (b) and (d) of Article 26 of the Constitution which provide, in so far as it is material here for understanding Mr. Bhattacharyya's contention:

"... every religious denomination or any section thereof shall have the right—

x x x x x x x

(b) to manage its own affairs in matters of religion;

x x x x x x x

(d) to administer such property in accordance with law."

such property meaning property, movable and immovable, any religious denomination or a section thereof may own or acquire: just what clause (c) of Article 26 prescribes.

53. How this freedom guaranteed by Article 26 to every religious denomination or a section thereof can avail the appellant beats us. The appellant has the freedom to manage his own affairs in matters of religion. His autonomy to decide what rites and ceremonies are essential according to the tenets of the Hindu religion he subscribes to — and these are all matters of religion — remains unfettered. Sure enough the scheme we see before us puts no fetters upon it. And sure enough again, the mode of representation to the Temple Committee and all that is not a matter of religion either. Article 26, Clause (b), of the Constitution, therefore, fails the appellant.

54. So does Clause (d) thereof. The property of Sri Sri Kali Mata Thakurani is

being administered in accordance with the mandate of the highest court of the realm, such mandate itself being law binding upon us all.

55. The matter appears to be so free from doubt or difficulty that it is hardly necessary to refer to any authority. And authorities there are.

56. Hence I am for dismissing the appeal as my learned brother is, and in the manner proposed by him.

Appeal dismissed.

AIR 1970 CALCUTTA 384 (V 57 C 69)

D. BASU, J.

Sunil Kumar Ghosh, Petitioner v. State of West Bengal and others, Opposite Parties.

Civil Rule No. 1305 (W) of 1965, D/- 29-5-1969.

(A) Constitution of India, Article 311 (2) and Proviso (a) — Reasonable opportunity for delinquent — Words "criminal charge" in Proviso (a) — Meaning — Delinquent convicted under Section 29, Police Act and dismissed — Article 311 (2) Proviso (a) applies — Hence Article 311 (2) is inapplicable.

The offence under Section 29, Police Act is created by a special statute. It is a criminal offence and a charge thereof is a "criminal charge" within the meaning of Art. 311 (2) Proviso (a). Article 311 (2) therefore does not apply to his dismissal based on that conviction. The delinquent in such a case cannot question an inquiry held under Article 311 (2) on the ground that his service records were referred to without notice to him. AIR 1966 Andh Pra 72 and AIR 1946 Mad 375 and AIR 1957 Punj 97 and AIR 1959 Assam 134 and *Salmund on Torts* 10th Edn. Pp. 2 and 7; *Torts by Winfield*, 7th Edn. Pp. 10 and 11, *Outline of Criminal Law by Kenny*, 16th Edn. P. 539 and *Criminal Law by Wilshire*, 17th Edn. Pp. 1 and 2, Foll. (Paras 18, 19, 22, and 26)

(B) Constitution of India, Article 311 (2) and Proviso (a) — Exemption from holding inquiry and giving opportunity under Article 311 (2) — Exemption is for benefit of administration and is conducive to public interests — Government not stopped from claiming such exemption even after inquiry — (Evidence Act (1872), Section 115). AIR 1961 SC 619, Dist. (Para 24)

(C) Constitution of India, Article 311 (2) — Reasonable opportunity to delinquent — Police officer absenting from duty, dismissed — No suspension order passed — Notice for treating absence as leave without pay not given — Extraordinary leave not sought — Earned leave due to delinquent — Period of absence till dismissal date cannot be treated as extraordinary leave without pay

JM/DN/ES95/69/JRM/C

— Delinquent entitled to full salary as if on duty. AIR 1968 SC 240, Applied.

(Paras 27, 28 and 29)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 240 (V 55) =

1968-1 SCR 355, Gopalkrishna v. State of M. P. 28

(1966) AIR 1966 Andh Pra 72 (V 53) =

1966 Cri LJ 251, Re Nagabhushan 21

(1961) AIR 1961 SC 619 (V 48) =

1961-3 SCR 386, Akshaibar Lal v. Vice Chancellor 24

(1959) AIR 1959 Assam 184 (V 46),

Jagadindsa v. I. G. of Assam Rifles 21

(1957) AIR 1957 Punj 97 (V 44) =

1956-30 ITR 423, Durga Singh v. State of Punjab 21

(1946) AIR 1946 Mad 375 (V 33) =

1946-1 Mad LJ 249, Venkatarama v. Province of Madras 21

Nani Coomar Chakraborty, Chittotosh

Mukherjee and Jamini Kumar Banerjee, for

Petitioner; B. C. Dutta and Murari Mohan

Dutta, for Opposite Parties.

ORDER: This Rule raises a short but nice

question of law.

2. I. That question, apart from others

raised in the Petition (which will be dealt

with hereafter) is—

2a. Whether 'conviction on a criminal

charge', in Proviso (a) to Article 311 (2)

of the Constitution includes conviction of a

statutory offence.

3. The Petitioner, a Sub-Inspector of

Police, was, at the material time, serving as a

District Enforcement Officer of 24 Parganas.

By an order of December 19, 1959, passed

by the Supdt. of Police, he was transferred

to Nadia with effect from January 2, 1960

and directed to undergo training in Finger-

print (Annexure A to the Petition) from

there. The Petitioner made representations

during the pendency of which another order

was issued by the Addl. Supdt. of Police

(Enforcement) of 24-Parganas on March 22,

1960, by which he was asked not to dis-

charge any duties as a Police Officer in the

Dt. of 24-Parganas as he had been transfer-

red away from the district with effect from

January 8, 1960. As he did not still com-

ply with the said order of transfer, a com-

plaint was lodged against him, under orders

of the Superintendent of Police, 24-Parganas

for alleged offence under Section 29 of the

Police Act for violation of the order of

transfer. This ended in the conviction of

the Petitioner by the Magistrate, 1st Class,

Alipore on November 25, 1961, and the

Petitioner was sentenced to pay a fine of

Rs. 100 or, in default to undergo simple

imprisonment for one week. His appeal

against this sentence was dismissed (Annex-

ure F) and so was his application for revi-

sion to this Court, where it has been held

that he was clearly guilty of violating the

order of transfer to Nadia (Annexure H).

4. Thereupon on December 28, 1963, he

was served with the charge-sheet at An-

nexure I. The Petitioner pleaded not guilty to the charge. There was a proceeding held upon the charge by the Superintendent of Police, 24-Parganas and on May 30, 1964, he recommended (Annexure N/1) that—

(a) The Petitioner be dismissed from service;

(b) His period of absence from duty from January 8, 1960 till the date of dismissal be treated as extraordinary leave without pay.

5. The Deputy Inspector-General of Police approved of the order proposed (Annexure O) and, in pursuance thereof, the order at Annexure P, dated July 2, 1964 was passed, dismissing the Petitioner with effect from that date on which a copy of the Deputy Inspector-General's order had also been served upon him. Annexure Q is an order of the Superintendent, asking for a return of the uniforms and appointment certificate in view of the foregoing order of dismissal.

6. The Petitioner challenges the orders at N/1 to Q on the ground, inter alia, that the requirements of Article 311 (2) of the Constitution have been violated in making the aforesaid orders inasmuch as the Petitioner was denied the opportunity of cross-examining witnesses at the inquiry held on the charge and his service records were taken into consideration to award the extreme penalty of dismissal, without giving him notice that they would be considered at the inquiry.

7. But, even assuming that the complaint of the Petitioner was true on facts, he cannot get any relief on the present ground if Proviso (a) is attracted, to exclude the operation of Clause (2) of Article 311 altogether. That clause provides for an inquiry on the charges at which the delinquent shall have an opportunity of being heard and thereafter to make a representation against the penalty proposed, where that penalty is dismissal, removal or reduction in rank of a person holding a civil post under the Government. There is no dispute as to a Police Officer holding a civil post under the State Government, so as to be entitled to the protection of Clause (2) of Article 311.

8. But the application of the entire Clause (2) of Article 311 is excluded by Proviso (a) which says—

"Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge".

9. The Petitioner has been convicted of the offence under Section 29 of the Police Act for violating the order of transfer to Nadia. But it is contended on behalf of the Petitioner by Mr. Chakravarty, that the expression 'criminal charge' refers to charge of an offence under the general law of crimes and not to an offence which is commonly known as a 'statutory offence'.

9a. Section 29 of the Police Act, 1861 provides—

"Every police-officer who shall be guilty of any violation of duty or wilful breach or neglect of any....lawful order made by competent authority.....shall be liable, on conviction before a Magistrate to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour for a period exceeding three months, or to both."

10. Obviously, this is not a charge of an offence included in the Indian Penal Code, which constitutes the general law of crimes in this country, but an offence created by a special statute, namely, the Police Act, to be met with by a statutory penalty. The question is whether this constitutes a 'criminal charge', which expression is not defined in the Constitution or in the General Clauses Act.

11. The question has, therefore, to be answered with reference to general principles.

12. The Dictionary meaning of the word 'charge' in the legal sense is 'accusation'. 'Criminal charge', therefore, would mean accusation of a 'crime'. The Dictionary meaning of the word 'crime', again, is an 'act punishable by law' (Shorter Oxford Dictionary). To punish means to 'inflict penalty on an offender'. If these Dictionary meanings prevail, any offence which is created by any statute and is punishable by any penalty imposed thereby would be included within the concept of a 'criminal charge'.

13. The most common way adopted by leading treatises is to define crimes by distinguishing them from civil wrongs. In Salmond on Torts (10th Ed., p. 7), the distinction is drawn as follows:

"The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant: for example, an action for the recovery of a debt....Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. He who proceeds civilly is a claimant, demanding the enforcement of some right vested in himself; he who proceeds criminally is an accuser, demanding nothing for himself but merely the punishment of the defendant for a wrong committed by him".

14. The element of punishment as the differentia of a crime is also emphasised by Winfield (Torts, 7th Ed., 10-11) and Kenny [(Outline of Criminal Law (16th Ed., p. 539)]. In some cases, of course, criminal law provides for payment of monetary compensation by the convicted person to the

person injured; but even in those cases, such compensation is awarded in addition to some punishment.

15. Quoting observations in decisions, Wilshire (Criminal Law, 17th Ed., pp. 1-2) explains the essential characteristics of a crime as follows:

"The essential characteristic of a criminal offence is that it entails a liability to punishment: the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common feature that they will be found to possess is that they are prohibited by the State and that those who commit them are punished".

16. The old distinction between mala prohibita and mala in se has broken down because many acts which have been made punishable as an offence by statutes do not involve any moral turpitude:

"In particular, nothing in the moral character of an act or omission can distinguish it from a civil wrong or make it a criminal offence. There are, for example, many breaches of statutory regulations and bye-laws which, because they are punishable in criminal proceedings, must be classed as criminal offences though they do not involve the slightest moral blame, as, for example, 'the failure to have a proper light on a bicycle....' (Salmond, *ibid*).

17. But a statutory offence should not be a criminal offence "unless the punishment is inflicted as a result of criminal proceedings" (p. 2, *ibid*.), i. e., in a proceeding before a criminal court.

18. Judged by the foregoing tests, the offence under Section 29 of the Police Act is a criminal offence and the charge of such an offence is a criminal charge because—

(a) By the statute, violation of duty or wilful breach of any order made by a competent authority has been prohibited and made punishable by fine or imprisonment or both.

(b) The offence is triable before a Magistrate, i. e., a criminal court.

(c) The proceeding is a criminal proceeding because the object of the proceeding is not the enforcement of some right belonging to any complainant or person injured by such act but the punishment of the delinquent Police Officer, and it started with a prosecution (Annexure D/1).

19. Consequently, the instant case would fall under the purview of Proviso (a) to Article 311 (2) of the Constitution. The conclusion arrived at by me is also supported by the interpretation so far given by the High Courts to that clause:

20-21. It has been held that—

Conviction on a criminal charge in this clause includes conviction under any law which provides for punishment for an offence, whether by fine or imprisonment [In re Nagabhushan, AIR 1966 Andh Pra 72], and that no distinction is made by this clause between crimes involving moral turpi-

tude and other crimes [Venkatarama v. Province of Madras, AIR 1946 Mad 375; Durga Singh v. State of Punjab, AIR 1957 Punj 97; Jagadindra v. I. G., AIR 1959 Assam 134.] AIR 1957 Punj 97 ibid., was a case of conviction of the offences specified in Section 34 of the Police Act, and is thus directly to the point.

22. I have no doubt, therefore, that Clause (2) of Article 311 was not attracted to the present case and that, accordingly, no opportunity to be heard or inquiry was to be held before dismissing the Petitioner on the ground that he had been convicted under Section 29 of the Police Act.

23. II. In view of the foregoing finding, it is not necessary to go into the question whether an opportunity was actually given to the Petitioner. Nevertheless, I may observe that a proceeding was actually held by the Superintendent of Police before proposing to dismiss the Petitioner, but that the Petitioner could not avail of the opportunity to make his submissions against the punishment proposed, owing to his reclitrant attitude and misconception about his legal position.

24. III. It was contended that after proceeding to hold an inquiry, Respondents cannot fall back upon the Proviso (a) to Article 311 (2) and in this connection reliance is placed upon the Supreme Court decision in Akshaibar Lal v. Vice Chancellor, AIR 1961 SC 619. But that was a case where two alternative procedures were provided for by the relevant statutory provisions and it was held that after resorting to a general provision, the authority could not be allowed to take resort to the more stringent provisions of the special procedure. That principle cannot apply to a case like the instant one where the constitutional provision itself says that no inquiry need be held and no opportunity need be given. This exemption is for the benefit of the administration and conducive to public interests, which cannot be forfeited by the administration by estoppel. This contention must therefore be rejected.

25. IV. It was next contended that the impugned order is bad because it does not give the reasons, as required by Reg. 864 (b) of the Police Regulations, as to why some punishment other than dismissal could not be awarded because the conviction did not involve moral turpitude. But reasons have in fact been given, namely, the service career of the Petitioner, having 22 punishments as against 5 rewards. Hence, this contention must be rejected.

26. The incidental argument that the service records were referred to without giving notice to that effect to the Petitioner would also not succeed because Art. 311 (2) is not applicable, as held by me.

27. V. We now come to the claim for salary from January 2, 1960 to July 2, 1964, i. e., up to the date of dismissal. On this

point, the Petitioner is entitled to succeed, because there was admittedly no order of suspension passed against him at any time.

28. It is true that he absented himself from duty, but even then there was no notice given to him that his absence would be treated as leave without pay if he did not join at once. Even when his prayer for casual leave was rejected, no such order was communicated to him [Annexure 6/1]. In *Gopalkrishna v. State of Madh Pra.*, AIR 1968 SC 240, the Supreme Court has held that no order under F. R. 54 of the Fundamental Rules could be made without affording an opportunity to the person to be affected, of being heard on this matter specifically. The same principle should be applicable to the grant of leave without pay when the Petitioner did not ask for extraordinary leave and earned leave for some period was actually due to him (vide para. 24 of the Petition), which was not rebutted.

29. In this view, the Rule will be made absolute in part, to this extent only that Respondents shall be commanded to pay to the Petitioner his full emoluments for the period from January 2, 1960 to July 2, 1964, as if he were on duty. There will be no order as to costs.

Petition partly allowed.

AIR 1970 CALCUTTA 387 (V 57 C 70)
S. K. CHAKRAVARTI AND
ANIL K. SEN, JJ.

Mazirannessa alias Mizirannessa Bibi, Appellant v. Khondakar Golam Kibria and others, Respondents.

A. F. A. D. No. 998 of 1968, D/- 17-3-1969.

Mahomedan Law — Inheritance — Husband and wife — One spouse can inherit other also in some other capacity.

There is nothing in Mahomedan Law to prevent a husband or a wife inheriting the other spouse's property in some other capacity. The rule that neither the husband nor the wife is entitled to the Return, so long as there is any other heir, does not preclude the husband from inheriting the residue as a distant kinsman.

(Paras 6, 7, 9 and 10)

Sudhir Kumar Acharya and Amal Chandra Chatterjee, for Appellant; Prasanta Kumar Bandyopadhyaya, for Respondent No. 1.

S. K. CHAKRAVARTI, J.: An interesting point under the Mahomedan Law arises for determination in this second appeal. It is as to whether a husband is entitled to inherit from his wife both as husband and as a distant kinsman.

2. The properties in dispute belonged to one Makdunnessa who died in Ashar 1357 B. S., and was survived by her husband Bechu. On the death of Makdunnessa,

ceed against the petitioner company as a 'successor' of the Meghlibundh Tea Company as has been assumed but is seeking to realise the income-tax demand from the Bank who holds money on behalf of the Meghlibundh Tea Company, whose name has since been changed into that of the appellant. Section 46 (5A) runs as follows:—

"The Income-tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income-tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income-tax Officer.

The failure to comply with this notice is given in the 5th paragraph of that sub-section as follows:—

"If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income-tax Officer, further proceedings may be taken by and before the Collector on the footing that the Income-tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section (2) of Section 46".

When read with the said proviso, the meaning of this would be that if the person upon whom the notice under Section 46 (5A) has been served fails to comply with the notice, the monies specified in that notice may be recovered from such person either by resorting to the proceedings under the Revenue Recovery Act, 1890 or as an attachment in a civil proceeding under the Code of Civil Procedure. The only question, therefore, which arises in this context is does the Allahabad Bank hold any money for or on account of the Meghlibundh Tea Company, who was the assessee for the demand in question? For an answer to that question, we must turn to the provision in Section 11 (5) under which the change in name stated at the outset took place. In the corresponding provisions of the Companies Act, 1956, it is provided in Section 21, that a Company may, by special resolution and with the approval of the Central Government signified in writing, change its name. In Section 23 (1), it is stated that when a company changes its name under Section 21, the Registrar shall enter the new name on the register in the place of the former name, and shall issue a fresh certificate of incorporation with the necessary alterations embodied therein

4. Sub-section (3) of Section 23 thereafter says,

"The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it; and any legal proceedings which might have been continued or commenced by or against the company by its former

name may be continued by or against the company by its new name."

It is clear from sub-section (3) that by the change of name, the constitution of the old company is not changed. The only thing that is changed is its name and all the rights and obligations under the law of the old company pass to the new company. It is not similar to the reconstitution of a partnership, which, in law, means the creation of a legal entity altogether. If, therefore, under sub-section (3) all the rights and obligations of the company pass on to the new one, it follows that the assets of the old company which were being held by the Allahabad Bank Ltd., are still being held on their behalf. Of course, in the notice under Section 46 (5A), it is curiously stated that money is due from the new company, the Economic Investment Corporation; even then that does not make any difference in law because the new company holds the assets and all the property belonging to the old company under a new label and not only the rights but also the obligations, — including the obligation to pay income-tax belonging to the old company, — have passed on to the new company under the provisions of Section 11 (3) of the Companies Act.

5. It was of course pointed out on behalf of the respondents that in the return of income submitted by the old company (vide page 64 of the paper book), the name of the assessee was given as "Meghlibundh Tea Company Ltd., (now Economic Investment Corporation Ltd.)" and, therefore, the Economic Investment Corporation was already there in the records of the Income-tax Officer. To this, however, it has been contended on behalf of the appellant that the return was submitted not by the appellant but by the old company. Here again is another quibble, which has no substance in law, because the new company is nothing but the old company with a new label, as has already been stated; there has been no change in position and no change in legal status. It was further pointed out that subsequent to the assessment, on 24th September, 1949, it is the appellant who asked for time to pay the aforesaid tax and on different dates in 1949-50, the appellant company paid up part of the assessed money to the extent of Rs. 22,000/-. Here again Dr. Pal submits that so far as the substantive liability to pay is concerned, the appellant does not deny it and cannot deny, in view of the provisions under Section 11 (3) of the Companies Act. The grievance of the petitioner is that the Income-tax Officer, even though informed of the change of name, did not substitute the name of the appellant company in place of the old one in his assessment records. This confusion has taken place in view of the reference to the provision in Sec. 26 of the Income-tax Act, 1922 in the proceedings leading up to the appeal. That Section has no application to the instant case. So far as sub-section (1) of Section 26 is concern-

ed, it deals only with the situation arising from a reconstitution of a partnership firm, which is not the case here. Sub-section (2), on the other hand, speaks of legal succession by one person to another in the same capacity, which is also not the case here, because as has been stated at the beginning, there has been no legal succession, because the juristic entity is the same, namely, the old company under a new name. Sub-section (2) of Section 26, therefore, is not attracted either. Upon this, however, Dr. Pal based his argument that there is no provision in law as to what would happen under the law of Income-tax when there is a change of name of a company under the provisions of Section 11 (3) of the Companies Act, 1913. The answer to that is simple, namely, that no such question does arise in law just as it arises in the case of a legal succession under sub-section (2) and in the case of a reconstitution of a partnership firm under sub-section (1) of Section 26. In both these cases, there is a substitution or succession of one legal person by another legal person. To our mind, there has been no substitution or succession of one legal person by another legal person in the instant case. There has, to reiterate again, been only a change in name. It is only for that reason that no special provision has been considered necessary to meet that situation like the instant one in the Income-tax Act. From whatever angle of vision the problem is viewed at, we have no doubt that there has been no irregularity or illegality in demanding the money from the Allahabad Bank Limited, which undoubtedly holds the assets of the Meghli-bundh Tea Company which assets are now in the hands of the appellant-company.

6. Before concluding, however, we should point out that this Court does not view with any amount of indulgence the indifference and carelessness which has been shown by the Income-tax Officer who made the assessment on 29-8-49 without caring for the letter which was addressed by the appellant company to the Income-tax Officer on 4-2-48 (vide page 85 of the paper book). This very Income-tax Officer, in the Certificate proceedings, applied for substitution of the name of the certificate debtor (vide page 34 of the paper book). It is not clear to us why he rose from his slumber so late. The higher authorities of the Income-tax department, who are very keen to stop evasions of payment of income-tax, should be keener to manage their own house and put it into order. It is these drain-pipes through which leakage occurs and, we believe, proper enquiry would be made in this matter when a copy of this judgment is forwarded by the Registrar of this Court to the respondent No. 1.

7. The appeal is accordingly dismissed but, in the circumstances of the case, we would make no order as to costs.

Appeal dismissed.

AIR 1970 CALCUTTA 391 (V 57 C 72)

D. BASU AND A. K. BASU, JJ.

M/s. Ondal Coal Co., Appellant v. M/s. Sonepur Coal Fields Ltd. and others, Respondents.

A. F. O. O. No. 254 of 1966; Matter No. 198 of 1963, D/- 18-2-1970, against judgment of A. N. Roy, J., D/- 20-1-1966.

(A) Coal Mines (Conservation and Safety) Act (1952), Section 3 (1) — Owner — Definition in Indian Mines Act (1923), Section 3 adopted — Lessee or occupier of mine is owner.

The petitioner was not a lessee and his title to ownership rested on his status as occupier. Where the fact of his possession was disputed by another party the Coal Board should have decided the question before disposing of the applications for opening or reopening a Coal mine.

(Paras 6, 8)

(B) Coal Mines (Conservation and Safety) Act (1952) — Rules under — Rule 39, sub-rule (3c) — Disposal of application for opening or reopening of mine — Procedure — Applicant entitled to opportunity of making representation against the order proposed.

The expression "Opportunity of making representation" implies only an opportunity to make a written representation. Petitioner is not entitled to personal hearing but before making the order rejecting his application he was entitled to a notice to show cause why order to give permission to the other party should not be made. Case law referred.

(Paras 12, 14)

(C) Constitution of India, Article 14 — Principles of natural justice — Right to personal hearing — Not an essential ingredient in every case in quasi-judicial proceedings before a Tribunal — Case law referred.

(Para 13)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 SC 850 (V 55) =	1968-2 SCR 186, Union of India v. P. K. Roy	14
(1966) AIR 1966 SC 671 (V 53) =	1966-1 SCR 466, M. P. Industries v. Union of India	14
(1962) 2 WLR 1153 (PC) = 1962 AC 322, Kunda v. Govt. of Halava		14
(1960) AIR 1960 SC 493 (V 47) =	1960-2 SCR 569, Kapur Singh v. Union of India	14
(1957) AIR 1957 SC 232 (V 44) =	1957 SCR 98, N. P. T. Co. v. N. S. T. Co.	13
(1957) AIR 1957 SC 648 (V 44) =	1957 Cri LJ 1026, F. N. Roy v. Collector of Customs	13
(1950) AIR 1950 SC 27 (V 37) =	1950 SCR 88, Gopalan v. State	13, 14
(1949) 1 All ER 109 = 65 TLR 225, Russel v. Duck of Norfolk		13
(1943) AC 627 = 1943-2 All ER 337, General Medical Council v. Spackman		13

892 Cal. [Prs. 1-7] Ondal Coal Co. v. Sonepur Coal Fields

A. I. R.

(1915) 1915 AC 120 = 85 LJB 72, 18
Local Govt. Board v. Arlidge

JUDGMENT:— This is an appeal against the judgment of A. N. Roy, J., (as he then was), dated January 20, 1966, by which the Rule obtained by the Respondents, Sonepur Coal Fields, was made absolute, and the order of the Coal Board of May 17, 1963, which is at p. 31 of the Paper Book, was quashed. The present appeal is by the Ondal Coal Co., which was Respondent No. 4 in the Petition under Article 226 of the Constitution brought by the Sonepur Coal Co., (hereinafter referred to as the Petitioner Co.).

2. The Petitioner Co.'s case was that the Ondal Coal Co., a lessee of the disputed coal mines, granted a sub-lease in favour of the Petitioner Co., and delivered possession on June 1, 1946, since when the Petitioner Co. has been in possession and has also fulfilled the other terms of the agreement of sub-lease, so that the only interest now left with the Ondal Co., in the said Mines is the right to receive royalty from the Petitioner Co. The Petitioner's case, in the aforesaid circumstances, is that the Petitioner Co. has become the 'owner' of the disputed Mines within the meaning of that term in the Coal Mines (Conservation and Safety) Act, 1952 (hereinafter referred to as 'the Act'); and as such is entitled to obtain permission under the Act, from the Coal Board (Respondent No. 1 in the Petition), for opening and reopening the Mines.

3. The Petitioner, in fact, did obtain such permission in 1947 under the Coal Control Order of 1945 (p. 23) but the Mines could not then be worked by the Petitioner Co. The Company subsequently made an application to the Coal Board under the Rules made under the Act for reopening the Mines in July 1957 and the Coal Board advised the Petitioner Co. to obtain a licence from the Central Government under the Industries (Development & Regulation) Act, 1951 to establish an industrial undertaking for production of Coal. Before the application of the Petitioner to the Board could be disposed of in March 1961, the Board informed the Petitioner that a similar application had been received from the Ondal Coal Co. The Petitioner Co., protested against the granting of any permission in favour of the Ondal Coal Co. but the Board did not pay any heed to that. Coming to know that the Board was going to hold a meeting for disposing of the application of the Ondal Co., without issuing any notice to the Petitioner Co., the Petitioner sent a formal letter to the Board through its Solicitors, on February 4, 1963, raising objections (p. 23). The Board asked for certain information from the Petitioner Co. (p. 28) and eventually, by its impugned letter at p. 31, informed the Petitioner Co., that since the latter had not produced the documents called for by the Board, the Board

had taken final decision "granting" reopening permission to the Ondal Coal Co."

4. In the Petition, the Petitioner prayed for quashing the impugned order of the Board in favour of the Ondal Co. and for directing the Board to grant the permission to the Petitioner. The learned Trial Court came to the following conclusions:

(a) That the Petitioner was an 'owner' within the meaning of the Act and was entitled to apply for the permission;

(b) That the duty to be performed by the Board in the matter was quasi-judicial and that the impugned order made, without hearing the Petitioner, was violative of the requirements of natural justice.

(c) As to whether the Petitioner Co., had obtained possession, the Court did not come to a finding, presumably because it was considered unnecessary.

5. The Appellant Co., has challenged the findings of the Court below and has also contended that the Board has, in fact, offered to the Petitioner sufficient opportunity to represent its case.

6. The first question for determination is whether the Petitioner is an 'owner' within the meaning of Rule 39 (2) of the Rules made under the Act. Sub-rule (1) of this Rule says that no mine can be opened or reopened without the prior permission in writing of the Board, for which an application has to be made by the 'owner', under sub-rule (2). The term 'owner' is not defined in the Rules. The definition clause in Section 3 (1) says that for the definition of this term we are to refer to Section 3 of the Indian Mines Act, 1923. The material portion of that definition is:

"Owner", when used in relation to a mine, means any person who is the immediate proprietor or lessee or occupier of the mine, but does not include a person who merely receives a royalty, rent or fine from the mine" The petitioner Co., is therefore, entitled to claim to be the 'owner', if it can establish the case made in the Petition, namely, that it is a sub-lessee or that it was the occupier of the disputed mines.

7. In the counter-affidavit of the Ondal Coal Co., it is admitted that by a written agreement executed by the Co. in December, 1947, the Company assigned its leasehold interest in the Petitioner Co. and also delivered possession of the surface, in terms of such assignment (para. 3 (m)). The agreement, however, was not completed owing to the default of the Petitioner, according to the Ondal Coal Co., — so that the latter has recovered possession of the mines from the Petitioner in January, 1960. That the latter threatened to re-enter would appear from the correspondence at page 217 of the Paper Book, but the Petitioner Co., denied the allegation of actual recovery of such possession and at the hearing before the learned trial Judge it was contended on behalf of the Petitioner Co., that no particulars as to how such possession had been

recovered had been given in the counter-affidavit (p. 235 of the Judgment). There was thus an admission by the Ondal Co. that the Petitioner had entered into possession of the mines under the agreement of sub-lease. This much was *prima facie* sufficient to make the Petitioner an 'occupier' within the meaning of the definition of 'owner'. It was for the Ondal Coal Co. to establish how that possession had been recovered back. The trial Court, apparently, was not satisfied as to the affidavit of the Ondal Coal Co., on this point but did not enter into an investigation of this disputed fact. It is not possible for this Court to come to a finding on this question of fact, which it was for the Board to decide.

8. It cannot be held that it was not necessary for the Board to decide the aforesaid question inasmuch as since no lease-deed had yet been executed in favour of the Petitioner Co., it cannot be held to be a 'lessee'. Nevertheless, it could claim the *locus standi* to make an application if it established that it was an 'occupier'. To do that, it was necessary for the Petitioner to show that it was in possession at the date of the application before the Board.

9. Since the Petitioner had made such averment in its application before the Board, and had, in fact, reiterated it in its letter to the Board as late as February 4, 1963. The question of 'possession' was not thus irrelevant for the disposal of the application before the Board before coming to a finding whether or not the Petitioner Co., was an 'occupier' within the definition of 'owner' in the relevant statutory provisions. And the Board did the right thing in calling upon the Petitioner to produce his title deed and/or disclose the material facts as to its possession as alleged (p. 28). But the Board did not give the Petitioner an opportunity of showing cause why, in the absence of the Petitioner's evidence forthcoming, the Board should not reject the Petitioner's application and make order in favour of the Ondal Coal Co.

10. No such thing has been done and there has in fact been no order by the Board rejecting the Petitioner's application. When the learned Judge was directing the Board to come to a fresh decision, it should have also directed the Board to determine the question whether the Petitioner was an 'owner', after giving it a fresh opportunity of adducing evidence of its possession.

11. The real question for determination, therefore, is whether the Coal Board was entitled to decide the application filed by the Petitioner or by the Ondal Co., without hearing the Petitioner as held by the learned Judge (p. 235 of the Paper Book).

12. The manner in which the Board is to dispose of an application for such permission is laid down in sub-rule (3C) of Rule 39 of the Rules made under the Act. It says—

"No order under sub-rule (3A) or (3B) shall be passed unless the owner concerned has been given an opportunity of making representation against the order proposed."

13. Now, sub-rule (2) requires that the person seeking such permission must make an application in writing. In disposing of such application, the Board has to give the applicant 'an opportunity of making a representation against the order proposed.' It is, therefore, clear that some other step has to be taken by the Board than merely going through the application, before disposing of it. The learned trial Judge has held that this required that the Board must give a personal hearing to the applicant before coming to its decision. It is not possible for us to go so far since it is now established both in England and in India that the requirements of natural justice which a quasi-judicial tribunal has to comply with do not conform to any rigid formula which is universally applicable but they vary with the varying constitution of the tribunals and the statutory provisions which govern them (*General Medical Council v. Spackman*, 1943 AC 627 at p. 638; *Local Govt. Board v. Arledge*, 1915 AC 120 (HL); *Russell v. Duke of Norfolk*, (1949) 1 All ER 109 at p. 118; *N. P. T. Co. v. N. S. T. Co.*, 1957 SCR 93 = (AIR 1957 SC 232)) and also that a personal hearing is not an essential ingredient of natural justice in every case (*Gopalan v. State*, 1950 SCR 88 at p. 124 = (AIR 1950 SC 27 at p. 44); *F. N. Roy v. Collector of Customs*, AIR 1957 SC 648 at p. 652).

14. In the instant case, the statutory rule merely requires that the Board must give the applicant an 'opportunity of making representation against the order proposed.' It must therefore be held that the Board had no obligation to give the applicant an opportunity of appearing before the Board and to make oral arguments. But the applicant was entitled to a notice to show cause why the order to give the permission to the Ondal Co., should not be made, before making the impugned order. That is the meaning that Courts have given to the expression 'opportunity of making representation', in various statutes e. g., (*Kapur Singh v. Union of India*, AIR 1960 SC 493; (1950 SCR 88 at p. 124 = (AIR 1950 SC 27 at p. 44); *Union of India v. P. K. Roy*, AIR 1968 SC 850 at pp. 852, 859; *Kanda v. Govt. of Malaya*, (1932) 2 WLR 1153 (PC); *M. P. Industries v. Union of India*, AIR 1966 SC 671 at p. 675). In the last mentioned case, it was clearly laid down that the statutory expression 'opportunity to make representation' *per se* did not imply anything more than the opportunity to make a written representation.

15. It remains therefore to see whether the Board, in the instant case, gave the Petitioner Co., the opportunity to make a written representation before making the impugned order. It is true that the Board by its letter of April 6, 1963 (p. 28 of the Paper

Book) asked the Petitioner Co., to produce copies of its sub-lease and also furnish information as to its possession, for the purpose of making 'inquiry'. In its reply, the Petitioner Co., promised to produce its evidence but before doing that it demanded information from the Board whether the Ondal Co., had made a similar application to the Board. This letter was dated May 7, 1963 (p. 30). The Board gave no reply to this letter but by the impugned letter of May 17, 1963 (p. 31), it was merely stated that "although more than a month has elapsed your clients have not produced any document in support of the case made out by them," accordingly, the Board was taking the final decision "granting permission to the Ondal Coal Co." It is evident that no real opportunity to produce the evidence called for was afforded to the Petitioner, in the circumstances of the case.

16. It is to be noted that the Board did not supply the information, asked for by the Petitioner Co., in its letter of May 7, 1963, which was a material information required if it had to make a representation why an order in favour of the Ondal Co., (the Petitioner's alleged lessor), in place of the Petitioner should not be made. At any rate, they could not, in the face of the statutory obligation, make the impugned order without issuing a notice to the Petitioner to show cause why an order in favour of the Ondal Co., should not be made. This obligation not having been complied with, the impugned order is ultra vires and without jurisdiction. We should also observe that if the Board really used the evidence adduced by the Ondal Co., against the Petitioner, they could do so only after supplying to the Petitioner the materials relied upon by the Ondal Co., so that the Petitioner might be in a position to meet them.

17. We, therefore, agree with the trial Court that the Rule should be made absolute, but on different grounds.

18. But before making our order, we must notice the fact, brought to our notice on behalf of the appellant, that in the order which was drawn up by the office in pursuance of the judgment of the Trial Court, the office went beyond the judgment and directed the Board "to issue an order according to permission to the said Petitioner Company in terms of its application mentioned in the said petition." No such order can be made by any Court in a proceeding for certiorari. In view of this blunder in the operative order, we have to allow the appeal in part, in the following terms—

19. The appeal is allowed in part and the judgment and order of the Court below be modified as follows:

The Rule be made absolute, the impugned order of the Coal Board be quashed and the Coal Board (Respondent No. 1) be directed to decide the application in accordance with

the law, in the light of the observations made herein.

We make no order as to costs.

20. A. K. BASU, J.—I agree.

Appeal partly allowed.

AIR 1970 CALCUTTA 394 (V 57 C 73)

R. M. DATTA, J.

Rekhab Chand Jain, Applicant v. Paras Das Bhartiya, Opposite Party.

Suit No. 38 of 1968, D/- 30-7-1968.

(A) Letters Patent (Cal), Clause 12 — Original jurisdiction as to suit — Cause of action — Meaning of.

For the purposes of invoking jurisdiction of the Court the expression cause of action has a distinct connotation. Merely saying that something has happened within the jurisdiction of the High Court would not be effective in conferring jurisdiction on the Court or to ask for leave under clause 12. It must first be a cause of action in the suit; secondly, such cause of action must arise within the jurisdiction of the High Court and thirdly, that part of the cause of action on which jurisdiction is sought for, must affect the defendant or defendants against whom relief is asked for. (Para 9)

(B) Letters Patent (Cal), Clause 12 — Jurisdiction — Plaintiff resident of Calcutta — Suit under Clause 12 against defendant residing in U. P. claiming compensation for writing defamatory letter — Claim held remained unascertained and could not be called a debt due to the plaintiff payable at Calcutta — Calcutta Court could not have jurisdiction — Principle that debtor must find out creditor to pay his debt could not apply. (Para 13)

(C) Letters Patent (Cal), Clause 12 — Balance of convenience — Leave under Clause 12 granted to file suit in Calcutta Court — Averments in application for revocation of leave showing that balance of convenience would be overwhelmingly in favour of the defendant in having the suit heard in the Uttar Pradesh Court and the prejudice to defendant would amount to injustice if the suit was allowed to be proceeded with in the Calcutta Court — Leave held should be revoked. (1888) ILR 13 Bom 178, Distinguished. (Para 19)

(D) Letters Patent (Cal), Clause 12 — Revocation of leave — Considerations.

In an application for revoking leave under Clause 12 of the Letters Patent the possibility of the suit being barred by limitation cannot be of any consideration for the Court if it otherwise comes to the conclusion that such leave should be revoked. (Para 22)

(E) Letters Patent (Cal), Clause 12 — Application for revocation of leave — Question of mala fide cannot be considered.

DN/DN/B698/70/MVJ/B

The Court cannot decide the question of mala fide of the plaintiff in instituting the suit in a particular forum except at the trial of the action. AIR 1952 Cal 82 & Appeals Nos. 83 and 84 of 1948, D/- 19-11-1948, (Cal), Applied. (Para 23)

Cases Referred: Chronological Paras

(1967) AIR 1967 Cal 372 (V 54),
Shalimar Paints Ltd. v. Omprokash
Singhania 21

(1966) Appeal No. 234 of 1966 (Cal),
Union of India v. Promode Kumar
Agarwalla 21

(1952) AIR 1952 Cal 82 (V 39)=55
Cal WN 585, Parasram Harnandrai
v. Chetandas 23

(1952) AIR 1952 Cal 340 (V 39)=
Basantlal Jagatramka v. Dominion
of India 21

(1949) Suit No. 2743 of 1948, D/-
4-5-1949 (Cal), Basantlal Jagatramka
v. Union of India 21

(1948) Appeals Nos. 83 and 84 of 1948,
D/- 19-11-1948 (Cal), Ridhakaran
Kabra v. A. Karamally 23

(1888) ILR 13 Bombay 178, Geffert
v. Ruckchand Mohla 17, 18

ORDER:— This is an application for revocation of leave granted under clause 12 of the Letters Patent 1865 and for other reliefs. The suit was filed on or about 3rd January, 1968 and at that time on the ex parte prayer of the plaintiff the Court granted the leave to institute this suit.

2. The suit is for damages for Rupees 80,000/- for libel supposed to be contained in a letter dated 3rd July, 1967, addressed by the defendant to the District Inspector of Schools.

3. Before the filing of the suit the plaintiff's solicitor wrote to the defendant stating that the copy of the letter dated 3rd July, 1967, was forwarded to several persons of Jain Community in Calcutta and the letter was published in Calcutta and received wide publicity and the same was to the knowledge of the defendant. It is necessary here to set out the relevant portion of the said letter which ran as follows:—

"Our client's attention has been drawn to a copy of your letter dated the 3rd July, 1967, addressed to the District Inspector of Schools, Mainpuri. A copy of that letter has been forwarded to several persons of the Jain Community in Calcutta. The letter has been published in Calcutta and has received wide publicity."

4. In the plaint also the plaintiff does not make out a definite case that the defendant had published the copy of the said letter or the contents of the said letter at Calcutta amongst divers members of the Jain Community nor is that fact admitted by the defendant. The relevant paragraph which is paragraph 3 of the plaint is set out below:—

"The said letter dated 3rd July, 1967, and/or copies thereof have been widely published to and/or circulated amongst divers

persons in the State of Uttar Pradesh outside the aforesaid jurisdiction. The said letter was also widely published to and/or circulated amongst divers members of the Jain Community in Calcutta within the said jurisdiction and in particular to one Babulal Saraogi at premises No. 196, Jamunlal Bajaj Street, Calcutta, within the said jurisdiction by whom the said letter was in the ordinary course of business opened and read, the defendant well knowing that the said letter would and intending that it should be so opened and read."

5. Previous to that in paragraph 2 of the plaint the plaintiff has stated that the defendant had written the said letter to the District Inspector of Schools at Mainpuri outside the jurisdiction of this Court and that fact is admitted by the defendant before me in this application.

6. The plaintiff next relies on paragraph 5 of the plaint for invoking this Court's jurisdiction. It has been pleaded there that the plaintiff has been lowered in the estimation of right-thinking members of the Society and in particular of the Jain Community in Calcutta within the said jurisdiction. Here also the plaintiff has not stated anywhere that the defendant is responsible for publishing this letter to the members of the Jain Community in Calcutta.

7. The plaintiff lastly relies on the statement made in paragraph 8 of the plaint for the purpose of invoking this Court's jurisdiction. The averments made therein are to the effect that the said sum of Rs. 30,000/- is due and payable by the defendant to the plaintiff as his creditor at the said address of the plaintiff in Calcutta within the said jurisdiction.

8. I shall now deal with the said three contentions to find out whether on the aforesaid pleadings the jurisdiction of this Court has been properly invoked in the plaint or not and whether leave under clause 12 of the Letters Patent 1865 was properly granted or not.

9. It is settled law that for the purposes of invoking jurisdiction of the Court the expression "Cause of action" has a distinct connotation. Merely saying that something has happened within the jurisdiction of this Court would not be effective in conferring jurisdiction on the Court or to ask for leave under Clause 12 of the Letters Patent. It must first be a cause of action in the suit; secondly, such cause of action must arise within the jurisdiction of this Court and thirdly, that part of the cause of action on which jurisdiction is sought for, must affect the defendant or defendants against whom relief is asked for. In this case, the averments made in paragraph 2 of the plaint have been made to establish that the defendant has written, signed and published the impugned letter containing the alleged defamation at Mainpuri. That makes out a good cause of action for the purpose of proceeding against the defendant in a suit. The cause

of action for damages is complete but that part of the cause of action would not confer jurisdiction on this Court because that has arisen outside the jurisdiction of this Court. Therefore, the plaintiff has to make some more averments whereby the defendant would be made liable to the plaintiff.

10. Each publication of the defamatory matter would give rise to a separate cause of action. Publication in Calcutta of the said letter is a distinct cause of action. It may be done by the defendant or by any body else. It may be done by some body at the instigation of the defendant which facts are necessary to be pleaded for the purposes of making out the cause of action to confer jurisdiction on this Court. Merely to say, that the said letter was published and circulated in Calcutta within the jurisdiction of this Court would not make the defendant liable unless it is specifically pleaded that the defendant is responsible for such publication in Calcutta. In my opinion, in the absence of such pleading in paragraph 3 of the plaint the plaintiff cannot be allowed to rely on the said averments for the purposes of conferring jurisdiction on this Court to recover his damages against the defendant who alone has been impleaded as the defendant in this suit.

11. Mr. Chatterjee wanted me to read paragraph 3 along with paragraph 2 of the plaint. But those two averments constitute separate and distinct causes of action which are independent of each other. In my opinion, both the solicitor's letter as also paragraph 3 of the plaint could not be interpreted to suggest at this stage that the defendant was responsible for the publication of the said letter in Calcutta within the jurisdiction of this Court. It appears to me that paragraph 3 of the plaint has been intentionally and purposely framed in that vague manner because it is not the plaintiff's case that the defendant was responsible for publishing the said letter or the copy thereof to any body in Calcutta. Had it been otherwise, there could be no reason why the same would not be pleaded in a definite manner either in the said letter of the solicitor or in paragraph 3 of the plaint.

12. It follows therefore that the averments made in paragraph 5 of the plaint also cannot be relied on for the same reason as above for the purposes of conferring jurisdiction on this Court to make the defendant liable.

13. There remains the question to determine whether the plaintiff can be called a creditor for the said sum of Rs. 30,000/- which the plaintiff says is due and payable at the plaintiff's address in Calcutta within the jurisdiction of this Court so as to confer jurisdiction on this Court on the said averments. The principle that the debtor must find out the creditor to pay his debt, has been applied in cases arising out of contracts or where a sum is payable as a liquidated amount or debt from the defendant to the

plaintiff. In such cases, applying that principle Courts have assumed jurisdiction where moneys would be payable at a place within the Court's jurisdiction. That is not the case here. The plaint proceeds on the basis of damage alleged to have been suffered by the plaintiff from the defendant. It is the plaintiff's estimate that the said sum is payable by the defendant to the plaintiff as damages suffered by the plaintiff. Until the figure is agreed to by the parties or until the Court determines the said amount or finds any other amount, it is not possible for the defendant to pay the amount. The claim remains unascertained and cannot be called a debt due to the plaintiff. Under those circumstances, in my opinion, this is not a cause of action and cannot be relied on by the plaintiff as a part of the cause of action for the purposes of vesting this Court with jurisdiction.

14. Under those circumstances, I should revoke the leave already granted on the ground that the causes of action showing the jurisdiction of this Court as pleaded in the plaint do not amount to causes of action for the purpose of vesting jurisdiction in this Court.

15. The next point that has been argued before me is about the balance of convenience. On behalf of the defendant it is contended that the balance of convenience is overwhelmingly in favour of the suit being tried in the Uttar Pradesh Court where admittedly the letter was written and published and specially when the proposed defence as indicated in this application would be justification. It is contended that the letter complained of speaks of failure on the part of the plaintiff to render accounts in respect of the charitable trust for quite some time past and the said letter was written by the defendant as the auditor of the said trust and of the plaintiff who was the treasurer thereof. According to the defendant he was duty-bound to call for such accounts specially when persons interested in the trust were asking him to audit such accounts and to place them before them. The registered office of the said trust is in Uttar Pradesh; the books of accounts are all in Uttar Pradesh. The plaintiff might be living in Calcutta and doing business in Calcutta but in the matter of the said trust the plaintiff was acting as a treasurer in the said distant place at Uttar Pradesh. The persons who were asking the defendant to call for such accounts from the plaintiff and who have to be called as witnesses in support of the plea of jurisdiction, are all residents of Uttar Pradesh. The inspector of Schools to whom the letter was sent and published was at Uttar Pradesh and the records of the said Inspector of Schools which would be necessary at the trial are all at Uttar Pradesh.

16. On behalf of the plaintiff it is contended that the plaintiff has the choice of forum and the plaintiff would have to call all those persons of the Jain Community who

are residents of Calcutta to establish how and in what manner and to what extent the plaintiff had been lowered in their estimation. The plaintiff has also to prove the publication of the letter in Calcutta to one Babulal Saraogi who resides at premises No. 196, Jamunalal Bajaj, Street, Calcutta, by calling him to give evidence in Calcutta. The plaintiff's other witnesses are in Calcutta particularly one Chakresh Kumar Jain and one Lalchand Asofa who have filed affidavits in support of the plaintiff on 30th April, 1968. I find that the said two affidavits have little evidentiary value.

17. In support of his contention Mr. Chatterjee has relied on an old decision in the case of Geffert v. Ruckchand Mohla, reported in (1888) ILR 13 Bom 178. That decision was based on an application under the then Section 20 of the Code of Civil Procedure (Act XIV of 1882) which provided as follows:—

“Section 20. If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.”

18. That was also a case of defamation. The plaintiff who was a dismissed employee charged the defendant with having defamed him in Bombay by publishing in the Bombay Gazette a notice of his dismissal from the office of the Secretary and agent to the Company. The defendant was the Chairman of the said Company. There also the defence was justification. Before the filing of the said suit for defamation the plaintiff filed a suit against the said company claiming damages for wrongful dismissal. That suit was filed in the Court at Wardha. The defendant who was the chairman of the said company contended in the said application under Section 20 of the Code of Civil Procedure 1882 that the plaintiff should not be permitted to bring the present suit in Bombay and

that it could be more conveniently tried at Wardha. The Court proceeded on the basis that the plaintiff had the right to file the suit in the Bombay Court where the libel complained of by the plaintiff was published, and refused to make an order on the said summons and accordingly discharged the same. From a careful study of the said case it will appear that the said case was decided on the basis of the provisions of the then Section 20 of the Code of 1882 where it was provided that the Court might make such an order if it was satisfied that justice was more likely to be done by the suit being instituted in some other Court. There is no equivalent provision in the present Code of 1908. Accordingly, in my opinion, the case reported in (1888) ILR 13 Bom 178 cannot be cited as an authority in an application for revocation of leave under clause 12 of the Letters Patent.

19. In my opinion, the averments in the petition make out a case whereby the Court can come to a conclusion that the balance of convenience would be overwhelmingly in favour of the defendant in having the suit heard in the Uttar Pradesh Court and the prejudice which will be suffered by the defendant would amount to injustice if the suit is allowed to be proceeded with in the Calcutta Court.

20. The next point that has been argued on behalf of the plaintiff is that if at this stage the leave is revoked then the plaintiff's suit if instituted at this stage at the Uttar Pradesh Court would be barred by limitation. It is necessary here to set out certain dates in order to appreciate the correct position. The suit was filed on 4th January, 1968, the writ of summons was served on 3rd February, 1968 and the present application was taken out on 18th March, 1968. It appears that the affidavit-in-opposition on behalf of the plaintiff was filed as late as on 7th May, 1968, and the affidavit-in-reply was filed on 4th June, 1968, and since thereafter no attempt was made by either party to have this application disposed of. The question is, should the plaintiff be heard to say now that injustice would be caused to the plaintiff if leave is revoked at this stage when the plaintiff himself has failed to expedite the hearing of this application and allowed the time to expire? The further question is would the Court fetter its own hands on this point when otherwise the Court finds that the case is one where leave should be removed (revoked)?

21. Reliance has been placed on a decision of this Court in the case of Shalimar Paints Ltd. v. Omprokash Singhania, reported in AIR 1967 Cal 372 where it was held that if there would be any possibility of the claim being barred by limitation if the claim was to be referred to arbitration on a stay of the suit, that fact would be a relevant and material consideration in exercising the discretion conferred on the Court under Section 34 of the Arbitration Act. This point

also came up recently for consideration before a division bench of this Court in the case of Union of India v. Promode Kumar Agarwalla in Appeal No. 234 of 1966 (Cal), where the Division Bench considered the said case of Shalimar Paints Ltd., amongst many other cases and held that the possibility of the claim being barred by limitation before the arbitrators was not a relevant consideration for the exercise of discretion under Section 34 of the Arbitration Act. In fact, this very point was previously considered by this Court as early as in the year 1949 in the case of Basantlal Jagatramka v. Dominion of India, unreported judgment D/- 4-5-1949 in Suit No. 2743 of 1948, (Cal), where S. B. Sinha, J., allowed an application for stay of a suit pending the arbitration proceedings even though the consideration of the suit being barred by limitation was raised and considered by him. There was an appeal from that order of S. B. Sinha, J., in the case of Basantlal Jagatramka v. Dominion of India reported in AIR 1952 Cal 340 where the Division Bench of this Court observed as follows:—

“On the last day of limitation, the appellant brought a suit for damages for breach of contract. The respondent applied for a stay of the suit pending arbitration. The appellant objected to the stay being granted firstly on the ground that if a stay was granted his claim would be barred by limitation. The learned Judge very rightly pointed out that by filing the suit on the very last day of limitation the appellant took a very grave risk. It appears that the respondents were prepared to undertake not to raise this question of limitation before the arbitrators. But whether that undertaking is a valid one or not I need not consider.”

22. In my opinion, the Court's hands cannot be fettered, if the Court is otherwise inclined, on the facts of the case before it, I hold that leave should be revoked, by reason of the consideration that to do so would result in the plaintiff's case being barred by limitation. In my opinion, in an application for revoking leave under clause 12 of the Letters Patent the possibility of the suit being barred by limitation should not be of any consideration for the Court if it otherwise comes to the conclusion that such leave should be revoked.

23. The last point that has been argued on behalf of the petitioner is that the suit is wholly mala fide. There are previous disputes between the parties for which litigations are still pending as between the defendant's father on the one side and the plaintiff and his wife on the other. It is contended that to satisfy the old grudge and to harass the defendant this suit has been filed particularly in Calcutta where it would put the defendant into serious difficulties in the matter of prosecuting this suit. Mr. Chatterjee relies on the case of Parasram Harandrai v. Chetandas, reported in 55 Cal

WN 585=(AIR 1952 Cal 82) where it was observed that the Court could not decide the question of mala fide of the plaintiff in instituting the suit in a particular forum except at the trial of the action. That observation was taken from the judgment of Riddhikaram Kabra v. A. Karamally & Sons, unreported judgment of the Division Bench of this Court D/- 19-11-1948 in Appeal Nos. 83 and 84 of 1948 (Cal.).

24. That being the position I am bound by the said observation even though on the facts and circumstances of this case I was inclined to come to the conclusion and to hold that the plaintiff's intention to file this suit in Calcutta evinced a mala fide motive on his part to satisfy the old grudge against the defendant.

25. By considering all these points, I have no hesitation to come to the conclusion that leave under Clause 12 of the Letters Patent which was already granted at the time of the institution of the suit should be revoked and I revoke the leave accordingly. It is recorded that Dr. Das appearing on behalf of the defendant has given an undertaking that the point of limitation will not be taken if the suit would be filed within a reasonable time from the date hereof at the proper Court in Uttar Pradesh. I need not consider the effect of such undertaking but it is recorded in the manner it was given. The plaintiff will bear the costs of this application and would pay the same to the defendant.

Order accordingly.

AIR 1970 CALCUTTA 398 (V 57 C 74)

K. L. ROY J.

In the matter of, the India Electric Works Ltd., Petitioner.

Company Petn. No. 261 of 1967, D/- 27-8-1968.

(A) Companies Act (1956), Section 443 — Winding up — Several creditors opposing the petition — Petition filed by secured creditor whose claim exceeded the claim of other creditors put together — Whether company should be wound up — Test for determining.

Where several creditors oppose the petition for winding up filed by a secured creditor whose claim exceeds the claims of the other creditors put together, the test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding up. The expression commercially insolvent means that the existing assets and liabilities of the company are such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities. The other test is whether at the date of the presenta-

AN/CN/A538/70/MLD/C

tion of the winding up petition there was any reasonable hope that the object of trading at a profit with a view to which a company was formed would be attained. AIR 1936 PC 114 and AIR 1942 Bom 231, Rel. on. (Para 8)

So where it is not disputed that the company was not only commercially insolvent but hopelessly insolvent at the date of the petition for winding up and there is no reasonable hope that the object of trading at a profit, with a view to which the company was formed, would ever be attained, then, an order for winding up should be made *ex debito justitiae*. (Paras 9, 33)

(B) Companies Act (1956), Sections 439, 529 — Petition under Section 439, for winding up by secured creditor — Maintainability — Not necessary for the secured creditor to give up security or to prove for balance after valuing the security as provisions of bankruptcy are not applicable to petition for winding up. (Para 12)

(C) Companies Act (1956), Section 439 — Winding up petition by secured creditor — Maintainability of, challenged by other creditors on the ground that all assets of company are mortgaged to the petitioner — Assets of company not sufficient even to satisfy the claim of secured creditor — Petition is maintainable. (Para 12)

(D) Companies (Court) Rules (1959), R. 21 Form 3 — Petition for winding up to be affirmed by Principal officer of petitioning company under Rule 21 — Rule is not mandatory — Petition verified by responsible officer — Provisions of form 3 not applicable to such case — Petition cannot be rejected in limine. (Paras 14, 20)

(E) Companies Act (1956) Ss. 443 (1), 293 (1) (d). — Petition for winding up — Assets of company mortgaged for an amount exceeding the limit prescribed in Section 293 (1) (d) — Court will not refuse to make winding up order only on that ground. (Para 15)

(F) Industries (Development and Regulation) Act (1951), Section 18E (1) (c) — Management of company taken over by Government — Petition for winding up of company — Dispute regarding validity of sanction under the section — Shareholders or creditors of such company are not entitled to challenge the validity of liquidation proceedings on the ground of validity of the sanction as the section does not give any right to them. (Para 26)

Cases Referred: Chronological Paras
(1968) AIR 1968 Cal 388 (V 55) = 70 CWN 852, Star Textiles Engineering Works Ltd. v. Gaya Textiles Pvt. Ltd. 19
(1967) AIR 1967 SC 1269 (V 54) = (1967) 2 SCR 625, State of Orissa v. Dr. Binapani Dei 22, 29
(1967) AIR 1967 SC 1836 (V 54) = 1967-3 SCR 525, Satwant Singh v.

Assistant Passport Officer, New Delhi 22, 29
(1967) 71 CWN 38 = (1969) 2 Com LJ 213, In re, Bengal Flying Club Ltd. 26
(1965) AIR 1965 Cal 98 (V 52), In re Sulekha Works Ltd. 22
(1965) 35 Com Cas 456 (SC), Amalgamated Commercial Traders (P) Ltd. v. A. C. K. Krishnaswami 17
(1961) 1 All ER 302 = (1961) 1 WLR 229, In re, P. and J. Macrae Ltd. 6
(1960) AIR 1960 Cal 764 (V 47), Ramkumar Agarwala v. Buxar Oil and Rice Mills Ltd. 19
(1959) AIR 1959 SC 107 (V 46) = 1959 SCR 1440, Radheshyam v. State of M. P. 29
(1959) AIR 1959 All 276 (V 46), Mohanlal v. Grain Chamber Ltd. 27
(1955) AIR 1955 Bom 355 (V 42) = ILR (1955) Bom 550, Baehhraj Factories Ltd. v. Hiraji Mills Ltd. 27, 32
(1955) AIR 1955 Cal 273 (V 42) = 58 CWN 689, Bengaluxmi Cotton Mills Ltd. v. Mahaluxmi Cotton Mills Ltd. 17, 26
(1955) AIR 1955 Mad 582 (V 42) = ILR (1954) Mad 1187, K. V. O. Refineries Ltd. v. Madras Industrial Investment Corporation Ltd. 5, 19
(1952) AIR 1952 Cal 323 (V 39) = 54 CWN 514, Mohammed Amin Bros. Ltd. v. Dominion of India 16, 19, 26
(1952) 56 Cal WN 29, In re Bharat Vegetables Products Ltd. 17, 26
(1942) AIR 1942 Bom 231 (V 29) = 44 Bom LR 505, Re. Cine Industries and Recordings Co. Ltd. 8, 22, 27
(1936) AIR 1936 PC 114 (V 23) = (1936) 1 All ER 299, Davies and Co. Ltd. v. Brunswick (Australia) Ltd. 7
(1906) 1906-1 Ch 640 = 75 LJ Ch 378, In re, African Farms, Ltd. 14
(1906) 1906-2 Ch D 327 = 75 LJ Ch 662, In re, Criggicstone Coal Co. Ltd. 6
(1893) 20 Ind App 139 = ILR 21 Cal 60 (PC), Delhi and London Bank Ltd. v. Oldham 23
(1892) 2 Ch D 362 = 61 LJ Ch 462, In re, Borough of Portsmouth Tramways Co. 5
(1885) 10 AC 354, Baroness of Wenlock v. River Dee Co. 21
(1885) 16 QBD 315 = 55 LJ QB 45, Re, Lennox; Ex parte Lennox 18
(1883) 24 Ch D 259 = 52 LJ Ch 934, In re, Chapel House Colliery Company 19
(1882) 21 Ch D 769 = 51 LJ Ch 743, In re, Great Western Coal Consumers Co. 6
(1879) 10 Ch D 681 = 40 LT 620, Moor v. Anglo-Italian Bank 5, 11

on of the winding up petition. The first due on the aforesaid by the company in favour of a profit with a view to the company, on the same date, also any was formed would company, on the same date, also 936 PC 114 and Altered its stock-in-trade and various n. goods and also created a first charge So where book debts, outstanding, claims, bills, Contracts etc. by an agreement for Cash Credit Account, Hypothecation of Debts and Assets. By a further agreement entered into in January, 1963 the petitioner agreed to advance monies or grant accommodation to the company by way of Cash Credit called the Second Cash Credit Account, to the extent of Rs. 55,00,000 and the said limit was subsequently raised upto Rs. 70,00,000 during the year 1966. The amounts advanced or to be advanced to the company under the Second Cash Credit Account were secured by an equitable mortgage by deposit of title deeds on the 4th January, 1963 in respect of the lands and buildings comprising the factory, fixed plant and machinery belonging to the company with intent to create a first mortgage on the said lands, buildings, factory, plant and machinery as continuing security for payment of all moneys due in respect of the said account No. 2. The company also executed an on-demand promissory note for Rs. 70,00,000 on 5th April, 1967 payable to the President of India which was in turn duly assigned to the petitioner and the President of India also executed a deed of guarantee on the 5th April, 1967 in favour of the petitioner for Rs. 70,00,000. The petitioner advanced various sums to the company in the said two Cash Credit Accounts and the said Accounts were at all material times maintained as mutual open current and continuous accounts according to the English calendar. As the company failed to abide by the terms of the said Cash Credit Account agreements, the petitioner by two letters both dated the 18th April, 1967 informed the company that the company would not be allowed to draw on the said two Cash Credit Accounts after the close of business on the 22nd April, 1967. On April 22, 1967 the petitioner stopped further operation of the said two accounts by the company and after adjusting the said two accounts the outstanding debit balance with interest on that date in the said Cash Credit Accounts Nos. 1 and 2 were Rs. 85,29,768 and Rs. 69,17,632.53 respectively. The petitioner duly notified the company that the said two amounts had become due in respect of the said two accounts. According to the petitioner upto the 5th November, 1967, a total of Rs. 1,61,30,623 became due and owing by the company to the petitioner in respect of the said two accounts. On the 22nd September, 1967 the petitioner's solicitors demanded the repayment of the said amount of Rs. 1,59,72,953 then due on account of principal and interest and the said notice of demand was received by the company on the 23rd September, 1967. In spite of the

said notice the company failed and neglected to pay the petitioner the amounts aforesaid. The petitioner further states that the company had been incurring heavy losses year after year and such losses for the years ending 30.9.62, 30.9.63 & 30.9.64 amounted to Rs. 13,62,000, Rs. 9,05,000 and Rs. 12,67,000 respectively. The petitioner claims that the company is hopelessly insolvent and it is just and equitable that the company should be wound up.

3. Mr. Subrata Roy Choudhury, the learned counsel for the petitioner, submitted that the petition was based on two grounds, namely, (1) that the company is unable to pay its debts and (2) that the company is unable to carry on its business due to recurrent losses in the past years. Apart from the creditors supporting and opposing this petition, various other creditors have filed suits in this Court as well as other court against the company, the total amount of claims in such suits being over Rs. 19,17,756. The creditors opposing the winding-up as well as the shareholder Rohatgi contest the petitioner's right to a winding-up order mainly on two grounds, namely, (1) that the petitioner is a secured creditor which has not given up its security and as such it is not entitled to proceed with the winding-up and (2) that the Central Government, which had been in actual control of the company for the last seven or eight years, had by its negligence, malfeasance and misfeasance created this huge burden of debt and the State Bank, which is another undertaking controlled by the said Government should not be allowed to present this application. Another point taken is that the sanction given by the Central Government under Section 18E (1) (c) of the Industries (Development and Regulation) Act is neither valid nor bona fide and as such the petition is not maintainable. The last two points have been elaborated by Mr. S. C. Sen, the learned counsel appearing for the shareholder Rohatgi and will be dealt with later. Mr. Roy Choudhury objected to the admission of the affidavit filed on behalf of the employees' association as neither the Secretary nor the Association could claim to be a creditor of the company. Though strictly the Association is not entitled to take part in these proceedings for winding-up, the affidavit filed on its behalf gives some material facts which are to be taken into consideration in determining whether the company is solvent or is able to pay its debts. Apart from mentioning that an amount of about Rs. 29,50,000 is due to the members of the Association from the company on account of provident fund and arrears of dearness allowance, the affidavit points out that even prior to 1960 the company was working at a loss and its liabilities to the Punjab National Bank Ltd. and other creditors were to the extent of Rs. 1,07,85,000 upto September 30, 1960. This liability had

further increased during the period the company was under the management of the Government and the affidavit makes certain suggestions as to the way the company could be put up on its feet again. But for that purpose another sum of Rs. 80 lakhs was required as working capital over and above its various other liabilities. There was no liquid working capital available and the production had practically come to a standstill.

4. It has been nobody's case before this Court that the company was solvent or that it could in any way pay its liabilities or that it could carry on its production. Everybody is agreed that it is only the Central Government who can keep the company going. That the company is hopelessly insolvent has not been denied by anybody.

5. Mr. Roy Chowdhury referred to the well-known cases of *Moor v. Anglo-Italian Bank*, (1879) 10 Ch D 681 and in *Re: Borough of Portsmouth Tramways Co.*, (1892) 2 Ch D 362 where it had been held that a secured creditor is not debarred from presenting a petition for winding-up without giving up his security or without valuing the security and proving for the balance. A similar view was also taken by the Madras High Court in *K. V. O. Refineries Ltd. v. Madras Industrial Investment Corporation Ltd.*, AIR 1955 Mad 582 where, following the decision in (1879) 10 Ch D 681 (*supra*), it was held that the rule in bankruptcy, that before a secured creditor could file a petition for winding-up he had to give up his security or to value the security and aver that after giving credit to such value there would be a balance due and payable to him, did not apply to a winding-up. It was therefore submitted that the fact that the State Bank was a secured creditor did not disentitle it from presenting the petition.

6. Several decisions of the English Courts were cited by Mr. Roy Chowdhury for the proposition that though the order which the petitioner for the winding-up seeks is not an order for his individual benefit but for the benefit of a class of which he is a member, yet the mere fact that the majority of the creditors oppose the petition does not by itself make it incumbent on the Court to refuse an order for winding-up. As has been observed in *Re: Great Western Coal Consumers Co.*, (1882) 21 Ch D 769 that in determining whether regard should be paid to the wishes of the creditors who oppose the making of a winding-up order, the Court ought to consider not only the number of creditors and the amount of their debts, but also the reasons which they assign for their conclusion. If the opposing creditors do not give a satisfactory reason for their opposition or it is not shown that the petitioner would gain nothing if the company was wound up, the Court would be justified in making an order for winding-up. Even where all the assets are charged

in favour of the secured creditors and there were no assets available for the unsecured creditors a winding-up order should be made in order that the unsecured creditors might be represented before the Official Receiver. It has also been observed that an order, when there is nothing at all to be wound up, might at times be justified as the means of bringing to an end a vicious career. (*Criggstone Coal Co's case*, (1906) 2 Ch D 327). The view that the Court has a discretion whether to grant or to withhold the order and the bare fact that the opposing creditors are a majority is not sufficient of itself to entitle them to have the order refused is also borne out by the decision of the English Court of Appeal in *Re. P. and J. Macrae Ltd.*, (1961) 1 All ER 302. In my opinion these cases have no application to the facts of the present case, as, assuming that the petitioner bank, though a secured creditor, is entitled to present this petition, its claim would undoubtedly exceed the claims of all the other creditors put together.

7. The test to be applied in such cases has been laid down by the Privy Council in *Davies and Co. Ltd. v. Brunswick (Australia) Ltd.*, (1936) 1 All ER 299 = (AIR 1936 PC 114) thus:—

"Holding an even hand between the two conflicting interests in the present case, their Lordships are of the opinion that the decisive question must be the question whether at the date of the presentation of the winding-up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained."

8. In *Re Cine Industries and Recording Co. Ltd.*, AIR 1942 Bom 231, Chagla, J., as he then was, enunciated the principle to be followed in such cases in the following words:—

"The test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding-up. The expression, 'commercially insolvent' means that the existing assets and liabilities of the company are such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities."

The other test is whether at the date of the presentation of the winding-up petition there was any reasonable hope that the object of trading at a profit with a view to which a company was formed would be attained."

9. On the facts of the present case there can be no dispute that the company was commercially insolvent at the date of the petition for winding-up and there is no reasonable hope that the object of trading at a profit, with a view to which the company was formed, would ever be attained. Accordingly, an order for winding-up should be made *ex debito iustitiae*.

10. Mr. Ganguly, the learned solicitor for one of the supporting creditors, Anwar Ali and Bros. supported the petitioner and submitted that if there was some surplus, the unsecured creditors might be paid something. He submitted further that if the petitioning creditor is held not to be entitled to present this petition, the supporting creditor should be substituted in its place under Rule 101 of the Companies (Court) Rules. A similar prayer was also made by Mr. N. C. Roy Choudhury, the learned counsel for the other supporting creditor Steel Distributors to be substituted for the petitioner under the said Rule 101. He also submitted that the only other alternative was framing a scheme under Section 391 after a compromise with the creditors. Even if such a scheme was sanctioned, it would be found unworkable and a winding-up order would follow in terms of Section 392 (2). As the company itself had not appeared and opposed the application, the allegations made by the opposing creditors and the shareholder Rohatgi of mismanagement by the Central Government would be an additional reason for dissolution of the company.

11. Mr. Rajat Ghose, the learned counsel for one of the opposing creditors, James Finlay and Co. submitted that no order should be made on the petition though it is not disputed that the company could not go on. The proviso to Section 529 of the Companies Act makes the rules of insolvency applicable to a petition for winding up. Accordingly, a secured creditor, in order to continue the winding-up proceedings, if he is not prepared to give up the security, could only prove for the balance after valuing the security and setting it off against his claim. No such valuation of the assets of the company charged or mortgaged to the petitioner has been given in the petition. So unless the security fell short of the claim of the secured creditor no petition could be maintained. The mortgage gives the petitioner the right to appoint a receiver of the assets in case of default of payment. The petitioner has not taken any steps to recover its dues. Mr. Ghose relied on certain decisions under the Insolvency Acts which, in my opinion, have no application to the facts of the present case. Mr. Ghose tried to distinguish the ratio laid down by Sir George Jessel in (1879) 10 Ch D 681 on the ground that the decision was based on the fact that in English law there was no rule of bankruptcy forfeiting the petitioning creditor's debt.

12. I am entirely unable to accept this contention. The said decision is a clear authority for the proposition that the rules in bankruptcy are not applicable to a petition for winding-up presented by a secured creditor and this view has also been accepted by the Courts of this Country. Mr. Ghose then submitted, that as all the assets are mortgaged to the petitioner it can realise

its security without a winding-up. The petition was an abuse of the process of the Court. I am also unable to accept this contention as there can be no doubt that the Company is hopelessly insolvent and the assets are not sufficient even to satisfy the claim of the secured creditor. Mr. Ghose also wanted to raise an issue that as there is no affidavit from the Central Government, the sanction under Sec. 18E (1) (c) of the Industries (Development and Regulation) Act 1951 had not been proved to have been duly granted and as such the winding-up proceedings had not been validly initiated. In his view the interlocutory proceedings for the production and inspection of the written sanction by the Central Government at the instance of the shareholder Rohatgi have no relevance so far as the competency of the petition was concerned. There is no substance in this contention also as the production and inspection of the written sanction was directed by the Court.

13. Mr. S. C. Sen, the learned counsel for the shareholder Rohatgi, made no attempt to prove that the company was solvent. He fairly and frankly admitted that unless the Central Government took up and continued the management of the company, it would not be possible to keep the company alive. He, however, urged two grounds for rejecting the petition.

14. His first objection was against the maintainability of the application, in that the petition has been verified by an affidavit affirmed by one Samindra Kumar Gupta describing himself to be the Superintendent, Advances Department of the State Bank of India and as such a principal officer of the petitioner. Mr. Sen submitted that under the Rules of this Court, which are mandatory, all pleadings and affidavits on behalf of a Company are to be affirmed and signed by a principal officer of the company. A principal officer is a person holding a substantial post in the company. Rule 21 of the Companies (Court) Rules, 1959 provides that a petition, including a petition for winding up by a company, shall be verified either by a Director, Secretary or other principal officers of the company. It would, therefore appear that even a Secretary of a company is not its principal officer. Mr. Sen referred me to Buckley's Companies Act 12th Edition at page 1028 where the learned author sets out Rule 30 of the English Rules which is more or less in the same terms as the aforesaid Rule 21 of the Companies (Court) Rules, and points out that where the petitioner is a company, its assistant secretary cannot be regarded as a principal officer under the said Rule. Mr. Sen further submitted that 'principal' is defined in Jowett's Legal Dictionary, Vol. II page 1404, as "a head, a chief" and therefore the Superintendent of one of the numerous departments of the State Bank of India could not be said to be a principal officer thereof. But on the same page in Buckley's

aforesaid Commentary there appears the following note:— "For the rule is only directory, and does not say that no other affidavit is admissible. If the petitioner's affidavit cannot be obtained, the affidavit of some person who can speak to the facts as well or better than the petitioner, may be accepted." The authority cited for the above note is *Re: African Farms Ltd.*, (1906) 1 Ch 640. The learned author also mentions a case where the Court allowed the affidavit to be made by a clerk of the solicitors of the petitioner who had full knowledge of the proceedings where the petitioners were resident abroad. It would, therefore, appear that the above rule is not mandatory, as claimed by Mr. Sen and even assuming that Samindra Kumar Gupta could not be said to be a principal officer of State Bank of India, the petition verified by his affidavit could not be rejected in limine.

15. The second argument advanced by Mr. Sen was that the alleged loan given by the Petitioner to the Company was ultra vires the Companies Act in as much as the said amount exceeded the aggregate of the paid-up capital of the Company and its reserves and no consent of the members in a general meeting had been obtained as provided in Section 293 (1) (d). Under Section 18E (1) (c) of the Industries (Development and Regulation) Act, 1951 the person authorised under Section 18A of that Act to take over the management of an industrial undertaking, which is a company, shall for all purposes be the director of the company, duly constituted under the Indian Companies Act and shall alone be entitled to exercise all the powers of the Director. It is, therefore, submitted that by borrowing the amounts in excess of the limits prescribed by Section 293 (1) (d) of the Companies Act, the authorised person has exceeded the authority conferred on him by the Industries (Development and Regulation) Act and as such the loan is not binding on the company. That the members of a company whose management has been taken over by the Central Government under the Industries (Development and Regulation) Act are not debarred from holding meetings and passing resolution is apparent from the provisions of Section 18E. In my opinion, there is not much substance in this contention. Under the proviso to Section 443 (1) the Court would not refuse to make a winding up order only on the ground that the assets of the company had been mortgaged for an amount exceeding the limit prescribed in Section 293 (1) (d). Further, in view of the provisions of the Industries (Development and Regulation) Act no resolution of the members of the company would be binding on the Government or on the authorised person.

16. The more substantial ground of objection raised by Mr. Sen is that the petition

is not maintainable as there is no proper sanction by the Central Government under Section 18E (1) (c) of the Industries (Development and Regulation) Act, 1951. As such a sanction is the condition precedent to the presenting of a petition for winding-up, the petition should be dismissed as incompetent. Mr. Sen submitted that the sanction alleged to have been granted by the Central Government to the petitioner is already under challenge in proceedings under Article 226 of the Constitution and this Court has already issued a rule on the 5th April, 1968 and the hearing of the application is pending. The grounds taken in the said application are (1) that the Industries (Development) and Regulation) Act, 1951 is ultra vires as it imposes unreasonable restrictions on the subject in carrying on its business and (2) that the alleged consent purported to have been given by the Central Government under Section 18E (1) (c) of the said Act was illegal, inoperative, without jurisdiction, arbitrary, capricious, mala fide and void. In the said application very serious allegations of malfeasance, misfeasance and non-feasance by the controlling authority have been alleged. Mr. Sen submitted that in view of the rule issued by this Court no order should be made on the winding-up petition until the writ petition was heard and determined. Mr. Sen pointed out that in the event of a winding-up order, the winding-up proceedings would be conducted by the Official Liquidator, who is an officer of the Central Government and his client apprehends that the various allegations of misconduct against the controlling authority would not be properly investigated. Mr. Sen further submitted that both in England and in this country winding-up proceedings have been adjourned when there had been any doubts as to the competency of the petitioner to present a petition for winding-up. In *Ex parte Lennox*, *In Re Lennox*, (1885) 16 QBD 815 it was held that on a petition by the judgment creditor for a receiving order, even though the debtor had consented to the judgment, if at the time of the hearing of the petition facts are alleged by the debtor, which if proved, would show that notwithstanding the judgment, there was by reason of fraud or otherwise no real debt, the Court ought not to make a receiving order without first enquiring into the truth of the debtors' allegation. This was a decision of the Court of Appeal consisting of Lord Esher M. R., Cotton L. J. and Lindley L. J. and the observations of Lindley L. J. at page 329 are apposite:—"It means, I think, that although the judgment debtor could not go behind the judgment, the Court of Bankruptcy will not allow itself to be put in motion at the instance of a person, who is not a real creditor. The Court will not allow bankruptcy proceedings to be had recourse to for the purpose of enforcing debts, which are fictitious and not real even although they are in the form of

judgment debts." This case was cited by Mr. Sen for the proposition that in winding up proceedings the Court could go behind the transaction to find out the true nature thereof and is not bound by the assertions which are apparently proved. The next case cited by Mr. Sen is a decision of a Division Bench of this Court in *Mahammed Amin Bros. Ltd. v. Dominion of India*, 54 Cal WN 514 = (AIR 1952 Cal 323). In that case very heavy demands were made on the company for arrears of income-tax and corporation tax and some assets of the company were attached in execution of such demand. Thereafter the company passed a resolution for voluntary winding-up and appointed a Liquidator. Subsequently, an application was made by the Revenue Authorities for the compulsory winding-up of the company and the Company Court admitted the petition and gave direction for advertisement and also appointed a Provisional Liquidator. At the hearing, the company opposed the application, *inter alia*, on the ground that the claim of the revenue was being disputed and the appeals filed by the company against the assessment orders were still pending before the Appellate Tribunals, and as such the amount of the claim of the revenue authorities were disputed. *Sinha, J.*, passed an order for the winding-up of the company. On appeal the Division Bench held, *inter alia*, that an order for winding-up should not be made when the company wants to challenge or impeach a judgment in proper proceedings and where there is a reasonable doubt as to whether a valid debt exists or not. In a case where the debt is disputed the Court has first to see whether the dispute is on the face genuine or merely a cloak for the company's real inability to pay its debt and that winding-up proceedings should not be utilised for recovery of a disputed debt. *Chatterjee, J.*, observed that in that case there was no doubt that the debts claimed by the Dominion of India were disputed and that the disputes with regard to these debts were bona fide and serious. But his Lordship felt some difficulty as to the form of the order to be passed by the Court of Appeal and observed that in his view the Court should not accede to the extreme contention raised by the appellant that the petition should be dismissed but should see that justice was done to both the parties and the only way in which justice could be done in that case was to set aside the winding-up order but to keep the application for winding-up on the file and to refuse to pass any final order thereon unless and until there was a determination of the assessment proceedings and until the adjudication by the proper forum determining what was the debt justly due to the Dominion of India. Mr. Sen submitted that in this case also the hearing of the petition for winding-up should be kept pending until the disposal of the writ petition determining the validity of the consent required under Sec-

tion 18E (1) (c) of the Industries (Development and Regulation) Act, 1951.

17. The next case relied on by Mr. Sen was another Division Bench decision of this Court in *Bengaluxmi Cotton Mills Ltd. v. Mahaluxmi Cotton Mills Ltd.*, 58 Cal WN 689 = (AIR 1955 Cal 273) where the ratio of the decision in *Amin Brothers* case was further enlarged and it was observed that when a debt was disputed on a substantial ground and the dispute was bona fide, the winding-up court would not proceed further and decide the dispute itself and determine whether or not a debt existed and had become payable. In such a case the Court would either dismiss the petition for winding up or keep it pending till the creditor has established his claim in a regular action. In that case the creditors of the respondent company were entitled to certain payments under a scheme framed by the Court and on failure of the respondent to make such payments four of such creditors made an application for winding-up of the respondent company. The respondent company admitted that the claims by the creditors were due but contended that the scheme provided that the debts were to be paid out of the profits and inasmuch as the respondent company had not made sufficient profits, the debts had not yet become payable. The Court observed that the scheme presented a substantial problem of construction and there being bona fide dispute as to the maturity of the appellants' claim and as to the company's liability for immediate payment, no winding-up order would be made till the dispute was decided. In that case also the appeal was kept pending till the disposal of the suit which had been brought for the construction of the scheme. In *Re, Bharat Vegetable Products Ltd.*, (1952) 56 Cal WN 29, *Bachawat, J.*, made a further extension of the principle enunciated in *Amin Bros.* case and held that even if a part of a debt was admitted, but if a sufficient part was disputed, the Court would not proceed with the petition for winding-up and would stay further hearing of the petition. In *Amalgamated Commercial Traders (P) Ltd. v. A. C. K. Krishnaswami*, (1965) 35 Com Cas 456 (SC), the Supreme Court held that it was well settled that a winding-up petition was not a legitimate means of seeking to enforce payment of a debt which was bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed. Mr. Sen submitted that in this case also the shareholders were challenging the loan under Section 293 (1) (d) of the Companies Act and also the factum and validity of the alleged consent given by the Central Government for the commencement of winding-up proceedings against the company.

18. Mr. Sen then referred to various decisions of the Supreme Court where provisions of various Acts had been struck down

on the ground that such provisions conferred an unfettered and unrestricted discretion and were as such invalid and unconstitutional. Even where the statute itself was not held to be ultra vires, the orders purported to be made thereunder were, in some cases, held to be ultra vires. Mr. Sen also pointed out that for violation of the principles of natural justice, for instance, where no notice of an intended proceeding is given to the party affected thereby, the proceedings would be struck down and submitted that the rule in the writ petition in this Court was obtained on the aforesaid grounds challenging the vires of the Act and also the validity of the alleged consent given by the Central Government under the provisions of the Industries (Development and Regulation) Act.

19. Mr. Sen next submitted that though a secured creditor could apply for liquidation, the Court has always a discretion not to allow such a creditor to put the company in liquidation without enforcing his security and for this proposition he relied on the decision of the Madras High Court in AIR 1955 Mad 582 but in that case the High Court qualified the aforesaid observation by saying that where the secured creditor had ample security for his debt and there was no averment that his security was insufficient, no useful purpose would be served by an order of winding-up at his instance except the realisation by him of his security. In *Ramkumar Agarwal v. Buxar Oil & Rice Mills Ltd.*, AIR 1960 Cal 764 a Division Bench of this Court held that where there was a serious dispute as to the claim of the alleged creditors, the Court would not make an order for winding-up. In that case the trustees for the debenture-holders presented a petition for winding-up on the failure of the company to pay interest on the debentures. The petition was opposed by the unsecured creditors who raised serious disputes as to the validity of the debentures and the debenture trust deed. The Company Court dismissed the application and the Division Bench upheld the decision of the Court below. Bachawat, J., who was a member of the Bench, observed that the dispute could not be resolved on the affidavits and in the circumstances the winding-up order ought not to be made. The debenture trustees would be at liberty to enforce their rights by other means. Mr. Sen finally cited the decision of the English Court of Appeal in *In Re, Chapel House Colliery Co.*, (1883) 24 Ch D 259. In that case all the assets of the company had been assigned to trustees upon trust for its debentures and the colliery was also mortgaged for a large amount payable in instalments. The colliery was not worth the amount of the mortgage but it was working at a profit and the instalments of the mortgage debt were being paid but nothing was left to pay interest to the debenture-holders. There appeared to be reason to think that if the business was continued and the colliery trade improved, there would be

something for the debenture-holders. The colliery was lease-hold and liable to forfeiture if the company was wound up. A holder of debentures to a small amount presented a petition to wind-up the company which was opposed by a large majority of the other debenture-holders. The Judge in the Chancery Division dismissed the application and the order of dismissal was upheld by the Court of Appeal. Cotton, L. J., observed that in his opinion a petition ought not to be presented when it was clear that the company could not pay any of its debts and the main ground on which he decided the case was that nothing could be got for anybody by a winding-up order. Bowen, L. J., observed that it did not follow that if the machinery provided by the Act could not possibly avail itself for the purpose of paying debts, the creditor was still entitled to put that machinery in motion for his own delectation. It was an abuse of the procedure to set it in motion when it was shown that it could not accomplish the purpose for which it was established by the Legislature. Mr. Sen submitted that in the present case also the assets of the company would not be sufficient even to meet the claim of the petitioner who is the mortgagee of all the moveable and immovable properties belonging to the company. There would, therefore, be nothing left for the other creditors and the general body of creditors would not be benefited by the winding-up order. The petitioner could enforce its claim against the company by a suit and realise whatever it could from the sale of the assets belonging to the company. The procedure of winding-up was not the proper procedure for enforcing the claim of the petitioner. Mr. Sen accordingly submitted that the petition should be dismissed or in the alternative the application for winding-up should be kept on the file and any final order thereon should be refused until and unless the determination of the writ petition pending in this Court as suggested by Chatterji, J., in *Amin Brothers' case*, 54 Cal WN 514= (AIR 1952 Cal 323) (Supra).

20. Mr. Ajoy Ghose, appearing for the opposing creditor Messrs. Narayan Chowdhury Bros. Pvt. Ltd., elaborated two of the grounds against the maintainability of the petition raised by Mr. Sen. Mr. Ghose's contention was that the person who had affirmed the affidavit in support of the petition was not competent to affirm such an affidavit and the affidavit has not been properly verified. He referred to Rule 11 (15), Rule 21 and Form No. 3 in the Companies (Court) Rules and submitted that Form No. 3, which is the form prescribed, inter alia, for applications for winding-up, provide that in the case of such an application by a corporation the petition must be affirmed by a director, the secretary, or a principal officer of the Company and if not a principal officer of the company, the person affirming the petition has to declare that he is duly

authorised to make the affidavit on behalf of the company. It was accordingly submitted that the petition not being in the proper form and properly verified, the application should be dismissed and this Court should not grant leave to the petitioner to cure the defect by re-verifying the petition. He relied on a decision of this Court in *Star Textiles Engineering Works Ltd. v. Gava Textiles Pvt. Ltd.*, 70 Cal WN 852 = (AIR 1968 Cal 388) where it was observed as follows:— "But it cannot be overlooked that the present petition is a petition for winding up of a company and the winding-up relates back to the date of the presentation of the winding-up petition. If on the date when the petition was presented there was no proper verification according to law, then there was no petition at all on which the Court could issue directions for advertisement. Secondly, if leave is granted to cure the verification today, then a proper petition for winding-up of the company would come into existence as from to-day and in that event the question of dealings by the company with its assets between the date of presentation of the winding-up petition and the date when the Court grants the company leave to re-verify the petition would also create a good deal of confusion."

In the circumstances the Court refused to allow the petitioner to re-verify the petition. In my opinion, Mr. Ghose is not right when he contends that Form No. 3 of the Companies (Court) Rules require that in the case of a petition by a company, *inter alia*, for an order for winding-up, such a petition must contain an averment that the person affirming the affidavit is duly authorised by the company on their behalf. The said provision only applied to a case where the petition is affirmed by a person who is not an officer of the company. As in this case the petition was affirmed by an affidavit of the Superintendent of one of the departments of the State Bank it could not be said that the petition was not affirmed by an officer of the petitioner-company. I have already expressed my opinion as to the contention that Mr. Gupta was not a principal officer of the petitioner.

21. Mr. Ghose next argues that the loans given by the petitioner had exceeded the limits prescribed by S. 293(1)(d) and as such borrowings were ultra vires the Companies Act and void altogether. No rights or privileges could accrue in favour of the State Bank from the aforesaid transactions and for this proposition the learned Counsel relied on the following passage in Gower's Company Law 2nd Edition page 88:— ".... or if the Company has no power to borrow or has only power to borrow up to a certain sum, the activity will be ultra vires whether the other party realises it or not and when the transaction is ultra vires, the other party, speaking generally, has no rights at all; the transaction being completely void, cannot confer rights on the third party nor duties

on the company. Even recovery of judgment on the ultra vires contract will not create an enforceable obligation, unless the Court specifically adjudicated on the ultra vires issue or unless there was a bona fide compromise of it." Mr. Ghose referred me to the decision of the House of Lords in the *Ashbury Railway Carriage and Iron Co. Ltd. v. Riche*, (1875) 7 HL 653 where it was held that a contract made by the directors of a company upon a matter not included in the Memorandum of Association was ultra vires of the directors and is not binding on the company. Mr. Ghose cited another decision of the House of Lords in *Baroness of Wenlock v. River Dee Co.*, (1885) 10 AC 354. In that case the company was a statutory company for the purpose of recovery and preserving of the river Dee. The Constituent Act was amended by subsequent Acts, but none of them expressly authorised or forbade the company to borrow. Section 24 of Act 14 and 15 Vict. c. 87 empowered the company to borrow at interest upon bond or mortgage of the lands recovered and inclosed by them, a sum not exceeding £25000 and also a further sum not exceeding £25000 upon mortgage of the tolls, rates and duties. It was held that under the statute the company was prohibited from borrowing except in accordance with the provisions of that statute and the decision in *Ashbury Company's case* was re-affirmed. This aspect of the matter would be dealt with along with the similar objection by Mr. Sen after considering the reason given by Mr. Roychowdhury in his reply.

22. Mr. Somnath Chatterjee, the learned Counsel for Tulsi Chatterjee, an employee of the company opposing the petition, also supported the contention of Mr. Ghose that if the petition was defective then it could not be looked into for any purpose whatsoever. He relied on the decision of this Court in *In re, Sulekha Works Ltd.*, AIR 1965 Cal 98. But that decision only reiterates the principle enunciated by Chagla, C. J., in AIR 1942 Bom 231 that the winding-up petition must contain all the grounds on which an order was being sought. Mr. Chatterjee referred to Section 18E (2) of the Industries (Development and Regulation) Act and submitted that once the management of a company was taken over under the Act, neither the shareholders nor the directors of the company could interfere with the management and control of the company without the sanction of the Central Government. Undoubtedly, the shareholders are free to hold meetings but any resolutions passed in such a meeting would not be binding on the authorised person. An order under Section 18A therefore is a serious encroachment on the rights of the shareholders and directors of the company and the principle of natural justice would apply in such a case and where the Act confers on the executive arbitrary powers the doctrine of equality of law would be violated and in such a case the Act

and any action taken thereunder would be liable to be set aside by the Courts. This point had also been urged by Mr. Sen, but Mr. Chatterjee referred me to some of the recent decisions of the Supreme Court dealing with this aspect of the case. In *State of Orissa v. Dr. Binapani Dei*, AIR 1967 SC 1269, it was observed that "if there was power to decide and determine to the prejudice of a person, duty to act judicially was implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person was made, the order was nullity. That was a basic conception of the rule of law and the importance thereof transcends the significance of a decision in any particular case." It was therefore observed that even an administrative order which involved civil consequences must be made consistently with the rules of natural justice after giving an opportunity to the respondent of being heard and explaining or meeting the evidence. In *Satwant Singh v. Assistant Passport Officer, New Delhi*, AIR 1967 SC 1836 it was observed as follows:— "This doctrine of equality before the law is a necessary corollary to the high concept of the rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority. Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification. While in the case of enacted law one knows where he stands, in the case of unchannelled arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive." Mr. Chatterji therefore submitted that in this case the alleged consent by the Central Government under Section 18E(1)(c) of the Industries (Development and Regulation) Act, without any notice to the persons affected, violates the principles of natural justice and exposes the provisions of that Section to the risk of being struck down on the ground of allowing the executive uncontrolled arbitrary discretion.

23. Mr. Roy Chowdhury, in his reply, submitted firstly that the petition was not defective and the provisions of either R. 21 or Form No. 3 of the Company (Court) Rules had not been violated. Mr. Gupta the person who had affirmed the petition was the Superintendent of the Advances Department of the State Bank of India and as such he is the officer who is conversant with all the facts relating to the loans made to the company. The petition consists of 27 paragraphs and Mr. Gupta has affirmed that the statements in all the paragraphs except paragraphs 2, 5 and 23 were true to his knowledge and that the statements in the

aforsaid three paragraphs were based on information derived from relevant records which are believed to be true. It would therefore appear that Mr. Gupta was the person most suitable for affirming this petition. Mr. Roy Chowdhury also pointed out that in Form No. 3, prescribed under the Companies (Court) Rules the provision for a declaration that the person affirming the petition was duly authorised on behalf of the company applied only to the case where the petition is not affirmed by such an officer. As in this case the affidavit verifying the petition was affirmed by Mr. Gupta, who was an officer, and in the submission of Mr. Roychowdhury a principal officer of the petitioner, the petition could not be said to be defective. Mr. Roychowdhury further submitted that under the corresponding provisions of the Civil Procedure Code (Previous Section 435, at present Order 29, Rule 1) the Privy Council in *Delhi and London Bank Ltd. v. Oldham*, (1893) 20 Ind App 139 (PC), has held that a person who was exercising all the powers of management was principal officer for the purpose of Section 435. It was also submitted that the term 'principal officer' was very wide and a responsible officer with knowledge of the facts would come under that category.

24. Mr. Roychowdhury's rejoinder to the argument that the loans made by the petitioner to the Company were ultra vires the provisions of Section 293 (1) (d) and as such the transactions were void ab initio and no rights accrued therefrom to the petitioner was to produce, under subpoena, the minutes of the extraordinary general meeting of the share-holders of the company held on April 30, 1956, authorising the Board of Directors to borrow any sum exceeding the aggregate of the paid-up capital and its fixed reserves. Mr. Roychowdhury also contended that as the advances made by the State Bank were under cash credit agreements payable on demand, they were temporary loans obtained by the company from its bankers in the ordinary course of business and Section 293 (1) (d) had no application to this case. He also referred me to Explanation II to the said section. Mr. Roychowdhury submitted that as Section 293 (1) (d) did not apply to this case or even if it applied there was sanction by the members, the authorities cited by Mr. Ghose had no application.

25. In answer to Mr. Sen's contention that the hearing of the petition for winding-up should be stayed pending the decision of the Writ Court, Mr. Roychowdhury submitted that under the Companies Act the Court could stay an application for winding-up only under the provision of two sections, namely, Sections 443 and Section 446. Under Section 443 (1) (b) the hearing of the petition may be adjourned conditionally or unconditionally, while Section 446 provides for a stay of the winding-up order after the order is made. The object of both the Sections is to see whether the company could

be rehabilitated. The contention of the respondents is that the issue of the validity of the sanction under Section 18E (1) (c) of the Industries (Development and Regulation) Act is pending before this Court in its Writ jurisdiction and so the Company Court should not pre-judge that issue by holding that the sanction was properly given. According to Mr. Roychowdhury it would not be proper for this reason to stay the hearing of this petition pending the disposal of the Art. 226 — matter as it may take years for a final decision to be arrived at. Even the rule that has been issued has not yet been served on the respondents to that application. Though there was a prayer in the petition for injunction restraining the State Bank from proceeding with the winding-up petition, no such injunction has been granted by the Writ Court. It was therefore submitted that the power of stay which this Court undoubtedly possesses should be exercised in very exceptional circumstances and this is not a fit case for its exercise.

26. The decisions of the Appeal Court in 54 Cal WN 514 = (AIR 1952 Cal 323), 58 Cal WN 689 = (AIR 1955 Cal 273) and the decisions of the Single Judge in the Company Court in (1952) 56 Cal WN 29 and (1967) 71 Cal WN 38 were all cases of disputed debts. The company was strenuously contesting the claim of the petitioning creditor and it was in those circumstances that the Courts held that the dispute should be decided in an appropriate Court of law and the Company Court should not itself proceed to decide the disputes. In this case the dispute is regarding the validity of the sanction under Section 18E(1)(c) of the Industries (Development and Regulation) Act. Such a sanction would prejudice the Company mostly and the company was not appearing and challenging the sanction. Further Sec. 18E (1) (c) of the aforesaid Act restricted the right of the petitioning creditor to wind up the Company, it did not affect the rights of the company or the share-holders thereof. The provisions in the aforesaid section are more or less in the nature of a notice of the claim to the Central Government in the case of companies managed and controlled by it, so that the Central Government may have an opportunity of settling the dispute and are similar to the provisions of Section 80, of Civil Procedure Code. The restrictions imposed by the said section are that no petition for winding-up or applications for receiver should be instituted against a company under the control of the Central Government without notice to and consent of the Central Government. Such a provision does not give any right to the share-holders or the creditors of such a company and as no such rights are affected, the respondents are not entitled to challenge the validity of the liquidation proceedings.

27. Mr. Roychowdhury strongly relied on the observations of Chagla, C. J., in *Bachharaj Factories Ltd. v. Hiraji Mills*

Ltd., ILR (1955) Bom 550 = (AIR 1955 Bom 855). The facts in that case are somewhat similar to the facts in the present case. The petitioners were holders of debentures issued by Hiraji Mills which contained a covenant to pay the amount of the debentures with interest thereon. The Mills failed to pay the interest which became due and thereupon the amount of the debenture became payable. The petitioners filed a petition for the winding-up of the Mills, alleging, as the facts were, that the liabilities of the Mills, which amounted to Rs. 1,41,50,000, far exceeded the assets which were not worth more than Rs. 60,00,000 and that it was impossible to carry on the business of the Mills except at a loss. The Trial Court ordered the petition to stand over to a later date. On appeal it was observed:— "So now we come to the real merits of the matter and we are afraid that there is not much that can be said on the merits. The two grounds on which a winding-up is sought by the petitioners are that the company is unable to pay its debts and it is just and equitable that the company should be wound up. Now, I took the view in AIR 1942 Bom 231 that the insolvency contemplated by the Companies Act was that the company should be commercially insolvent, not in any technical sense, but plainly and commercially insolvent, that is to say, that its assets and existing liabilities must be such as to make the Court feel satisfied that the existing and probable assets will be insufficient to meet the existing liabilities. It is difficult to conceive of a stronger case than this where the Mills are not only commercially insolvent, but hopelessly insolvent, howsoever the expression 'insolvent' may be construed or interpreted. There was not even a suggestion before the learned Judge below as to how the Company proposed to meet its liabilities of Rs. 1,41,50,000 with assets at the most aggregating to Rs. 60,00,000. No scheme was proposed, no suggestion was made, no financier came to salvage the Mills." It was further observed "It is hardly necessary to point out what serious consequences a decision refusing to pass an order of winding-up may have in certain circumstances. A company may go on functioning, it may go on frittering away its assets, it may go on adding to its liabilities and serious and irreparable damage may be caused to creditors and even to shareholders." The Allahabad High Court in *Mohanlal v. Grain Chamber, Ltd.*, AIR 1959 All 276 cited with approval the following passage from *Palmer's Company Precedents* 17th Edn. Vol. 2 at page 81. "The Court will not, except in special circumstances, order a petition to stand over for a long period. It will either make an order or dismiss the petition; for if, after adjournment, a winding-up is made, the order would date back to the presentation of the petition, and avoid, therefore, or imperil, anything, done by the company in the meantime," and held on the facts of the

case before it that an order for holding up the winding-up proceedings till the disposal of the civil suit would be very much against the interests of the company and therefore should not be made.

28. Mr. Roychowdhury also referred to similar passages as quoted from Palmer's Company Precedents in the Allahabad decision from Palmer's Company Law at page 706 and also from Buckley's Companies Act 13th Edition page 468.

29. Mr. Roychowdhury then referred to certain passages from Basu's Commentary on the Constitution of India 5th Edition Vol. 1 for establishing certain presumptions arising from the exercise of executive power by the State. The first of such presumptions is that officials will discharge their duties honestly and this presumption is heightened when the law vests a discretion in high officials or authorities as distinguished from minor officials, or in the Government itself. The second presumption is of legality of official acts, in other words, when an administrative act is challenged as ultra vires, it is presumed, until the contrary is shown, that it has been done according to the formalities and conditions laid down by the statute and the onus lies on the party who challenges its vires to establish the contrary. The authorities for these propositions are also given in the said volume. Mr. Roychowdhury submitted that there has been no attempt by any of the respondents to establish the contrary, namely, that the sanction has not been given according to the provisions of Section 18E (1) (c) of the Industries (Development and Regulation) Act. Mr. Roychowdhury further submitted that as the aforesaid provision was for the benefit of neither the creditors nor the shareholders it would be preposterous to suggest that the notice of the proceedings for granting such a sanction should be given to the shareholders or the creditors of the company. The learned counsel relied on the following observations in Basu's Commentary on the Constitution:— "Administrative orders are not, generally reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. Where a corporation is primarily affected by the administrative action, a stockholder can challenge it only if he has a 'substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected.'" Mr. Roychowdhury submitted that as the consent granted did not affect any substantial financial or economic interest of the shareholders or of the creditors as distinct from those of the company such a sanction could not be constitutionally challenged. The decision of the Supreme Court in Radhesyam v. State of M. P., AIR 1959 SC 107 has been referred by Mr. Basu in his aforesaid work for the proposition that the doctrine of natural justice is applicable only to judicial and quasi-

judicial proceedings and not to purely administrative proceedings. It was accordingly submitted that the respondents could not make any grievance of the fact that no notice of the order granting sanction under Section 18E (1) (c) of the Industries (Development and Regulation) Act was given to them. Mr. Roychowdhury referred to the scheme of the Industries (Development and Regulation) Act 1951 and pointed out that the provisions of Ch. III-A of that Act applied only to scheduled industries or other industrial undertakings which fulfilled the conditions laid down in Section 15. The power of the Central Government to take over control of such industries was to be exercised only in cases where the industry was being run detrimentally to the interest of the industry or the share-holders or the public. Section 18-E provides that when the management of an industrial undertaking is taken over by the Central Government neither the Board of Directors nor the share-holders could interfere with the management of the company, though there is no prohibition to the share-holders holding general meetings and passing resolutions. Such resolutions would not be binding on the authorised person. As the industries are being managed and controlled by the Central Government it is necessary that the Central Government should have notice of any contemplated action against the company, either by way of winding-up or by an action for appointment of receiver. Such proceedings could be instituted only with the prior consent of the Central Government. In this case complaint against the manner in which the sanction has been made is by a single share-holder, and by a few creditors. There is no allegation by the company or by the share-holders in a general meeting that the formalities required for the granting of such sanction had not been observed. The cases cited by Mr. Somnath Chatterji, in AIR 1967 SC 1269 and AIR 1967 SC 1836 were cases where the enquiries without notice caused serious prejudice to the applicants or where a fundamental-right was involved. Mr. Roychowdhury further submitted that nothing was shown in any of the affidavits in opposition that in the case of this company, which was in a hopelessly insolvent condition, the granting of the sanction was an arbitrary use of authority. Mr. Roychowdhury finally contended that this was a case eminently suitable for an order for the winding-up of the company.

30. Mr. Sen, in reply, pointed out that the resolution of the company in general meeting produced under subpoena was passed in the year 1956. The Companies Act was amended in 1960 and the Central Government took over this company in 1961. So the loan transactions by the company with the State Bank after 1960 could not be validated under Section 293 by such a resolution. Mr. Sen further submitted that under Order 27-A of the Civil Procedure

Code suits involving a substantial question of law as to the interpretation of the Constitution cannot be heard by the Court without notice to the Attorney-General of India or to the Advocate-General of a State as the case may be. Section 141 of the Code makes the provisions applicable to suits also applicable to all proceedings in any Civil Court. It was submitted that a suit challenging a statute as ultra vires or inconsistent with a mandatory provision of the Constitution has been held to involve a question of Constitutional interpretation and accordingly these proceedings cannot continue without the notice required under Order 27-A.

31. I am entirely unable to appreciate the last point urged by Mr. Sen. By no stretch of imagination could it be said that the petition for winding-up of India Electric Works Ltd., involve any question of law as to the interpretation of the Constitution. There can be no application of the principles of O. 27-A of the Civil Procedure Code to the present proceedings.

32. I am also unable to agree with the contention raised on behalf of the respondents that the present proceedings should be stayed until the final determination of the proceedings under Article 226 of the Constitution pending in this Court. As I have already pointed out, there is no dispute that the company is hopelessly insolvent and cannot carry on the object for which it was incorporated. I have been informed by the learned counsel appearing for the employees of this company that the production in the workshop had completely stopped and that on the State Bank ceasing to provide the company with credit accommodation the affairs of the company are at a stand-still. The authorised person in management on behalf of the Central Government is paying the salary and remuneration due to the employees and also making provisions for contribution to the provident fund. Thereby the company is incurring further liabilities and the longer the company is kept alive the larger would be such liability without any hope of ever repaying it. This is a case where the observations of Chagla, C. J., in *Hiraji Mills case*, ILR (1955) Bom 550 = (AIR 1955 Bom 355) (Supra) apply with even greater force. In this case also the company is not only commercially insolvent but hopelessly insolvent and there is no suggestion as to how the company proposes to meet its huge liabilities. No scheme has been suggested and no suggestions have been made as to how finance should be arranged for salvaging the company. To allow this company to go on functioning would be to allow it to go on adding to its liabilities and serious and irreparable damage may be caused to the creditors and even to the share-holders.

33. The serious allegations made by some of the respondents in their affidavits

against the manner in which the company has been managed during the seven years it was under the control and management of the Central Government is, in my view, not germane to the decision in this petition as it is quite evident that the company was hopelessly insolvent even before the Central Government took up its management. If there have been any acts of mal-feasance, mis-feasance or non-feasance by anybody they can be properly investigated in the winding-up proceedings and the persons responsible therefor might be made to make reparations to the Company. No useful purpose would be served by allowing the company to go on in its present state. It is not a happy decision to make as it would deprive a large number of employees of this company of the means of their livelihood. I have racked my brains to find out a suitable solution and also requested the learned counsel appearing for the different parties to suggest some practical means of keeping the company going. Everybody is agreed that it is only the Central Government who can revive the company and make it a going concern. I am given to understand that there is no lack of orders or demands for the products of the company and if a further initial capital outlay of Rs. 60 lacs to 80 lacs could be made, the company could be turned into a profit making concern. No private financiers would be willing to undertake such a big risk and it is only the Government who can bear this burden. I am also not unimpressed by the fact that the State Bank of India, though a secured creditor, has not proceeded to realise its security, but proceeded by way of an application for the winding-up of the company. I would therefore make an order for the winding-up of the company, but the operation of this order would be stayed till the 15th October, 1968 to allow for negotiations with the Central Government as I am informed that such negotiations are already going on.

34. The petitioner and the supporting creditors would be entitled to add the costs of this application to their claim while the other parties would bear their own costs.

35. Liberty to apply.

Order accordingly.

AIR 1970 CALCUTTA 411 (V 57 C 75)

K. L. ROY, J.

Pran Krishna Chatterjee, Petitioner v. Union of India and others, Respondents.

Civil Revn. No. 2484 (W) of 1967, D/- 20-1-1970.

Civil Services — Railway Establishment Code, Rule 2046 (2) (b), Rule II (as revised) — Compulsory Retirement — Under Note I of Appendix XXXII Railway Board

CN/DN/B400/70/VSS/C

competent to declare ministerial servants — Senior Inspector of Station Accounts — Declaration excluding him from list of ministerial servants — Conclusive — Not entitled to be retained in service till age of sixty.

(Paras 6, 7 and 8)

A. P. Chatterjee with A. P. Sarkar, for Petitioner; A. K. Basu, for Respondents.

ORDER:— The petitioner, Pran Krishna Chatterjee, was born on December 19, 1909 and entered service under the Bengal Nagpur Railway Limited on April 7, 1930 as Clerk Grade II and was confirmed in that post on April 7, 1931. In October 1944, the said Bengal Nagpur Railway was taken over by the State, and at present is, designated as the South Eastern Railway. On April 5, 1956 the petitioner was promoted to the post of a Clerk Grade I in the said Railway Administration. The petitioner passed the Appendix IIA and IIA Examinations held in December 1957 and on August 6, 1959 was promoted to the post of a Junior Inspector of Station Accounts (hereinafter referred to as T. I. A.). He was provisionally confirmed as a Senior T. I. A. in April 1965 and finally confirmed in that post on August 29, 1966.

2. By a notification in the South Eastern Railway Gazette No. 3 dated the 1st February 1967, a list of the employees of the said Railway due to retire during the calendar year 1967 was published and in serial No. 29 of that list the petitioner was shown as due to retire on the 19th December, 1967. Thereafter the petitioner made various representations to the Railway Board against the said notification contending that as he was a ministerial servant who had entered service before the 31st March, 1938, he was entitled to be retained in service till the day he attained the age of 60 years, that is, till the 19th December, 1969. The petitioner was finally informed by the Deputy Chief Accounts Officer of the said Railway by a memorandum dated the 9th November, 1967, that the petitioner's representations have been rejected as the Railway Board by its letter dated the 22nd September, 1969, has confirmed that the benefit of the amended Rule 2046 (2) (b) R-II is not admissible to the T. I. As. who do not come under the category of staff declared as ministerial for the purpose of the said Rule. The relevant extract from the aforesaid letter of the Railway Board was also annexed to the said letter. By a notification dated the 5th December 1967, described as "Staff Office Order", the said Railway Administration declared that the petitioner would finally retire from Railway service with effect from the 19th December, 1967, on attaining the age of superannuation.

3. This Rule was obtained on the 13th December, 1967, requiring the respondents — the Union of India, the Railway Board and various officials of the South Eastern Railway — to show cause why the order or the notice compulsorily retiring the peti-

tioner on and from the 19th December, 1967, should not be cancelled and/or recalled and for ancillary reliefs. Along with the Rule an interim injunction was obtained which was vacated on the 2nd May, 1969.

4. In the affidavit-in-opposition filed on behalf of the respondents reference has been made to Rule 136 of the Indian Railway Establishment Code Vol. I (hereinafter referred to as the Code) for the definition of a ministerial service. It also refers to the letter of the Railway Board dated the 1st August, 1951, defining the categories of staff to be treated as ministerial for the purpose of Rule 2046 R-II showing that the T. I. As. are not included in any of the said categories. It also points out that the caption "Ministerial Staff (Accounts Department)" in paragraph 48 of Chapter I Section B (III) of the Indian Railway Establishment Manual (hereinafter referred to as the Manual) published in 1960 was subsequently corrected by the Board's letter dated the 14th May, 1962, to read, "Ministerial and Non-Ministerial Staff (Accounts Department)." The affidavit further refers to various directions given by the Board and particularly to that dated the 22nd September, 1967, to the effect that T. I. As. Inspectors of Stores Accounts and Stock Verifiers in the Accounts Department do not come under the category of Staff declared as Ministerial for the purpose of Rule 2046 (b) R-II. It is pointed out that the Subordinate Accounts Department of the Railway consists of both indoor and outdoor staff. The indoor staff is divided into two main classes viz., Accountants and Clerks, while the outdoor staff consists of the T. I. As., the Inspectors of Stores Accounts, the Stock Verifiers. It is submitted that the petitioner is not entitled to the benefit of Rule 2046 (b) R-II as he did not belong to the category of Ministerial Staff at the material time when he attained the age of 58 years.

5. Prior to its substitution as hereinafter referred to Rule 2046 (2) (b) (F. R. 56) of the Code provided, inter alia, that a Ministerial Servant who had entered Government Service on or after the 1st April, 1938 but did not hold a lien or a suspended lien on a permanent post on that day shall ordinarily be required to retire at the age of 55 years. In exercise of the powers conferred by the proviso to Article 309 of the Constitution the President of India was pleased to direct that Rule 2046 (F. R. 56) of the Code be substituted by a new Rule, the material provisions of which are as follows:

"2046 (F. R. 56) (a) Except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of fifty-eight years.

(b) A ministerial railway servant who entered Government service on or before the 31st March, 1938 and held on that date —

(i) a lien or a suspended lien on a permanent post, or

x x x x
shall be retained in service till the day he attains the age of sixty years,

Note: For the purpose of this clause, the expression "Government Service" includes service rendered in ex-company and ex-State Railways, and, in a former Provincial Government.

x x x x x
6. In clause (17 of Rule 2003 (F. R. 9) of the Code a Ministerial Servant is defined to mean a Railway servant of a Subordinate Service whose duties are entirely clerical and any other class of servants specially defined as

Clerks Grade II (Rs. 60—180)

Clerks Grade I (Rs. 80—220)

Sub-Head (Rs. 160—250)

Senior Sub-Head (Rs. 200-800)

Junior Accountant
(Rs. 200-850)

Senior Accountant (Rs. 850—500)

Stock-Verifier (Rs. 160—250)

Stock Verifier (Rs. 200—800)

Junior Inspector of
Station Accounts/
Stores Accounts (Rs. 200-850)

Senior Inspector of
Station Accounts/
Stores Accounts (Rs. 850-500.)"

7. The controversy in this application is whether the T. I. As. are Ministerial servants within the meaning of Rule 2046 (2) (b) R-II revised as aforesaid. Mr. Chatterjee for the petitioner submits that under paragraph 48 of the Manual a grade-I Clerk who has passed the prescribed departmental examinations has the option to choose the line for promotion either to the rank of Accountants or Inspectors of Station Accounts or Inspectors of Stores Accounts. Both the Accountants and the Inspector of Station Accounts perform the same functions, namely, the checking and auditing of accounts, the only difference being that the departmental Accountants do their work in office while the T. I. As. have to go to the different stations to do the same job. If, therefore, the Accountants or the Clerks in the Accounts Department do clerical work and are Ministerial Servants it could not be said that the T. I. As. are not Ministerial Servants. The main contention of the respondents is that under Rule 103 of the Code the Subordinate Accounts Section of the Railway consists of both indoor and outdoor staff. The indoor or office staff is again divided into Accountants and Clerks while the outdoor staff comprises T. I. As., Inspectors of Stores Accounts and Store Verifiers. The Board had reason to consider the question of classifying the Railway Servants as Ministerial Staff for the purpose of the said Rule 2046 (2) (b) R-II and publish-

such by special or General Order of a competent authority. In respect of this definition the President has decided that those members of Class II services whose duties are predominantly clerical shall be classed as Ministerial Servants for the purpose of Clause (17) of Rule 2003 (F. R. 9). See Appendix XXX at page 160 of the Code (3rd reprint) 1958. The other provisions to be noticed is the aforesaid paragraph 48 of the Manual which is as follows:

IX Ministerial and Non-Ministerial Staff (Accounts Department)

"48. The classes included in this group and the normal channel of their promotion are as under:—

ed a list of categories of Staff which may be declared as Ministerial for the above purpose. This list circulated by the Board's letter dated 1st August, 1951, includes Senior/Junior Divisional Accountants, Sub-Heads and Clerks (Class I and II) but does not include the T. I. As., or the Inspector of Stores Accounts or Stock Verifiers. Though this list has been subsequently added to, from time to time, the T. I. As. have never been included in the said list. It is pointed out that under clause (15) of the aforesaid Rule 2003 of the Code, the competent authority in relation to the exercise of any power under these Rule means the President or any authority to which such power is delegated in Appendix XXXII of the Code. In Item No. 1 of the said Appendix XXXII, full power to declare a railway servant to be a Ministerial or Non-ministerial servant is delegated to the Railway Board. It would, therefore, follow that if the Railway Board has made a declaration excluding the T. I. As. from the list of the Ministerial Servants, that would be conclusive of the matter. There is no dispute that the Board issued such a list by its circular dated the 1st August, 1951 as a copy of the same as circulated on the 13th March, 1959 has been annexed to the affidavit-in-reply filed by the petitioner. The further contention that by a further circular dated the 20th February, 1959, the Board has declared Telephone Operators to

be Ministerial Servants and as such the distinction sought to be made between the indoor and outdoor staff is not tenable, is also not relevant.

8. An argument was advanced by Mr. Chatterjee that under the new Rule 2046 the crucial date was the 31st March, 1938 and if on that date a railway servant held a lien or suspended lien on a permanent Ministerial Post, he was entitled to the benefit of the said Rule. In my opinion this argument has no substance. The two tests to be satisfied are that the servant held a lien on a permanent post on the 31st March 1938 or was a Ministerial servant on the day he attained the age of 58 years. As the petitioner could not be said to be a Ministerial servant on the day he completed his 58th year, he was not entitled to the benefit of Rule 2046 (2).
(b) R-II.

9. This Rule is, accordingly, discharged. There will be no order as to costs.

Rule discharged.

AIR 1970 CALCUTTA 414 (V 57 C 76)

P. N. MOOKERJEE AND A. K. MOOKERJI, JJ.

Municipal Commissioners of Howrah, Appellants v. Calcutta Electric Supply Corporation Ltd., Respondent.

A. F. A. D. No. 807 of 1960, D/- 9-2-1970.

(A) Civil P. C. (1908), Section 11 Explanation 4 — Constructive res judicata — Suit for declaration that assessment of holding was void and illegal — Earlier judgment inter partes — Finding therein that impugned assessment in regard to holding had become final — Finding integral part of said judgment — Operates as constructive res judicata — AIR 1964 SC 1013 and AIR 1965 SC 1150, Disting. (Para 3)

(B) Constitution of India, Article 265 — Applicability — Suit for declaration that assessment of holding was void and illegal barred by constructive res judicata — Bar applies to prevent application of article to invalidate assessment. (Para 5)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1150 (V 52) = 1965-1 SCR 686, Devail Modi v. Sales Tax Officer, Rattlam

(1964) AIR 1964 SC 1013 (V 51) = (1963) Supp (1) SCR 172, Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara

(1958) 62 Cal WN 293 = ILR (1959) 2 Cal 1, Administrator Howrah Municipality v. M/s. Calcutta Electric Supply Corpn. Ltd.

(1926) 1926 AC 94 = 95 LJPC 33, Broken Hill Proprietary Co. Ltd. v. Municipal Council of Broken Hills

Satya Charan Pain, for Appellants; S. R. Banerjee and Soumendranath Mukherjee, for Respondent.

P. N. MOOKERJEE, J.: This appeal is by the Municipal Commissioners of Howrah against a decision of the lower appellate Court holding inter alia that the assessment of Holding No. 433/1, G. T. Road for the period in question is void and illegal and decreeing the plaintiff's suit for such declaration and temporary injunction, restraining the appellant Municipality from realising taxes on the basis of the said impugned assessment.

2. The suit was dismissed by the learned trial Judge but, on appeal, that decision was reversed and the plaintiff's suit was decreed, as aforesaid.

3. On the materials before us, we are in agreement with the learned court of appeal below in regard to its conclusion that the impugned assessment was in contravention of Section 134 of the Calcutta Municipal Act, as applying to Howrah and, prima facie, therefore, apart from the question of the bar of res judicata, which we will discuss hereinbelow, the said assessment would have been void and illegal. The difficulty, however, of the respondent before us is by reason of the judgment of this Court, reported in Administrator Howrah Municipality v. M/s. Calcutta Electric Supply Corporation Ltd., (1958) 62 Cal WN 293. That was a judgment inter partes, where the assessment of Holding No. 433, with which the amalgamation of the present Holding No. 433/1 was overlooked or ignored by the Municipality in the matter of making of the impugned assessment, was in question. In dismissing the respondent's appeal on that occasion, in regard to the said Holding 433 this Court proceeded upon the firm view that the present impugned assessment in regard to Holding No. 433/1 had become final. That was an integral part of the said decision and, without the said finding, the decision of this Court on the said occasion could not have been made. In the above state of things, whatever be the position if the matter had been or be considered res inter alia, the decision in the instant case must go against the respondent on account of the bar of constructive res judicata. The learned District Judge, in allowing the respondent's appeal and decreeing its suit, appeared to have missed this aspect of the matter and, accordingly, his decision cannot be upheld. We would, therefore, hold that the instant suit of the respondent for a declaration that the impugned assessment is ultra vires, void and illegal and for a permanent injunction, even though it might have otherwise succeeded on merits, must fail on the ground of constructive res judicata by reason of the above decision of this Court (1958) 62 Cal WN 293.

4. Mr. Banerjee, appearing on behalf of the respondent, drew our attention to the connection to two decisions of the Supreme Court, reported in Amalgamated Coalfields

Ltd. v. Janapada Sabha Chhindwara, AIR 1964 SC 1013 and Devilal Modi v. Sales Tax Officer, Ratlam, AIR 1965 SC 1150, to impress upon us that the bar of res judicata would not apply in the instant case on the above authorities. We are, however, unable to accept the said submission, as the said cases are obviously distinguishable, they being founded on the well-known principle (vide Broken Hill Proprietary Co.'s case, 1926 AC 94) that the assessment for a particular year may not, under certain circumstances, be res judicata for assessment in respect of a different year. In the instant case, the period in question is the same and those decisions would be distinguishable on that ground apart from the fact that the above cited Supreme Court decisions were decisions given in the Writ jurisdiction.

5. Mr. Banerjee also drew our attention to Article 265 of the Constitution. But whatever might have been the position under the said Article otherwise or had the matter been res integra we do not think that the said Article would be sufficient to override the bar of res judicata and, in our opinion, the bar of res judicata in the instant case would apply to prevent application of the said Article to invalidate the impugned assessment.

6. We would, accordingly, allow this appeal set aside the decision of learned District Judge, deprecating the plaintiff-respondent's suit and restore that of the learned Munsif, dismissing the plaintiff's suit.

7. The parties will bear their own costs in all the courts.

8. A. K. MOOKERJI, J.: I agree.

Appeal allowed.

AIR 1970 CALCUTTA 415 (V 57 C 77)

A. K. SINHA, J.

Wazir Brothers, Petitioners v. Commercial Tax Officer, Burdwan and others, Respondents.

Civil Rule No. 1341 (W) of 1964, D/-22-8-1968.

(A) Constitution of India, Article 226 — Power of High Court to issue writs — Interference with question of fact — Question whether notice of demand of tax was served on assessee or not, is a question of fact — Concurrent findings by Appellate or revisional authorities will not be interfered with when there is nothing in their findings which involved any question of jurisdiction or error apparent on face of record.

(Paras 8 and 9)

(B) Constitution of India, Article 226 — Power of High Court to issue writs — Appeal allowed to be time barred — Subject matter of appeal cannot be agitated in writ petition.

(Para 12)

(C) Sales Tax — West Bengal Sales Tax Rules (1941), Rule 84 — Service of notice of demand — Presumption as to, under Rule 84 (2) is a rebuttable one — Sub-rule (2) of Rule 84 is not inconsistent with sub-section (1).

(Para 11)

K. B. Roy, A. B. Bhunia, for Petitioners; Ram Mohon Bhattacharjee, D. C. Mukherjee, for Respondents.

ORDER: This Rule is directed against an order passed by the Additional Member, Board of Revenue, West Bengal, rejecting the petition of revision of the petitioner dated 24th July, 1964 affirming the successive orders passed in appeal from an order of assessment made by the Commercial Tax Officer.

2. The facts set out, briefly, are as follows:

The petitioner was running a railway canteen at Burdwan and Bandel Stations, District Hooghly and he had his head office at 147, Faithfulganj, Kanpur, Uttar Pradesh. It was registered as a dealer under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the Act) having registration certificate number BN/55B under the Commercial Tax Officer, the Respondent No. 1 in respect of its business in West Bengal. While carrying on the above business the petitioner submitted return for four quarters ending 31st July, 1956, showing Rs. 72,347-14-0 as gross turnover out of which Rs. 45,019-4-0 was claimed as deduction on account of sales on tax-free goods under Sec. 5 (2) (a) (i) of the Act and the tax amounting to Rs. 1,223-6-3 was paid on taxable balance of Rs. 27,328-10-0.

3. The respondent No. 1, Commercial Tax Officer, started an assessment case being No. A-285/56-57 for the above period which after several adjournments was fixed for hearing on 16th July, 1958. On this date the petitioner filed an application praying for another adjournment on the ground that its Accountant was on leave. This petition, it is stated, was rejected and a 'best judgment assessment' was made in absence of the petitioner on this score by the respondent No. 1.

4. With effect from 1st January, 1959, it is alleged, the petitioner's contract with the Eastern Railway was terminated and the petitioner wound up its establishment at Burdwan and did not hear anything about the assessment case for 1955-56 until 23rd October, 1959, when the petitioner's Accountant appeared and produced the books of accounts for 1955-56, 1956-57 and 1957-58 though assessment of 1955-56 was already completed on 16th July, 1958. On the very date, that is, on 23rd October, 1959, the petitioner's representative from Burdwan informed the petitioner at Kanpur that such an assessment was made for the year 1955-56. It is alleged that the petitioner did not receive any notice of demand or intima-

tion in regard to the impugned assessment after 16th July, 1958 and for the first time on 23rd October, 1959, he came to learn about such ex parte assessment through his representative.

5. Thereafter the petitioner took steps for filing appeal against the said assessment order in respect of 1955-56 and an appeal could not actually be filed before 17th November, 1959 which was registered as Appeal Case No. 261 of 1959-60. This appeal was heard by the Assistant Commissioner, Commercial Taxes, Asansol Circle, the respondent No. 3, who dismissed it on the ground of limitation, by his order dated 8th February, 1961. Against this order passed in appeal, the petitioner preferred a revision petition before the Commissioner of Commercial Taxes on 25th May, 1961, being Revision Case No. 92 of 1961-62 which, equally, was dismissed by the Additional Commissioner thus affirming the decision of the First Appellate Authority. As against this, the petitioner preferred a further Revision petition to the Board of Revenue being Revision Petition No. 23 of 1963 but the learned Member of the Board of Revenue by his order dated 24th July, 1964, dismissed the said petition. The petitioner still felt aggrieved and came up to this Court and obtained the above rule and an interim order of jurisdiction on terms.

6. Upon these facts several grounds were taken but the learned Advocate for the petitioner at the hearing raised only 2 points.

7. His first point was that there was no service of notice of demand as required under the Act upon the petitioner and therefore the view successively taken up to the Board of Revenue that the appeal was barred by limitation was bad in law. The second point was that the provisions of Rule 84 of the Bengal Sales Tax Rules, 1941 (hereinafter referred to as the rule) as contained in the proviso to sub-rule (1) of Rule 84 is invalid and ultra vires.

8. In elaborating the first point, it was contended that the petitioner came to know about the aforesaid order made on 16th July, 1958 only on 23rd October, 1959 through his own representative and thereafter he preferred an appeal although the notice of demand as contemplated under sub-sec. (3) of Section 11 of the Act was not received by him. Therefore, according to the learned Advocate, sufficient cause was shown to the satisfaction of the authorities concerned, that the appeal could not be preferred within the period of limitation on receipt of the notice. It was argued that, admittedly, the acknowledgment receipt of the registered notice was not forthcoming. Only on a presumption it was concluded by the successive authorities, either in appeal or in revision that this notice under Section 11 (3) must have been served upon the petitioner. It was contended that since the acknowledgment receipt did not come back it was for

the issuing authorities to show that such a notice was in fact served personally upon the petitioner as provided in the rule. In the facts and circumstances of the present case, it could not be presumed that the notice must have been served upon the addressee on the expiry of the period normally taken by a registered letter in transit unless the contrary was proved. I am afraid, I cannot agree. Whether or not the notice was served upon the petitioner in accordance with the rule is a question of fact which has been decided successively by the appellate or the revisional authorities. There is nothing in the findings either of the appellate authority or the revisional authority which involves any question of jurisdiction or an error apparent on the face of the record. Admittedly in this case, the petitioner was staying at Burdwan and the notice was sent by registered post and normally it must have reached the addressee within the time as found by the appellate authority. Even if the acknowledgment receipt did not come back, that by no means could establish that the notice was not served. However, I cannot enter into the merits of such findings as I am not sitting as an appellate authority. As I have already indicated that the finding is that the notice was served by registered post and, even though the acknowledgment receipt did not come back, it was presumed under sub-rule (2) of Rule 84 that the notice was served. So, there being a positive finding to this effect the question as to whether there was sufficient cause for condoning the delay is a matter exclusively to be considered not by this Court but by the authorities concerned. There was a delay of more than a year in filing the appeal and that the petitioner's only case made out before the authorities that no notice was served, but that he for the first time came to know from his own representative on 23rd October, 1959 about the ex parte order of assessment, was not believed.

9. Then again, from a reading of the petition itself, I think that the petitioner is extremely lacking in bona fides. He made an application before the Commercial Tax Officer for adjournment on 16th July, 1958 and thereafter he did not care to take any information as to what had happened to his application or whether the impugned assessment was made or not. It is equally unnatural for an assessee to remain silent by simply putting a petition for adjournment. This conduct on the part of the petitioner goes very seriously against him. Be that as it may, the question of condonation of delay is a matter, as I have already indicated, to be considered by the successive authorities concerned and the satisfaction to be derived must be the satisfaction of these authorities and not of this Court. These successive authorities were not satisfied as to sufficiency of the cause shown and refused to condone the delay. That being

Ex parte order D/- 25-11-1953 declaring appellant as evacuee and her property as evacuee property passed after service of notice under Section 7 by affixation — Notice under Section 7 is confirmed by the ex parte order and not exhausted or discharged — Ex parte order set aside by an order D/- 28-6-1955 on appeal and case remanded to Assistant Custodian (Judicial) for decision on merit — Setting aside of ex parte order only removes declaration of property as evacuee property but does not remove fetters that had been clamped on property on issue of notice under Section 7 by virtue of Section 7 (2) — Proceedings were pending on 7th May, 1954 within the proviso to Section 7A — Order D/- 11-1-1956 of Assistant Custodian (Judicial), on remand, declaring appellant as non-evacuee owner of property can be set aside in exercise of revisional powers and even if it results in declaration of property to be evacuee property that would not conflict with Section 7A as that declaration would be as a consequence of the notice issued before November, 1953 — Setting aside of order D/- 11-1-1956 would merely bring the case back to the order D/- 28-6-1955 according to which the investigation which had started with the notice under Section 7 was to be proceeded with and no new proceedings were to be initiated. LPA No. 92-D of 1961, D/- 13-1-1965 (Punj), Dist. (Paras 17 and 18 and 22)

(H) Administration of Evacuee Property Act (1950), Section 27 — Power of revision of Custodian-General — Suo motu revision in order to find out fraud and suppression of material facts — Enquiry cannot be confined to the record as it is and evidence can be taken on question of fraud and suppression of facts. (Para 23)

(I) Administration of Evacuee Property Act (1950), Section 27 — Power of revision of Custodian-General — Order of Assistant Custodian (Judicial) declaring a person as non-evacuee — Review of the order in order to find out fraud and suppression of material facts by such person not barred by principle of res judicata — Once fraud is established there would be no bar to the exercise of revisional powers. (Para 24)

(J) Civil P. C. (1908), Section 11 — Res judicata — Order of Assistant Custodian (Judicial) declaring person as non-evacuee — Review of order in exercise of revisional powers by Custodian-General in order to find fraud and suppression of material facts by the person not barred by res judicata. (Para 24)

Cases Referred: Chronological Paras
(1968) Civil Appeal No. 671 of 1966,
D/- 2-4-1968 (SC), Jagjit Distilling
and Allied Industries v. Deputy
Custodian 21
(1966) AIR 1966 SC 573 (V 53) =
(1966) 2 SCR 158, Bishambhar Nath
Kohli v. State of U. P. 8

(1965) L. P. A. No. 92-D of 1961,
D/- 13-1-1965 (Punj), Custodian of
Evacuee Property v. Jamil-ur-
Rehman 1, 19
(1963) AIR 1963 Punj 494 (V 50) =
65 Pun LR 328, Jagjit Distilling
and Allied Industries Ltd. v. Deputy
Custodian-General India 1, 20
(1961) AIR 1961 SC 1312 (V 48) =
(1962) 1 SCR 239, Mahomed Shar-
fuddin v. R. P. Singh 6
(1961) AIR 1961 SC 1371 (V 48) =
(1962) 1 SCR 297, Purshotam Lal
Dhawan v. Diwan Chaman Lal 8
(1957) AIR 1957 Punj 173 (V 44) =
ILR (1957) Punj 873 (FB), Kapur
Singh v. Union of India 14
A. N. Aurora, for Appellants; Brijbans
Kishore with J. P. Gupta, Raushan Lal, S. P.
Aggarwal, H. K. L. Sabharwal and Y. K.
Sabharwal, for Respondents.

P. N. KHANNA, J.: This is an appeal under Clause 10 of Letters Patent by Mst. Fatima Bi and her husband Mohd. Sayeed against the order dated May 27, 1966, of the learned single Judge who dismissed the appellant's petition under Articles 226 and 227 of the Constitution of India. It came up for hearing before the Division Bench consisting of my Lord the Chief Justice (I, D. Dua, C. J. as he then was) and my learned brother S. Rangarajan, J. As it was considered desirable to re-examine two bench decisions of the Punjab High Court viz., Jagajit Distilling and Allied Industries Ltd. v. Deputy Custodian General India, AIR 1963 Punj 494 and Custodian of Evacuee Property v. Jamil-ur-Rehman, L. P. A. No. 92-D of 1961, D/- 13-1-1965 (Punj), the appeal was directed to be placed for hearing before a larger bench. It was under these circumstances that this bench was constituted.

2. Briefly stated the facts of the case are that the appellants Mst. Fatima Bi, the owner of Property No. 1053/2283, Ward No. 111 situate in Gali Hinga Beg, Phatak Habash Khan, Delhi, claims to have been residing in India after the partition of the country in the year 1947. Some time before November 25, 1953, a notice under Section 7 (1) of the Administration of Evacuee Property Act, 1950, hereinafter referred to as "The Act", was issued to her. As personal service was not effected, service by affixation was considered sufficient. It was stated that she had migrated to Pakistan. By an ex parte order dated November 25, 1953, the Assistant Custodian (Judicial) declared her evacuee and the above property evacuee property. On May 25, 1955, she filed an appeal against the said ex parte order, which was accepted and the ex parte order was set aside, by the Authorised Deputy Custodian, who by his order dated June 28, 1955, remanded the case to the

Assistant Custodian (Judicial) to decide on merits after hearing the appellant. By an order dated January 11, 1956, the Assistant Custodian (Judicial) held that as the appellant, Mst. Fatima Bi was a non-evacuee owner of the said property, the notice issued earlier under Section 7 was discharged.

3. It appears that on some complaint being made, the local police investigated her case and moved the Custodian General for the grant of sanction under Section 195, Cr. P. C. for prosecuting Mst. Fatima Bi and others for having played fraud and deceit on the Department and for having obtained release orders of her property by suppressing real facts of her migration to Pakistan in 1947. A photostat copy of her application dated August 14, 1959, for the grant of visa on the basis of a Pakistani Passport, purporting to having been signed by her, with her photograph pasted thereon, another photostat copy of which has been placed on this record also, was filed before the Custodian General, wherein Mst. Fatima Bi had declared that she had migrated to Pakistan on or about November 10, 1947. On April 29, 1964, a notice was issued to the appellant, Fatima Bi, by the Custodian General of Evacuee Property informing her that he intended to suo motu revise under Section 27 of the Act, the order dated January 11, 1956, passed by the Assistant Custodian (Judicial) with a view to examine the propriety and legality of the said order. She was asked to show cause as to why the said order should not be revised and proper orders passed on the following amongst other grounds:—

"1. That Smt. Bi had left for Pakistan in 1947, and it was fraudulently averred that she was a non-evacuee and was residing at Calcutta with Shri Mohd. Sayeed.

2. That in order to establish her non-evacuee status as well as to secure the release of the property forged documents and perjured evidence was tendered before the Assistant Custodian (J).

3. That the impugned order is illegal and improper and is against facts and is liable to be set aside."

4. The appellant, Mst. Fatima Bi, in reply controverted the allegations of fact and raised certain preliminary objections questioned the jurisdiction of the Custodian General to review the order of the Assistant Custodian and to declare her property as evacuee property. On September 28, 1961, the appellant filed an application before the Deputy Custodian General praying that her preliminary objections raised certain issues of law which should be decided first as preliminary issues. This prayer was granted. Before the Deputy Custodian General the following three objections were pressed:

1. As the Department did not file any appeal against the order dated 11-1-1956 passed by the Assistant Custodian (Judicial) the same had become final and could not

be re-opened by virtue of Section 28 of the Act.

2. Fresh proceedings were barred under Section 7-A inserted in pursuance of the Amendment Act 42 of 1954.

3. The proceedings under Section 27 of the Act were barred by time.

5. The learned Deputy Custodian General by his order dated February 1, 1965, decided the said objections against the appellant holding that at any rate the grounds on which suo motu powers were being invoked were not within the knowledge of the Department earlier and, therefore, there was no force, according to him, in the preliminary objections. He, therefore, directed the Authorised Deputy Custodian to record evidence in the case and submit his report expeditiously. It was against this order that the appellant filed a petition under Articles 226 and 227 of the Constitution and prayed that the said order dated February 1, 1965, of the Deputy Custodian General of Evacuee Property be quashed and he be restrained from interfering in any manner with the rights of the petitioner in the property. The three preliminary objections raised before the Deputy Custodian General were again pressed before the learned single judge who by his order dated May 27, 1966 dismissed the petition as already stated. Aggrieved by this order the present appeal was filed.

6. Mr. A. N. Arora, the learned counsel for the appellant has urged mainly the same objections before us. He submitted that the order dated January 11, 1956, of the Assistant Custodian (Judicial) declaring the appellant non-evacuee had become final. The learned counsel conceded that as held by the Supreme Court in Sharfuddin's case, AIR 1961 SC 1312 the Assistant Custodian cannot be said to be aggrieved person and, therefore no appeal by him was competent. All the same, the order dated January 11, 1956, of the Assistant Custodian (Judicial) must be deemed to have become final, according to the learned counsel, in terms of Section 28 of the Act which reads as follows:—

"Save as otherwise expressly provided in this Chapter, every order made by the Custodian-General, Custodian, Additional Custodian, Authorised Deputy Custodian, Deputy Custodian or Assistant Custodian, shall be final and shall not be called in question in any court by way of appeal or revision or in any original suit, application or execution proceedings."

7. The very opening words of the Section, however, expressly save the power of revision under Section 27 (which occurs in the same Chapter) vested in the Custodian General. Although the seal of finality attaches to the order passed by the Assistant Custodian, the power of revision vested in the Custodian General under Section 27 is not ousted. The argument raised, therefore, is of no avail to the appellant.

8. Mr. Aurora, then submitted that the issue of notice for the intended exercise of suo motu revisional powers after a lapse of about nine years was clearly unreasonable and arbitrary. The argument of the learned counsel, howsoever attractive, lacks merit. Section 27 of the Act confers on the Custodian General the absolute discretion in the matter of entertaining an application for revision or moving in the matter by way of suo motu revision. This power is not intended to be curtailed by time. In this connection reference may be made to S. 56 of the Act, which apart from conferring general rule-making powers on the Central Government for carrying out the purposes of the Act, gives, (vide sub-section (2)) a list of particular spheres, where the said rule-making power is specifically permitted to be exercised. Significantly enough, time within which applications for revisions may be preferred has been particularly mentioned in Clause (r), but not the time within which suo motu revisional powers are to be exercised. Rule 31 (5) of the Rules framed by the Central Government under the said rule-making power merely lays down, as held by the Supreme Court, in Purshotam Lal Dhawan's case, AIR 1961 SC 1371, a rule of guidance for preferring an application for revision. Even there it leaves the matter still in the discretion of the Custodian General. Mr. Aurora, however, contended that in Purshotam Lal Dhawan's case, AIR 1961 SC 1371 the Supreme Court, while holding that Section 27 of the Act confers a discretionary power of revision on the Custodian General and empowers him to exercise such powers either suo motu or on an application made in that behalf at any time, and although the powers of the Custodian General were held to be uncontrolled by any time factor and the period of 60 days for filing of application for revision by the aggrieved party was ruled to be only a rule of guidance, observed that the powers under Section 27 were not intended to be exercised arbitrarily. Being a judicial power he had to exercise his discretion judicially. The learned counsel, on the basis of this, argued that in the instant case, the issue of notice for the intended exercise of the suo motu revisional powers was unreasonable. But these powers have by the Act, been left uncontrolled and even rules have (not) been framed for imposing limitations of time for the exercise of suo motu powers. The discretion of the Custodian General in such matters, (e. g. what is reasonable) therefore, cannot be called in question while the matter is being dealt with by this court in exercise of its writ jurisdiction, more especially, when allegations of fraud and suppression of facts supported by prima facie documentary evidence (in respect of which we are not expressing any opinion) are made, as has been done in this case. It will be observed that if principles enshrined in Section 17 of the Limitation Act are applied

the period of limitation does not begin to run until the other party discovers the fraud or with reasonable diligence could have discovered the same. The challenge against the exercise of the suo motu powers by the Custodian General, therefore, is futile. Mr. Justice J. C. Shah, speaking for the Supreme Court in Bishambhar Nath Kohli v. State of Uttar Pradesh, AIR 1966 SC 573 while dealing with the question of limitation in connection with the case of an application filed by an aggrieved party about twelve years after the property was declared evacuee property, observed thus:—

“Whether in a given case, the Custodian General may entertain a petition against an order passed by a subordinate authority, notwithstanding gross delay in instituting the proceeding, is a matter within his discretion. We do not think that in exercise of the appellate jurisdiction of this Court under Article 136 of the Constitution, we would be justified in interfering with the order of the Custodian General in a matter which is essentially within his competence and relates to the exercise of his discretion, however much we may disagree.”

9. In that case before the Supreme Court the revisional jurisdiction was invoked at the instance of the aggrieved party (the State of Uttar Pradesh). Here the matter has been taken up suo motu by the Custodian General. It, therefore, cannot be urged that these powers were being exercised in the instant case after the lapse of an unusual time or that the discretion proposed to be exercised by the Custodian General which prima facie appears to be not unreasonable, could be interfered with in these proceedings.

10. The appellant's learned counsel next contended that it was the order of the ‘Custodian’ which could be revised under Section 27 and not of the Assistant Custodian, which was sought to be revised in the present case. The contention has no merits in view of Section 2 (c) of the Act, which defines the expression ‘Custodian’ as including any Additional, Deputy or Assistant Custodian.

11. Mr. Aurora then urged that the revisional powers cannot be exercised in this case as they would, if allowed to be exercised, come in conflict with Section 7-A of the Act. The argument of the learned counsel is that in case the order dated January 11, 1956 of the Assistant Custodian (Judicial) is set aside in revision it would amount to declaring the property evacuee, which under Section 7-A of the Act cannot be done after May 7, 1954. The relevant portion of Section 7-A of the Act runs as follows:—

“Notwithstanding anything contained in this Act, no property shall be declared to be evacuee property on or after the 7th day of May, 1954;

Provided that nothing contained in this section shall apply to—

(a) any property in respect of which proceedings are pending on the 7th May, 1954, for declaring such property to be evacuee; and

(b) the property of any person who, on account of the setting up of the Dominions of India and Pakistan or on account of Civil disturbances or the fear of such disturbances had left on or after the 1st day of March, 1947, any place now forming part of India, and who on the 7th day of May, 1954, was resident of Pakistan:

Provided further that no notice under Section 7 for declaring any property to be evacuee property with reference to Clause (b) of the preceding proviso shall be issued after the expiry of six months from the commencement of the Administration of Evacuee Property (Amendment) Act, 1954."

12. The learned counsel for the appellants submitted that the case is not covered by the exception incorporated in proviso (b) to Section 7-A of the Act and proviso (a) was not applicable to this case, as was held by the learned single judge, as no proceedings were pending on May 7, 1954, for declaring such property to be evacuee property. It was, therefore, a case, urged the learned counsel, where the absolute bar created by Section 7-A operated and the property could not be declared to be evacuee property even by setting aside the order dated January 11, 1956, of the Assistant Custodian (Judicial) in revision.

13. The argument of the learned counsel, however, cannot survive a close examination. Proviso (a) to Section 7-A of the Act speaks of proceedings which were pending on May 7, 1954, for declaring the property to be evacuee property. It is, therefore, necessary to examine the position as it was on the said crucial date (May 7, 1954).

14. It would be worthwhile, at this stage to be clear about the import of the word 'proceedings'. The 'instituting' or carrying on of an action at law, and 'any step taken in a case by either party' would according to the Shorter Oxford English Dictionary be included within the meaning of the word. In a Full Bench decision of the Punjab High Court in Kapur Singh's case, AIR 1957 Punj 173 it was observed:

"But what a civil proceeding is may be defined as a judicial process to enforce a right and includes any remedy employed to vindicate that right. It covers every step in an action and is equivalent to an action. It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked."

15. The word 'proceedings' thus covers every step taken in a cause, and the act of 'instituting or initiating' would be a step in a cause. In the instant case the first step for declaring the property to be evacuee property, was taken by the issuance of a notice under Section 7 of the Act. Mr.

Sabharwal, the learned counsel for respondent No. 2, urged that even before the issue of the notice under Section 7, the Custodian has to form an opinion that the property is an evacuee property within the meaning of the Act. This, according to him, would be the first step and a start of the proceedings. In any case, there can be no doubt that by the issue of the notice at least, the proceedings get started and continue till the matter is finally decided.

16. Mr. Aurora contended that the proceedings cannot be deemed to have been started with the notice under Section 7 issued before November, 1953, as the said notice was not served on the appellant. Rule 28 of the Administration of Evacuee Property (Central) Rules prescribed the manner of service of notice and lays down that service may be effected in one of four given modes. The fourth mode reads:—

"by affixing the notice, summons or order on some conspicuous part of the premises concerned or"

Service in this case being effected by affixation on the premises concerned, was sufficient. The ex parte order dated November 25, 1953, was set aside not because service was not complete but because it was considered, that in the absence of personal service, the appellant was not perhaps aware of it, and it was considered just to have the decision made on merits after hearing her. Moreover, a reading of Section 7 under which the notice was issued makes it clear that it is the issue of notice and not its service, which is material for the purposes of the section because under sub-section (2) of this section, it is on the issue of the notice that the property concerned pending the determination of the question whether it is evacuee property or otherwise, becomes incapable of being transferred or charged in any way, except with the leave of the Custodian. It is, therefore, the issue of the notice and not its service, which sets in motion the proceedings in respect of the property concerned.

17. The order dated January 11, 1956, of the Assistant Custodian (Judicial) discharged the notice under Section 7 of the Act, which was no other than the one, issued before November 25, 1953, and whereby, as already stated, the proceedings for declaring the property concerned as evacuee property, were initiated and in pursuance of which the ex parte order was made on November 25, 1953. According to Mr. Aurora the said order dated November 25, 1953, declaring the appellant's property as evacuee property, had the effect of discharging the notice under Section 7, which should be considered to have been exhausted. This is a totally unacceptable argument. The said order did not discharge the notice. On the other hand in the absence of cause being shown against the intended action, which the notice had call-

ed upon the appellant to show, the proposal to declare the appellant evacuee had become absolute and confirmed. The notice was confirmed by the said order and not exhausted or discharged. If the said order is to be taken as final and termination of the proceedings started by the notice, then the property remains evacuee property, but the appellant herself challenged the finality of the said order and moved to set it aside; and it was set aside. As a result, the notice under Section 7, which had not been discharged, continued to hold the field. On May 7, 1954, in any case the appellant's property was an evacuee property. The setting aside of that ex parte order removed the declaration of the property as evacuee property, but did not remove the fetters that had been clamped on the property on the issue of the notice under Section 7, by virtue of Section 7 (2) of the Act. The proceedings in respect of the appellant's property which ultimately came to an end by the order dated January 11, 1956, of the Assistant Custodian (Judicial) had thus been on the run from before November, 1953, and were pending on May 7, 1954. The learned single judge, therefore, was in error when he observed that no appeal was pending on the specified date and that "the case may not thus fall under proviso (a) to Section 7-A". The case on the other hand, was actually covered by the proviso (a) to Section 7-A of the Act. The declaration of the property as an evacuee property even after May 7, 1954, was thus not barred. In this view of the matter the setting aside of the order dated January 11, 1956 of the Assistant Custodian (Judicial), if it be set aside and even if it ultimately results in the declaration of the property to be evacuee property would not conflict with Section 7-A of the Act, as that declaration would be as a consequence of the notice issued before November, 1953.

18. The setting aside of the order dated January 11, 1956, even otherwise cannot be said to have the effect of declaring Mst. Ahmad Bi, an evacuee or non-evacuee. It will merely bring the case back to the order dated June 28, 1955, according to which the investigation which had started with the notice under Section 7 issued before November, 1953, was to be proceeded with. No new proceedings are to be initiated.

19. The learned counsel then submitted that under the garb of exercising revisional powers, a fresh enquiry cannot be instituted to admit new evidence. Support was sought from the Bench decision of the Circuit Bench of the Punjab High Court at Delhi in (L. P. A. No. 92-D of 1961, D/- 13-1-1965 (Punj)). One Jamil-ur-Rehman the respondent in that case, had been declared non-evacuee in 1951. The notice issued under Section 7 of the Act was discharged by the order of Assistant Custodian made on 26th March, 1951,

and the properties were resumed by the respondent. It was then in March, 1955, that the Authorised Deputy Custodian issued a fresh notice presumably under Section 26 informing him that the order of the Assistant Custodian was liable to be revised and set aside. A second notice dated April 6, 1955, was issued presumably under Section 7 to the effect that the respondent was an evacuee and was called upon to show cause why he should not be declared as such and his property be declared as evacuee. It was under these circumstances that the Bench held that there was no proceeding for declaring the property to be evacuee property which was pending when the said two notices were issued. The argument that the power to review could be "used to reopen the proceedings concluded long before May 7, 1954, so as to evade the provisions of Section 7-A" was repelled, by the learned Single Judge before whom the case came first for hearing and whose decision was approved and upheld by the Bench. It was held that this would "amount to ignoring the opening words of that section that notwithstanding anything contained in this Act, no property shall be declared to be evacuee property on or after May 7, 1954." The learned single judge did not consider that "under Section 26 anything more than a review of the case on record as it stood was intended and it was never intended to start altogether new inquiry under this provision." Falshaw, C. J., delivering the judgment of the Bench quoted this passage from the judgment of the single judge with approval. The ratio of their Lordships' decision was that "property in dispute could not be declared to be (evacuee property in proceedings instituted in 1955 in spite of the ban imposed by Section 7-A on the declaration of any property to be evacuee property after May 7, 1954, the case not falling under either of the exceptions (a) or (b)." In the case before us, the notice issued before November, 1953, unlike the case before the Punjab Bench was not discharged before January 11, 1956. Proceedings were, therefore, not instituted after May 7, 1954, but were pending on the said crucial date and exception in proviso (a) to Section 7-A prevented the said Sec. 7-A from creating the bar to the declaration of the appellant as an evacuee. In the case of Jamil-ur-Rehman, the property was not evacuee and has been resumed by him and nothing further was required to be done on May 7, 1954. In the case before us, however, the property concerned was not free from the mischief of Section 7 of the Act. The said judgment of the Punjab High Court, therefore, has no application to the facts of the present case.

20. In AIR 1963 Punj 494 certain land had been transferred to the petitioner-company by the Custodian of Evacuee property under the provisions of Kapurthala State

Evacuees (Administration of Property) Act, 1948, and in pursuance of an agreement between the petitioner and the Government of His Highness the Maharaja of Kapurthala, by which the Government had agreed to acquire and transfer to the petitioner-company full proprietary rights in the land. After the merger of the State with the Patiala and East Punjab States Union, the Authorised Deputy Custodian (Judicial) of Evacuee Property Pepsu served a notice dated April 30, 1953, under Section 7 (1) of the Act calling upon the company to show cause why the land be not declared evacuee property. By order dated November 8, 1953, the Deputy Custodian (Judicial) discharged the notice and held that the land had already vested in the company under orders of the government of Kapurthala and the Custodian. On July 13, 1959, the Custodian General served a notice on the petitioner-company, to show cause why the order dated November 8, 1953, of the Deputy Custodian discharging the said notice under Section 7 (1) be not set aside. By order dated October 9, 1961, the Deputy Custodian General declared that the land had not been properly transferred to the company and directed the Additional Custodian to enquire into the proper value of the land; and if the deficiency in price, which may be discovered, was made within the prescribed time, the transfer of the land was ordered to be considered valid, otherwise the order of the Deputy Custodian (Judicial) was to be set aside. The High Court came to the conclusion that the sale of land to the company was not proved to have been made in accordance of the then prevailing law and, therefore, the order of the Deputy Custodian General was not wrong. Considering the effect of Section 7-A of the Act, A. N. Grover, J., (as he then was) spoke for the Bench and observed:—

“..... No fresh declaration or proceedings were being initiated for declaring it to be evacuee and all that the Deputy Custodian General had to decide on the revisional side was whether the order made by the Deputy Custodian (Judicial) was legal or proper. Once the finding was set aside, the land had to be treated as evacuee property, but by so doing the Deputy Custodian General was not making any order contrary to Section 7-A. He was only deciding that the sale or transfer was not valid, with the result that the order of the Deputy Custodian (Judicial) releasing the property stood reversed.”

21. Against the aforesaid order of the High Court, the petitioner-company took up the matter to the Supreme Court in appeal; and the order of the High Court was set aside, vide judgment D/- 2-4-1963 in Jagatjit Distilling & Allied Industries v. Deputy Custodian, Civil Appeal No. 671 of 1966 (SC). The effect of Section 7-A of the Act, however, was not considered. Their Lordships of the Supreme Court on the other hand reviewed the evidence and held that

the Custodian of Evacuee Property in whom the land stood vested in 1948 had validly transferred it to the company. The Deputy Custodian General, therefore, was held to have no jurisdiction to call upon the company to pay the price of land as assessed by the Additional Custodian. Nothing was said about the observation of A. N. Grover, J., cited above regarding the applicability or non-applicability of Section 7-A of the Act.

22. It is thus manifest that Section 7-A of the Act imposes a ban on the initiation of fresh proceedings for declaring a given property as evacuee property. It does not come in the way, if such proceedings had been initiated prior to May 7, 1954. The case before us, therefore, remains unaffected by the provisions of Section 7-A.

23. Regarding fresh evidence at the stage of revision, Rule 31 (9) of the Administration of Evacuee Property Central Rules, allows admission of additional evidence in a case where powers of revision are being exercised on an application for revision by an aggrieved party. It does not deal with the case of suo moto revisions. In the present case the evidence has to be led not directly on the merits of the case, but in order to find out if a fraud had been committed and material facts have been suppressed. The enquiry, by its very nature therefore, cannot be confined to the record as it is. The facts which have been suppressed and kept away from record by fraud, have to be proved and for this purpose evidence has to be led which is not already on record; and there is no bar to the admission of such evidence. The Custodian General on certain facts coming to his notice, has to satisfy himself as to the legality or propriety of the order intended to be revised. For this purpose, observing the principles of natural justice, he has to call upon the appellant to show cause against the proposed action. The proviso to Section 27 of the Act, specifically enjoins upon the Custodian General not to pass any order prejudicial to any person without giving him reasonable opportunity of being heard. For that purpose show cause notice under Section 27 was issued to the appellant in this case. She put in appearance before the Deputy Custodian General and as is mentioned in the order dated August 20, 1964, of the Deputy Custodian General of Evacuee Property, both parties made a request to be permitted to produce oral as well as documentary evidence in support of their respective contentions. Permission having been granted, evidence has to be recorded. There is nothing wrong, in the circumstances of this case, therefore, to admit evidence for deciding the question whether there was any justification for the exercise of suo moto revisional powers. The objections of the learned counsel for the appellant, therefore, cannot be sustained.

24. The learned counsel for the appellant then contended that declaration which

was once made about the appellant being a non-evacuee, prevented any fresh trial being conducted in order to upset the said finding. The earlier order, according to him, was binding and conclusive in all subsequent proceedings between the parties. This objection, however, was never urged before the learned single Judge and for that reason it is not permissible to go into that question at this stage. Even otherwise if the allegations of fraud and of suppression of facts by the appellant are proved and established, the earlier order, if any, would be vitiated. The question of the applicability of principles of res judicata in this case would not arise. The deciding factor has to be established whether fraud has or has not been committed. Once fraud is established there would be no bar to the exercise of the revisional powers conferred on the Custodian General under Section 27 of the Act.

25. The learned Single Judge was, under the circumstances right in reaching the conclusion which he did although on somewhat different grounds. The appellant has not been able to establish her case. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 DELHI 167 (V 57 C 35)

HARDAYAL HARDY AND V. S.

DESHPANDE, JJ.

The Birla Cotton Spinning & Weaving Mills Ltd., Birla Mills Ltd., Appellant v. The Employees State Insurance Corporation, Respondents.

F. A. F. O. No. 57-D of 1958, D/- 23-12-1969, from order of Judge Employees Insurance, Delhi, D/- 10-1-1958.

(A) Employees' State Insurance Act (1948), Section 2 (9) — 'Employee' — Workers in administrative departments etc. of manufacturing Company — Their work connected with work of factory — They are employees within Section 2 (9).

The workers employed by a textile manufacturing Company to work outside the factory but in close connection with the work carried on in the factory are employees within the meaning of Section 2 (9) of the Act. The work of employees in administrative Offices of the Company together with the manufacturing process constitutes the work of production in which the Company is engaged. When the manufacturing process carried on in the factory cannot in itself result in the production of goods without the help of these persons, the work done in the office of the factory must be said to be connected with the work of the factory. AIR 1967 SC 1364, Foll. Case law discussed.

(Paras 3, 14)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Employees' State Insurance Act (1948) being a welfare legislation it should be liberally construed.

(Para 9)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 488 (V 57) =

Civil Appeal No. 1644 of 1966, D/-

9-10-1969, Works Manager, Central Railway Workshop v. Vishwanath 13

(1967) AIR 1967 SC 1364 (V 54) =

(1967) 3 SCR 92, Nagpur Electric Light and Power Co. Ltd. v. Employee's State Insurance Corporation 9, 12

(1964) AIR 1964 Andh Pra 291 (V 51) =

(1964) 1 Andh WR 1, Sirsilk Ltd. v. Employees State Insurance Corporation 11

(1963) AIR 1963 Mad 361 (V 50) =

(1963) 2 Mad LJ 77, K. Thiagarajan Chettiar v. Employees State Insurance 11

(1963) AIR 1963 Punj 422 (V 50) =

ILR (1963) 2 Punj 11, Chanan Singh v. Employees' State Insurance Corporation, Amritsar 11

(1962) AIR 1962 SC 29 (V 49) =

1962 (1) Cri LJ 99, Ardeshir H. Bhiwandiwalla v. State of Bombay 6

(1961) AIR 1961 Mad 176 (V 48) =

ILR (1961) Mad 228, 'Employees' State Insurance Corporation v. Ganpathia Pillai 10

(1960) AIR 1960 SC 569 (V 47) =

1960 Cri LJ 750, State of U. P. v. M. P. Singh 7, 11

(1960) AIR 1960 Madras 248 (V 47) =

ILR (1960) Mad 322, Employees' State Insurance Corporation v. Srimululu Naidu 7

(1957) 1 Lab LJ 267 = (1956-57) 11

FJR 462 (Bom), Employees' State Insurance Corporation v. Raman 9

Dalip K. Kapur, for Appellant; Dipak

Choudhary with P. D. Sharma, for Respondents.

V. S. DESHPANDE, J.:— Birla Cotton Spinning and Weaving Mills Limited (hereinafter called the Company) is engaged in the manufacture of cotton textiles. As shown by the plan filed in the Court below, the premises of the Company are enclosed by a compound wall. Inside this compound, there is the main factory building shown inside the red border. Separated from the main factory building by open spaces or roads are other buildings such as godowns, offices, etc. The Company applied to the Employees Insurance Court under Section 75 (1) (a) of the Employees State Insurance Act, 1948 (hereinafter called the Act) for the determination of the question, whether the employees enumerated in the statement at the end of the record of this appeal are covered by the definition of an "employee" in Section 2 (9) of the Act. The Company had pleaded that these persons were not working in the factory nor were they doing work connected with the work of the factory and, there-

fore, they were not "employees" under the Act. The claim of the Company was resisted by the Employees' State Insurance Corporation and by certain employees. The Employees' Insurance Court held that these persons were employees under the Act. Hence this appeal.

2. The sole question for decision, therefore, is whether these persons are "employees" under the Act.

3. None of these employees is working in the main factory building. They are working either in the administrative offices or on other work of the company outside the main factory building and sometimes outside the premises of the Company enclosed by the compound wall. The Unit of production is the Birla Cotton Spinning and Weaving Mills. It has two main divisions. The vast majority of its employees numbering about 5000 are working inside the factory where the manufacturing process is carried on. The minority of the workers with whom we are concerned numbering about 178 are working outside the factory, but in close connection with the work carried on in the factory. Most of these 178 persons are working in administrative offices of the Company the work of which together with the manufacturing process constitutes the work of production in which the Company is engaged. The office work consists of keeping accounts, preparing bills, maintaining record of attendance, correspondence etc., while the outdoor work consists of the watch and ward department, taking delivery of goods from the Railway station and despatching goods to the Railway Station, sweepers, drivers, cleaners and peons. The manufacturing process carried on in the factory cannot in itself result in the production of goods without the help of these 178 persons. The factory workers and the outsiders together produce the goods.

4. The relevant portion of the definition of the word "employee" which governs the present case is contained in Section 2 (9) of the Act, as it stood before it was amended by Act No. 44 of 1966. It is necessary to read the said definition carefully. It is as follows:

"employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer on any work, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere". The above definition covers the following two types of persons, namely:—

(a) Those working in the factory; and

(b) Those working elsewhere but employed for wages in connection with the work of a factory or on any work or of incidental or preliminary to or connected with the work of the factory.

5. The first aspect of the question for decision, therefore, is whether any of the persons described in the attached statement are working in the factory. The definition of the word "factory" for the purposes of the Act is to be found in Section 2 (12) thereof and is as follows:

"factory" means any premises including the precincts thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952, or a railway running shed".

6. As we have stated above, none of these persons is working in the main factory building. The definition of "factory" however means any premises including the precincts thereof. The same expression has been used to define a "factory" in Section 2 (m) of the Factories Act which was also enacted in the same year, namely, 1948, in which this Act was enacted. In construing the word "premises" as used in Section 2 (m) of the Factories Act 1948, the Supreme Court observed in *Ardeshir H. Bhiwaniwala v. State of Bombay*, AIR 1962 SC 29 in paragraph (5) that "the word 'premises' has now come to refer to either land or buildings or to both, depending on the context". In paragraph (6), their Lordships further observed that:

"The expression 'premises including precincts' does not necessarily mean that the premises must always have precincts. Even buildings need not have any precincts. The word 'including' is not a term restricting the meaning of the word 'premises' but is a term which enlarges the scope of the word 'premises'".

In our view, the precincts would be the adjuncts of the premises. The premises could themselves be either the main factory building alone or the whole complex of buildings inside the compound-wall of the premises of the Company. As the main factory building dominates the area inside the compound, it appears to us that the premises of the factory could well mean the whole complex of the buildings inside the compound-wall of the premises of the Company, in a part of which the actual manufacturing process is carried on. Whether the main factory building alone is to be regarded as the premises of the factory or all the buildings inside the compound are to be so regarded depends on the sense of proportion in which the main factory building stands to the other buildings inside the compound. As the factory building is by far the biggest and the most important building, it is arguable that the other buildings are attached parts of the factory. On this view, the persons described in the statement would be working in the factory.

7. Even if the whole area inside the compound-wall is not regarded as the factory, the area outside the main factory building is capable of being regarded as the precincts of the factory. For, the open spaces and the buildings around the main factory building but inside the compound-wall are subservient to the main factory building. They have no other purpose except to serve the needs of the factory. Here again, the precincts are not independent buildings in themselves as they cannot exist independently but only as serving the needs of the factory. They are, therefore, inevitably attached to the factory and may justly be said to form the precincts of the factory. In *State of U. P. v. M. P. Singh*, AIR 1960 SC 569, the fields in which sugar plants were grown for being consumed by the sugar factory could not be regarded as being within the precincts of the factory or in the premises of the factory. Presumably, the fields could not be in the same compound in which the factory was situated and the area of the fields must have been too large to be regarded as being within the precincts or the premises of the factory. On the other hand, in the present case, the area around the main factory building but inside the compound-wall is not so large that it could not be said to fall within the premises or the precincts of the factory. This is why in *Employees' State Insurance Corporation v. Sriramulu Naidu*, AIR 1960 Mad 248, it was held that a number of departments situated in separate buildings but engaged in work connected with the manufacture within the same compound as the main factory building was situated constituted a factory. While we are inclined to hold that the whole area inside the compound-wall of the premises of the Company amounts to the premises and the precincts of the factory, we think that we would not like to give a final decision on this aspect of the question inasmuch as this appeal is capable of being decided finally by considering the second aspect of the question.

8. The second aspect is whether the persons enumerated in the attached statement are employed for wages "in connection with the work of the factory or on any work of or incidental or preliminary to or connected with the work of the factory".

9. As to what work can be said to be connected with the work of the factory is mainly a question of degree. There may be various degrees as to the closeness or the directness of the connection between the work of the factory and the work done elsewhere in connection with the work of the factory. It is possible to take either a strict or a liberal view of such connection. On a survey of the case-law dealing with this aspect of the question, it appears to us that the trend of the judicial opinion has definitely been to abandon the former strict view and to accept a more liberal view in view of the fact

that the Act is a piece of welfare legislation which should be liberally construed. In the *Employees' State Insurance Corporation v. Raman*, (1957) 1 Lab LJ 267 (Bom), the chemicals were actually manufactured by the Eastern Chemicals Company. The sales of the products manufactured by them were, however, looked after by the J. K. Chemicals, Ltd. It was not the case of the *Employees' State Insurance Corporation* that the Eastern Chemicals Company, as one company, ran two departments in one of which chemicals were manufactured and in the other, they were sold. On the contrary, the work of the factory proper was confined only to the manufacture while the work of the sales was done by another company. Their Lordships observed that:

"If we were dealing with the case of factory which, as one unit, runs two departments, perhaps different considerations may have come into play". On the special facts of the case, therefore, the decision was that the employees doing the work of sales in the J. K. Chemicals Ltd. were not the employees of the factory of the Eastern Chemicals Company. It is precisely on these special factors that this decision was distinguished later by the Supreme Court in *Nagpur Electric Light and Power Co., Ltd. v. Employees' State Insurance Corporation*, AIR 1967 SC 1364 which will be referred to later.

10. In the *Employees' State Insurance Corporation v. Ganpathia Pillai*, AIR 1961 Mad 176 the persons employed in the Managing Agents office were not doing any work connected with the work of the factory which was regarded as the actual manufacturing process. Apparently the connection insisted upon was a direct or immediate connection which was found to be wanting. It will be seen that this strict view has not found favour with subsequent decisions.

11. In AIR 1960 SC 569 referred to above, while the field workers employed in the sugar-cane fields could not be said to be employed in the precincts or the premises of the factory, they had been held by the High Court to be employed "in work connected with the subject of the manufacturing process". This finding of the High Court was not varied by the Supreme Court in paragraph (6) of the decision. This shows the trend of the liberal view of the word "connection". In *K. Thiagarajan Chettiar v. Employees' State Insurance Corporation*, AIR 1963 Mad 361 even the gardeners, building workers, office attendant, watchman etc., of a textile mill were held to be "employees" on a liberal view of the expression "work connected with the work of the factory". In *Chanan Singh v. Employees' State Insurance Corporation*, AIR 1963 Punj 422 a person working as Accountant and doing work connected with the sale and distribution of the products of the factory was also held to be an "employee" as his work was connected

with the work of the factory. In *Sirsilk Ltd. v. Employees' State Insurance Corporation*, AIR 1964 Andh Pra 291 workmen in the canteen attached to the factory were held to be employees inasmuch as their work was also connected with the work of the factory since they fed and entertained persons actually engaged in the manufacturing process.

12. This process of liberalising the concept of "work connected with the work of the factory" reached its final phase in AIR 1967 SC 1364 in which the work of the following persons was held to be "in connection with the work of the factory or incidental or preliminary to or connected with the work of the factory", namely, engineers, supervisors, electricians, and overseers engaged in the erection and maintenance of the electricity supply lines, cable joiners, mistries, linemen, coolies and wiremen employed for inspection of the supply lines, digging pits, erecting poles for lying distribution mains etc., masons, motor drivers and cleaners, clerks, draughtsmen and main office peons, store-keepers, meter superintendents, meter mechanics, accountants and even the telephone operators. It is to be noted that this decision is not based on an extended definition of the word "factory". In paragraph (8) of the report, their Lordships stated that they did not accept the proposition that wherever the manufacturing process was carried on, there was the factory. On the contrary, their Lordships approved of the proposition that "a factory must occupy a fixed site" in 17 Halsbury's Laws of England p. 15. This shows that the decision cannot be explained as being due to the special nature of the electric supply work. The work of the electric supply is spread over a large area and is not confined to a factory building. The basis of the decision is that the work of persons working outside the factory building over a large area was connected with the work of the factory and, therefore, all these persons were "employees" under the Act.

13. In the latest decision of the Supreme Court in the *Works Manager, Central Rly. Workshop v. Vishwanath*, (Civil Appeal No. 1644 of 1966, D/- 9-10-1969) = (reported in AIR 1970 SC 488) their Lordships were considering the definition of "worker" in Section 2 (1) of the Factories Act, 1948 which is more restricted than the definition of "employee" under the Act. The expression with which their Lordships were concerned was "work incidental to or connected with the manufacturing process or the subject of the manufacturing process". Their Lordships observed that:

"It is probably true that all legislation in a welfare state is enacted with the object of promoting general welfare; but certain types of enactments are more responsive to some urgent social demands and also have more immediate and visible impact on social vices by operating more directly to achieve social

reforms. The enactments with which we are concerned, in our view, belong to this category and, therefore, demand an interpretation liberal enough to achieve the legislative purpose, without doing violence to the language."

Therefore, the time-keepers who prepare the pay sheets of the workshop staff, maintain leave account, dispose of settlement cases and maintain records for statistical purposes were held to be "workers". The observations of their Lordships are applicable to the construction of the word "employee" in the Act which is also an enactment more responsive to an urgent social demand and in the same category as the Factories Act.

14. A look at the duties of the persons listed in the statement would show that all of them are intimately concerned with the work of the factory. They are all employed by the same Company which is running the factory. They are, therefore, different departments of the same Company, the object of which is to manufacture textiles. The manufacturing process cannot be carried on without the help of these office workers. It would be too artificial a view of a work in a factory to say that only the actual manufacturing staff should be regarded as doing the work of a factory. For, the manufacturing staff would be unable to function unless the other connected work is done by other persons. The work done in the office of the factory must, therefore, be said to be connected with the work of the factory and, therefore, the office workers must also be said to be "employees" under the Act. It is true that the preamble of the Act says that the Act was to provide for certain benefits to employees in case of sickness, maternity and employment injury. It may also be that the risk of employment injury may be greater to a worker actually carrying on the manufacturing process as compared to the office worker. But sickness and maternity are common to both the manufacturing workers and the office workers. The Act deals comprehensively with all these risks. This is why the definition of an "employee" under the Act covers not only the manufacturing workers but also persons doing work connected with the manufacturing work. On this view, the office workers are "employees" under the Act. We find so. Incidentally, it may be stated that the amendment of the definition of "employee" in Section 2 (9) of the Act by Act No. 44 of 1966, confirms the liberal view of the "connection" between the manufacturing process carried on in the factory and the work done in the office of the factory. The liberal construction adopted by us in this decision is, therefore, shown to have been in accordance with the intent of the legislature.

15. The appeal is, therefore, dismissed but without any order as to costs.

Appeal dismissed.

AIR 1970 DELHI 171 (V 57 C 36)

V. S. DESHPANDE, J.

Labh Singh Atma Singh, Petitioner v. Union of India and others, Respondents:

Civil Writ No. 834-D of 1963, D/- 18-9-1969.

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 33 — Residuary powers of Central Government — Application under Section 33 to set aside order of Chief Settlement Commissioner — Rejection by Deputy Secretary — Legality.

Where an application under Section 33 of the Act made to the Central Government for setting aside the order of the Chief Settlement Commissioner is rejected by the Deputy Secretary who acted for the Central Government under the rules of business, the order is not liable to be set aside on the ground that the Deputy Secretary was not higher in Status than the Chief Settlement Commissioner or that he was not authorised under Section 34 to exercise the powers of Central Government. (Para 7)

The decision of the Central Government under Section 33 being an institutional decision any authorised officer may deal with the business in question on behalf of the Government. The fact that a particular case was dealt with by him cannot be challenged on the ground that the decision under appeal dealt with by him was given by an Officer, who was higher in rank. For, every officer acting for the Government under the Rules of business is acting not for himself, but for the Government who is the highest authority. (Para 6)

(B) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 34 — Delegation of powers by Central Government — Word 'also' in Section 34 (1) indicates that delegation of powers is in addition to usual machinery established by rules of business to act for Government — AIR 1962 Punj 164, Rel. on. (Para 7)

(C) Constitution of India, Article 77 (3) — Executive power of Union — Transaction of Business Rules made by President — Power of Deputy Secretary to transact business without separate authorisation.

Under the Transaction of Business Rules made by the President under Article 77 (3) the business of the Government is authorised to be done by various officers on behalf of the Government. Unless a certain item of business is specified to be done by the Minister himself or by the Secretary himself, the rest of the business can be done by any of the Officers of the usual hierarchy in the Ministry, starting at the bottom with the Under-Secretary and ending at the top with the Secretary. The Deputy Secretary being an Officer in this hierarchy, is entitled to transact the business of the Government under the Transaction of Business Rules. It

is not, therefore, necessary for the Government to issue any separate authorisation to these officers for transaction of any particular business on behalf of the Government.

(Para 6)

(D) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 33 — Residuary power of Central Government — Nature of — Distinction between revisional power of Chief Settlement Commissioner under Section 24 (1) and that of Central Government under Section 33 — Procedure to be followed in dealing with application under Section 33 — Petitioner cannot claim oral hearing.

Though the power exercisable under Section 33 by the Central Government may in some respects be similar to the power exercisable by the Chief Settlement Commissioner under Section 24 (1), in fact, it is only the nature of the two powers that is similar. Everything else regarding them is different. While power under Section 24 is exercised in every case, the power under Section 33 is a residuary power which is hardly, if ever, exercised. It is not exercised as a matter of course. The power under Section 24 is exercised by a definite officer appointed under the Act but the power under Section 33 is just kept in reserve for the Central Government as a last resort if needed in any special case. It is exercised by an institution and not by any particular person. As the proceeding under Sec. 33 is neither an appeal nor a revision within the meaning of the Act and the Rules, Rule 105 does not apply to it and, therefore, an oral hearing could not be claimed by the petitioner under Section 33 by relying upon Rule 105. (Para 9)

(E) Displaced Persons (Compensation and Rehabilitation) Rules (1955), Chap. XVIII — Procedure for Appeal, Review and Revision — Chapter cannot apply to residuary powers of Central Government under Section 33 of Act — Hence Rule 105 cannot apply to proceeding under Section 33. (Para 9)

(F) Civil P. C. (1908), Pre. — Interpretation of Statutes — Same word occurring in statute is to be construed in same sense unless context otherwise indicates — Words used in Act to be construed also in same sense when used in Rules framed thereunder. (Para 9)

(G) Constitution of India, Article 226 — Natural justice — Principles of — No rule that at every stage a person is entitled to a personal hearing — Right to personal hearing is not a necessary part of audi alteram partem rule — Case law Ref. (Paras 11 to 13)

(H) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 33 — Residuary power of Central Government — In absence of any provision in Act or Rules giving of oral hearing to petitioner is discretionary — Order not vitiated merely because it was passed without giving oral hearing to

petitioner. AIR 1966 SC 671, Rel. on; and C. W. No. 367 of 1967, D/- 29-10-1968 (Delhi), Dist. (Para 15)

(I) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 33 — Application to Central Government for setting aside order of Chief Settlement Commissioner which was a well-reasoned order — Order of dismissal by Central Government not bad for not repeating reasons with which it agreed. AIR 1967 SC 1606, Applied. (Para 16)

Cases Referred:	Chronological	Paras.
(1968) C. W. No. 367 of 1967, D/- 29-10-1968 (Delhi), Smt. Bishan Devi v. Union of India		17
(1967) AIR 1967 SC 361 (V 54) = (1967) 1 SCR 739, Bharat Barrel and Drum Mfg. Co. v. L. K. Bose		10
(1967) AIR 1967 SC 1606 (V 54) = (1967) 3 SCR 302, Bhagat Raja v. Union of India		16
(1966) AIR 1966 SC 671 (V 53) = (1966) 1 SCR 466, M. P. Industries Ltd. v. Union of India	14, 15	
(1964) AIR 1964 SC 648 (V 51) = (1964) 5 SCR 294, Jayantilal v. F. N. Rana		6
(1962) AIR 1962 Punj 164 (V 49), Beli Ram v. Union of India		7
(1960) AIR 1960 SC 493 (V 47) = (1960) 2 SCR 569, S. Kapur Singh v. Union of India		11
(1960) AIR 1960 SC 606 (V 47) = (1960) 2 SCR 775, Shivji Nathubhai v. Union of India	14	
(1957) AIR 1957 SC 232 (V 44) = 1957 SCR 98, New Prakash Transport Co. Ltd. v. The New Suvarna Transport Co. Ltd.	10	
(1957) AIR 1957 SC 648 (V 44) = 1957 Cri LJ 1026, F. N. Roy v. Collector of Customs	12	
(1950) AIR 1950 SC 27 (V 37) = 51 Cri LJ 1883, A. K. Gopalan v. State of Madras	13	
(1915) 1915 AC 120 = 84 LJKB 72, Local Government-Board v. Arlidge	13	
(1911) 1911 AC 179 = 80 LJKB 796, Board of Education v. Rice	13	
Bhawani Lal with Miss Santosh Gupta, for Petitioner; S. L. Pandhi, for Respondent No. 4.		

ORDER:— The petitioner and respondent No. 4 are occupants of acquired evacuee property being House No. 324/20, Suman Bazar, Bhogal, New Delhi. The petitioner is a non-claimant, while respondent No. 4 was a claimant. The petitioner's application for the division of the property was rejected by Shri K. K. Mittal, Managing Officer, who ordered in June, 1959, as per annexure 'B' to the writ petition, that the Assistant Settlement Commissioner be asked to adjust the amount out of the claim of respondent No. 4 (by transferring the property to him). The appeal of the petitioner against the order of Shri K. K. Mittal was accepted

by Shri I. D. Chaudhry, Assistant Settlement Commissioner, on 11-1-1960, as per annexure 'C' whereby the order of Shri Mittal was set aside and the case was remanded for the determination of the eligibility of the property for division by the Settlement Commissioner under the then existing Rule 30 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955. The petitioner contends that his original application for the division of the property was revived, but the petitioner did not make any fresh application for the partition. The Regional Settlement Commissioner without issuing any notice to the petitioner ordered on 16-1-1962 for adjustment of part value of the property against compensation payable to respondent No. 4. The petitioner's appeal against the order dated 16-1-1962 was disposed of by Shri Parshotam Sarup, Deputy Chief Settlement Commissioner on 21-7-1962 as per annexure 'D' to the writ petition. He accepted the appeal, set aside the order dated 16-1-1962 and remanded the case with the direction that the question of divisibility and eligibility of the property qua parties may be determined after hearing them. The order after such hearing was passed by Shri A. L. Behl, Settlement Officer, with the powers of the Regional Settlement Commissioner, on 6-11-1962, as per annexure 'E' to the writ petition, holding that the property was not divisible.

The revision of the petitioner to the Chief Settlement Commissioner under Sec. 24 (1) of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter called 'the Act'), was dismissed by Shri N. P. Dube, Chief Settlement Commissioner, on 20th May, 1963, as per annexure 'F' to the writ petition, firstly on the ground that no proceeding for the partition of the property was pending on 31-12-1960 and, therefore, the Rule applicable to the case of the parties was the amended Rule 30, which did not provide for partition of the property; secondly, even if it was assumed that a partition proceeding was pending on 31-12-1960 and the unamended Rule 30 was applicable, then on merits the Chief Settlement Commissioner held that the learned Counsel for the petitioner had not been able to convince him that there is a case on merits for the partition of the house. There was concurrent finding of two officers holding that the property was indivisible and Shri Bahl's order explained why it is so in detail. The Chief Settlement Commissioner saw no reason to differ from their conclusion. He, therefore, held that the property could not be partitioned and ordered that it should be transferred to respondent No. 4.

2. The petitioner then applied to the Central Government under Section 33 of the Act for setting aside the order of the Chief Settlement Commissioner. The Central Government, however, dismissed this application on 17-7-1963, as per annexure 'G' to the writ petition on the ground that it saw

no reason to interfere with the order of the Chief Settlement Commissioner.

3. In this writ petition, the orders of the Central Government at annexure 'G' of the Chief Settlement Commissioner at annexure 'T' and of the Settlement Commissioner with the powers of the Regional Settlement Commissioner at annexure 'E', are challenged on the following grounds, viz.:—

(a) That the order of the Central Government dated 17-7-1963 at annexure 'G' was void for three reasons. Firstly, the Deputy Secretary purported to dismiss the application of the petitioner against an order of the Chief Settlement Commissioner, who was a Joint Secretary. The Deputy Secretary was not authorised to deal with the application on behalf of the Central Government. Secondly, no personal hearing was given to the petitioner by the Central Government before dismissing the application by the order at annexure 'G'. Lastly, the said order gave no reasons for the dismissal of the application.

(b) The order of the Chief Settlement Commissioner at annexure 'T', was challenged on the ground of an error of law patent on the face of the record, inasmuch as he held that no proceeding for partition was pending on 31-12-1960 in respect of the property in dispute, though such proceeding was, in fact, pending. The Chief Settlement Commissioner also did not give any reasons for his order.

(c) The order of the Settlement Commissioner with the delegated powers of the Regional Settlement Commissioner, was also wrong. He did not take into account the considered opinion expressed by Shri Parshotam Sarup after inspecting the house personally.

4. Respondents Nos. 1 to 3, viz., the Union of India, The Chief Settlement Commissioner and the Settlement Officer did not defend the writ petition. Respondent No. 4, however, contests the writ petition and points out that the impugned orders were valid because the order of the Central Government was passed by an authorised officer and that it was not necessary that it should have repeated the reasons given by the Chief Settlement Commissioner or that it should have been passed after giving an oral hearing to the petitioner. The order of the Chief Settlement Commissioner was right in holding that no partition proceeding was pending in respect of the house on 31-12-1960. Further, the Chief Settlement Commissioner decided on merits that the property was not divisible. He validly adopted the reasons for this conclusion given by Shri Bahl. The order passed by Shri Bahl was reasoned order and was correct.

5. The questions for decision, therefore, are as follows:

(1) Whether the order of the Central Government under Section 33 of the Act is liable to be set aside on the grounds that it was

passed by an officer not authorised to do so under Section 34 of the Act, because it was passed without giving an oral hearing to the petitioner and because he did not give reasons for the order?

(2) Whether the order of the Chief Settlement Commissioner passed under Section 24 (1) of the Act was bad for an error of law apparent on the face of the record and because he did not give reasons?

(3) Whether the order of the Settlement Officer with the delegated powers of the Regional Settlement Commissioner, dated 6-11-1962, was wrong?

6. The communication of the order of the Central Government to the petitioner was by the letter dated 17-7-1963 at annexure 'G' to the writ petition. It says that the petitioner's application under Section 33 has been rejected by the Deputy Secretary vide his order dated 12-7-1963. Apparently the order of the Deputy Secretary was passed on the file dealing with the application of the petitioner. The communication to the petitioner is signed by a subordinate officer for the Under-Secretary to the Government of India. The order passed by the Deputy Secretary was a quasi-judicial order by an administrative authority. The functions of the Government are generally classified into three divisions, viz., executive, legislative and judicial.

In *Jayanti Lal v. F. N. Rana*, AIR 1964 SC 648, the majority of the Supreme Court observed at the end of paragraph (10) of the judgment that "functions which do not fall strictly within the field of legislative or judicial, fall in the residuary class and must be regarded as executive". Strictly, judicial functions being performed only by the Courts, the Constitution provides for the performance of only the executive and legislative functions by the Government. Therefore, the quasi-judicial functions performed by the Government or the administrative authorities would be regarded as an exercise of the executive power of the Government, inasmuch as the authority exercising such powers are administrative authorities. The functions are quasi-judicial only in the sense that the rules of natural justice have to be followed before deciding the matter. The exercise of these functions by the Central Government is dealt by Articles 53, 73 and 77 of the Constitution. Article 53 (1) says that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through the officers subordinate to him in accordance with the Constitution. Article 77 (3) enables the President to make rules for the more convenient transaction of the business of the Government of India. These Rules are called the Transaction of Business Rules. Under these Rules the business of the Government is authorised to be done by various officers on behalf of the Government. Unless a certain item of business is specified to be done by the Minister himself or by the Secretary

himself, the rest of the business can be done by any of the officers of the usual hierarchy in the Ministry, starting at the bottom with the Under-Secretary and ending at the top with the Secretary. The Deputy Secretary is an Officer in this hierarchy. He is, therefore, entitled to transact the business of the Government under the Transaction of Business Rules. It is not, therefore, necessary for the Government to issue any separate authorisation to these officers for transaction of any particular business on behalf of the Government. In view of this established constitutional position, it was not necessary that the application of the petitioner under Section 33 of the Act should have been heard either by the President himself or by any particular officer. The decision of the Central Government is what may be called an 'institutional' decision as distinct from a personal decision, as I had occasion to point out in an Article entitled, "The one who decides must hear", published in 2 Journal of the Indian Law Institute, pp. 423-433 (1960). In such an institutional decision any authorised officer may deal with the business in question on behalf of the Government. The fact that a particular case was dealt with by him cannot be challenged on the ground that the decision under appeal dealt with by him was given by an Officer, who was higher in rank. For, every officer acting for the Government under the Rules of business is acting not for himself, but for the Government. The Government is the highest authority. It was higher than the Chief Settlement Commissioner, who was an officer of the status of a Joint Secretary. It is immaterial if a Deputy Secretary happened to decide this particular case on behalf of the Government. The decision is still of the Government and is, therefore, by an authority which is superior to the Chief Settlement Commissioner.

7. The Deputy Secretary, who decided the application of the petitioner under Section 33 was apparently not an officer to whom the residuary power of the Central Government to act under Section 33 had been delegated by any notification in the official Gazette issued under Section 34 (1) of the Act. As pointed out in *Belj Ram v. Union of India*, AIR 1962 Punj 164, the use of the word "also" in Section 34 (1) shows that this provision of delegation is in addition to the usual machinery established by the rules of business to act for the Government. It is clear, therefore, that the Deputy Secretary who rejected the petitioner's application was acting for the Central Government under the rules of business and it was not necessary that he should have been either higher in status than the Chief Settlement Commissioner or that he should have been notified under Section 34 (1). The first ground of attack on the order at annexure 'C' of the writ petition, therefore, fails.

8. Was the Central Government bound to give an oral hearing to the petitioner in dealing with his application under Section 33? The answer to this question must be primarily sought in the provisions of the Act itself. Chapter IV of the Act is entitled "Appeal, revision and powers of the officers under the Act." Sections 22 and 23 deal with appeals to the Chief Settlement Commissioner. Section 24 (1) deals with the ordinary power of revision of the Chief Settlement Commissioner. Section 24 (2) deals with the special power of the revision of the Chief Settlement Commissioner in particular cases involving fraud or misrepresentation. Section 24 (3) expressly states that no order which prejudicially affects any person shall be passed under Section 24 without giving such a person a reasonable opportunity of being heard. Section 24 (4) provides that a person aggrieved by the order of a Chief Settlement Commissioner under Section 24 (2) may make an application for the revision of the said order to the Central Government. Section 24, therefore, provides for a revision by the Chief Settlement Commissioner as also for a revision by the Central Government. Chapter IV does not give any other power of revision to the Central Government. Chapter V of the Act is entitled "Miscellaneous". Section 33 occurs in this Chapter and it is entitled "Certain residuary power of the Central Government". It enables the Central Government to call for the record of any proceeding under the Act and to pass any such orders as are not inconsistent with any provisions of the Act or Rules made thereunder.

9. The contention of the petitioner is that the power of the Central Government to act under Section 33 is a power of revision inasmuch as it enables the Central Government to call for the record of any proceeding under the Act just as Section 24 (1) enables the Chief Settlement Commissioner to call for the record of any proceeding under the Act. He says that the nature of the power of the Central Government under Section 33 being similar to the nature of the power of the Chief Settlement Commissioner under Section 24 (1), the power of the Central Government should be regarded as a power of revision. If the question merely was regarding the nature of this power, there would be no difficulty in regarding the nature of the power of the Central Government as being the same as that of the power of the Chief Settlement Commissioner under Section 24 (1). But the question before us is not that of the nature of his power, but of the procedure which the Central Government has to follow in dealing with an application under Section 33. In this respect, the power of the Chief Settlement Commissioner under Section 24 (1) and that of the Central Government under Section 33 are distinct and different from each other. This would be shown by the following reasons:

(a) Section 24 (3) itself provides for the grant of opportunity to a person before the order thereunder is passed against him. Section 33 does not make any such provision. The limitation on the power of the Central Government that its order should not be inconsistent with the provisions of the Act and the Rules must be understood to mean such provisions of the Act and the Rules as would govern and apply to the order passed under Section 33. For instance, it cannot be said that the order under Section 33 cannot be passed without complying with the provisions of Rule 105 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, inasmuch as Rule 105 does not apply to an order to be passed under Section 33 as will be shown later.

(b) The power given to the Chief Settlement Commissioner and to the Central Government under Section 24 is expressly called the power of revision. On the other hand, the power of the Central Government under Section 33 is called "certain residuary powers" and is not called a power of revision. There are sound reasons for this distinction. A full right of appeal on questions of law and fact having been given to the Chief Settlement Commissioner, the power of revision to the Central Government was restricted only to the cases of payment of compensation obtained by fraud or misrepresentation under Section 24. These revisional remedies were thought to be sufficient inasmuch as the Act also provides for full hearing by the Officer passing the orders and also by the appellate Officers. The hearing provided to a party before the Officer passing the order and before the appellate authorities and the revisional authorities was apparently thought to be sufficient by the legislature. This was why no hearing was provided for under Section 33.

(c) Chapter XVIII of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 is entitled "Procedure for Appeal Review and Revision". It is an elementary principle of the construction of statutes that the same word is used for the statute in the same sense unless the context indicates otherwise. On the same principle the words used in the Act are deemed to be used in the same sense in the Rules framed thereunder.

Chapter XVIII of the Rules, therefore, would apply only to the appeals, review and revision in the sense in which these words are used in the Act. It would follow, therefore, that Chapter XVIII would not apply to "certain residuary power of the Central Government" exercisable under Section 33 of the Act. When, therefore, R. 105 applied the procedure of Order 41 of the Code of Civil Procedure to the appeals and revisions under the Act, it must be understood that Order 41 was made applicable only to the proceedings under Sections 22, 23 and 24. The proceedings under Sec-

tion 33 were neither appeals nor revisions and Rule 105 could not, therefore, be understood to have applied Order 41 of the Code of Civil Procedure to those proceedings. It would be against all canons of interpretation of statutes to hold that Section 33 deals with proceedings in appeal or in revision when the Act specifically restricts the appeals to Sections 22 and 23 and revision to Section 24. The very fact that the legislature thought it fit to use the words appeals in Sections 22 and 23 and revision in Section 24, while using the words "residuary powers" in Section 33 is sufficient to show that the legislature wanted to call these three different powers by three different names and to keep them distinct and different from each other. We are not entitled, therefore, to apply Rule 105 to the proceedings under Section 33 merely because the power exercisable thereunder by the Central Government may in some respects be similar to the power exercisable by the Chief Settlement Commissioner under Sec. 24 (1). In fact, it is only the nature of the two powers that is similar. Everything else regarding them is different. While power under S. 24 is exercised in every case, the power under Sec. 33 is a residuary power which is hardly, if ever, exercised. It is not exercised as a matter of course. The power under Section 24 is exercised by a definite officer appointed under the Act but the power under Section 33 is just kept in reserve for the Central Government as a last resort if needed in any special case. It is exercised by an institution and not by any particular person. As the proceeding under Section 33 is neither an appeal nor a revision within the meaning of the Act and the Rules, Rule 105 does not apply to it and, therefore, an oral hearing could not be claimed by the petitioner under Section 33 by relying upon Rule 105.

10. It may be next considered whether apart from the provisions of the Act, natural justice requires that an oral hearing must be given by the Central Government to an applicant under Section 33. In *Bharat Barrel and Drum Mfg. Co. v. L. K. Bose*, AIR 1967 SC 361, the Supreme Court observed in paragraph (9) of the judgment that

"while considering the question of breach of principles of the natural justice, the Court should not proceed as if they are inflexible Rules of natural justice of universal application. The Court has to consider in each case whether in the light of the facts and circumstances of that case, the nature of the issue involved in the inquiry, the nature of the order passed and the interests affected thereby, a fair and reasonable opportunity of being heard was furnished to the person affected."

A similar approach to the question was made in the *New Prakash Transport Co., Ltd. v. New Suvarna Transport Co. Ltd.*, AIR 1957

SC 232, where the Court laid down the following guiding criteria:

"Rules of natural justice vary with the varying circumstances of statutory bodies and the rules prescribed by the legislature under which they have to act and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be put in the light of the provisions of the relevant Act."

11. Let us examine the circumstances of this particular case in the light of the above observation. Firstly, the petitioner in this case had a full hearing by two officers and thereafter by the Chief Settlement Commissioner under Section 24. It is well established that if oral hearing has once been given to a party it is not necessary that it should be repeated at the subsequent stage of the proceeding. In *S. Kapur Singh v. Union of India*, AIR 1960 SC 493, the appellant had been given an oral hearing during the departmental inquiry. On consideration of the report of the Inquiry Commissioner, the President of India gave the appellant notice to show cause why he should not be dismissed from the Government service. The appellant submitted written representation to the President in response to the show cause notice, but was not heard orally by the President. When he complained that the denial of an oral hearing by the President was a breach of natural justice, the Supreme Court repelled the contention by the following words at the end of paragraph (23) of the judgment:—

"An opportunity of making an oral representation not being in our view a necessary postulate of an opportunity of showing cause within the meaning of Article 311 of the Constitution, the plea that the appellant was deprived of the constitutional protection of that Article because he was not given an oral hearing by the President cannot be sustained."

12. Section 188 of the Sea Customs Act, 1878 provided for an appeal to the Chief Customs Authority and Section 191 of the said Act provided for a revision to the Central Government. In *F. N. Roy v. Collector of Customs*, AIR 1957 SC 648, the petitioner complained that he was not given a personal hearing in the appeal under Section 188 and in the revision under Section 191. The Supreme Court negatived the contention in paragraph (11) of the judgment in the following words:—

"There is no rule of natural justice that at every stage a person is entitled to a personal hearing."

13. Right from the inception there has been a complete consensus of judicial decisions that a right to a personal hearing is not a necessary part of audi alteram partem rule. In *Board of Education v. Rice*, 1911 AC 179, the House of Lords held that the Board having followed the procedure indi-

cated by the rules framed under the statute in question, there was no further obligation on the Board to hear the appellant either personally or through his representative or counsel because there was no indication in the statute to that effect. In *Local Government Board v. Arlidge*, 1915 AC 120, the procedure in the appeal was to be such as the Board might by rules determine. The House of Lords observed that what that procedure is to be in detail must depend on the nature of the Tribunal. The Minister is at the head of the Local Government Board. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. When, therefore, the Board is directed to dispose of an appeal, it does not mean that any particular official of the Board is to dispose of it. In these circumstances, Lord Haldane, L. C., concluded by the words "I do not think the Board was bound to hear the respondent orally provided it gave him the opportunity he actually had." These two Houses of Lords decisions have been quoted with approval by the Supreme Court in numerous decisions beginning with *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27. In paragraph (3) of the judgment in *Gopalan's case* Kania, C. J., observed as follows:—

"I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory."

14. It is to be further noted that Displaced Persons (Compensation and Rehabilitation) Act, 1954 and the Rules framed thereunder have established the authorities and officers acting thereunder all over India. In respect of the orders passed by all of them, the Central Government alone can act under Section 33. This is similar to the arrangement under the Mines and Minerals (Regulation and Development) Act, 1948 and the Rules made thereunder by which the Central Government has been given the power of review against the orders passed by all State Governments. In *Shivji Nathubhai v. Union of India*, AIR 1960 SC 606, the counsel for the appellant had argued in para (3) of the judgment that it was incumbent on the Central Government to "hear" the appellant before deciding the review application. The Supreme Court, however, held in paragraph (9) of the judgment that it was incumbent on the Central Government to give a reasonable opportunity to the appellant to represent his case. It is significant that the Court did not use the word "hear", but only used the words "a reasonable opportunity to represent his case". It was apparent that the Court was not emphasising the oral hearing, but merely the necessity of an opportunity, which may mean an opportunity to make a representation in writing, but without an oral hearing. There-

What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such, and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions, and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of error which can be appropriately described as error of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

In *Gangadhar Narsingdas v. Asst. Collector, Customs*, AIR 1968 Goa 105, cited by Mr. Baptista, the case-law on this topic is reviewed at some length. It was said in that case, relying on the observations of Lord Denning M. R. in *R. v. Paddington Valuation Officer*, (1965) 2 All ER 836 at p. 842, that when an error goes to the very root of determination because of wrong approach, decision given by 'quasi-judicial' authorities is amenable to certiorari. The law is well settled that the findings of fact reached by the inferior tribunal are not to be reviewed even if they are erroneous.

3. I shall now address myself to the rival contentions urged at the Bar on this point. The appeal in this case was dismissed on the preliminary ground without going into the merits. The right of appeal being a creature of the statute, its scope has to be determined by reference to Section 22 of the Act and Rule 25 of the Rules. Mr. Bhabha

invoked the provisions of Order III, Rules 1, 3, 3 (1) and 4 (1) of the Indian Civil Procedure Code in support of his argument that the recognized agents were competent to prefer the appeal on behalf of the petitioner-company. In this connection he relied on *Satyanarayana v. Venkata*, AIR 1957 Andh Pra 172 (FB) and on *Srinivasachariar v. Chairman, T. A. Committee*, AIR 1964 Mad 235. Order III, R. 1 provides that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf.

Rule 2 refers to recognized agents. Clause (a) postulates that the recognized agents of parties by whom such appearances, applications and acts may be made or done are persons holding Powers-of-Attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties. Clause (b) is not relevant for the present purpose. Rule 3 (1) provides for service of process on recognized agents as if the same had been served on the parties in person, unless the Court otherwise directs. Rule 4 (1) says that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a Power-of-Attorney to make such appointment. In the Andhra Pradesh case it was concluded: (1) that the presentation of an application for execution is an act required or authorized by law to be done by a party in person, by his recognized agent or by a pleader duly appointed by him in that behalf; (2) that acting includes applying and a pleader who makes an application on behalf of litigant acts for him and cannot do so unless he is duly authorized in that behalf; and (3) that the presentation of an application by a pleader to whom the authority in the prescribed manner under Rule 4 of Order 3, Civil Procedure Code, was not given is only an irregularity which could be cured at a subsequent stage.

In the Madras case the facts were that in an appeal against the order of the Revenue Officer filed before the Taxation Appeal Committee the appeal memo was signed by the Advocate of the assessee and not by the assessee himself, without any vakalat having been filed along with the appeal petition, and the Committee rejected the appeal on the date of hearing on the ground that the advocate had no authority to sign the appeal despite the Advocate's having offered to produce a vakalat. It was held that the appeal should not have been rejected. It was not necessary that the vakalat should have accompanied the appeal petition. If a person

purporting to be the authorized agent of the appellant files an appeal and if he has the necessary authority to so file a petition, it cannot be regarded as defective in any way. If the appeal petition was defective in any manner it was the elementary duty of the body entrusted with the hearing of the appeals to have intimated the appellant and to have permitted the defect to be rectified.

Mr. Baptista refuted the above argument of Mr. Bhabha by stating that reliance cannot be placed on the Code of Civil Procedure, as it is not applicable to the proceedings before the Custodian and the Administrative Tribunal constituted as the authorities under the Act. Assuming it applies, even then Section 3 of the Act will exclude its application. This submission of Mr. Baptista, it seems, is not without substance. The Administrative Tribunal is an authority of limited jurisdiction. It can exercise only such powers as are conferred on it in express terms or by necessary implication. The Court would interfere when it does not act within the ambit of the powers conferred upon it by the statute to which it owes its existence or when it transgresses the limits placed on its powers by the Legislature or when it does not act in conformity with the fundamental principles of judicial procedure. (*G. D. Labour Union v. Govt. of Goa*, AIR 1969 Goa 17 at p. 29). It cannot, for example, exercise inherent powers, as in the case of a Civil Court under Section 151 of the Code of Civil Procedure.

Order 3 being inapplicable, we have to turn to Section 22 of the Act read with Rule 25 and then decide whether there is an error of law apparent on the face of the record. I shall confine myself at this stage to the situation as on 12th December, 1966, when Dr. Fernando Jorge Colacao filed the appeal within the period of 60 days prescribed by Rule 25 (1). The situation thereafter, in my opinion, is not decisive. Section 22 speaks of "any person aggrieved by an order under Section 5 may prefer an appeal".

It is conceded by the Administrative Tribunal that the petitioner-company is a person aggrieved within the meaning of this Section and, therefore, is a proper authority, but it is said that the appeal is not preferred by it but by its recognized agents and, therefore, it is not according to law. The recognized agents are not aggrieved by the order. The word 'prefer', in its dictionary sense, means "to bring, to apply, to move for" (*Webster's Third New International Dictionary and Dictionary of English Law* by Earl Jowitt). Rule 25 (1) speaks of filing appeals. The word 'file' means "to perform the first act of (as a law suit); to deposit at an office or in Court." It implies something more than 'presented' for admission. It implies that a plaint or memo of appeal has been admitted and put on the file of the Court (*K. J. Aiyer's Manual of Law Terms and Phrases*). Rule 25 (2) speaks of pre-

sentation of appeals. The fact that the appeal was presented by Dr. Fernando Jorge Colacao and later filed in the office of the Administrative Tribunal is not in dispute. The requirements of Rule 25 are thus satisfied. The words 'file' and 'prefer' do not seem to have the same meaning used in the subordinate legislation. The question arises whether the appeal was preferred or brought by a competent person.

Neither Section 22 nor Rule 25 contemplates that an appeal must necessarily be brought by the party aggrieved in person. If this were the intention of the Legislature, it would have said so in express terms. The object of this rule is to afford greater facility to a party or his recognized agent or his pleader to perform certain acts which a party would otherwise be required to do in person, as in the case of an application by an applicant to sue or appeal by an appellant in forma pauperis, which are to be presented to the Court in person, unless they are exempted from appearance in Court (see Order 33, Rule 3 and Order 41 Rule 1 of the Code of Civil Procedure). It is argued by Mr. Baptista that the recognized agents, in this case, cannot be "any person aggrieved" within the meaning of Section 22. This may be so.

It is conceded by Mr. Baptista that an appeal can be filed and presented by them, but he hastened to add that they cannot prefer an appeal on behalf of their principal. This also seems to be the trend of thinking of the Administrative Tribunal. Mr. Bhabha, on the other hand, contended that the Administrative Tribunal having held that *M/s. V. S. Dempo & Co. (Pvt.) Ltd.* are the recognized agents and that the petitioner-company is a person aggrieved by the order of the Custodian within the meaning of Section 22, and further having accepted the position that the principle of Order 3, Rule 1 is embodied in Rule 25, it committed *ex facie* a patent error of law when it held that there was no appeal in accordance with law. This contention seems to be sound. The physical acts of filing, presenting and preferring the appeal in the present case could be performed by the recognized agents who were competent to represent the petitioner company before the local official authorities. It is not the stand of the Administrative Tribunal that the recognized agents had no instructions to prefer the appeal on behalf of the petitioner-company. They were not unauthorized persons.

The appeal was preferred only on behalf of the petitioner-company and in its name by the recognized agents through advocate Dr. Fernando Jorge Colacao. The latter had the authority to prefer the appeal. The distinction drawn by the Administrative Tribunal in para 6, submitted Mr. Bhabha, is a distinction without substance. I agree. Mr. Bhabha also submitted that assuming for the sake of argument that the vakalatnama in

favour of Dr. Fernando Jorge Colaco should have been by the petitioner-company and not by the recognized agents, in that case, Dr. Fernando Jorge Colaco should have been given an opportunity to produce it.

Mr. Bhabha also said that the bringing of an appeal was only an irregularity which was curable at a subsequent stage. The Administrative Tribunal may have acted more reasonably if this action had been taken, but for the present purpose, I would judge the order of the Administrative Tribunal in the light of the situation as it existed on 12th December 1967 when the petition of appeal signed by Dr. Fernando Jorge Colaco was presented and filed. The error of law is to be discovered with reference to this situation. It may be added that the 'show cause' notice under Section 5 (1) was served on the recognized agents as representing the petitioner-company. An amount of more than one lakh of rupees due to the petitioner-company and lying with the recognized agents was also recovered from them as recognized agents. In a manner of speaking what is sauce for the goose is also sauce for the gander. The finding of the Administrative Tribunal that recognized agents can present an appeal, but they cannot themselves bring an appeal on behalf of the petitioner-company discloses an error of law apparent on the face of the record.

It is a 'speaking' order which could be corrected by a writ of certiorari. It has not the inscrutable face of the "sphinx" as was pointed out by Lord Sumner in his classic decision in *R. v. Nat Bell Liquors Ltd.*, (1922) 2 AC 128. Section 22 and Rule 25 obviously have been misconstrued. They have to be given natural and literal meaning unless there is an ambiguity or anomaly. This error goes to the very root of determination because of the wrong approach. The reasons for rejecting the appeal are wrong in law. This finding, it appears, is so "plainly inconsistent" with the scheme of Section 22 and Rule 25 that no difficulty is experienced in holding that an error of law is manifest on the face of the record. The duty of bringing to the Administrative Tribunal an appeal by any person aggrieved can be performed either by the principal or his recognized agents, or his pleader. These provisions do not seem to bar this action. They are enabling provisions and not absolute provisions. The general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment is obeyed or fulfilled substantially. It is well settled that the statutory authority must address itself properly on the exercise of its statutory functions. I am inclined to agree with Mr. Baptista that the Power of Attorney executed afterwards on 16th January, 1967, by the petitioners in favour of Dr. Ataide Lobo with power to delegate cannot render the appeal valid if otherwise defective in substance. The power

of attorney has prospective and not back effect.

9. Mr. Bhabha next argued that having regard to the general scheme of the Act the petitioner-company cannot be declared an evacuee and its properties as evacuee property. What can be so declared, according to him, is a natural person but not an artificial legal person like the petitioner-company. In this connection he drew my attention to the definition of "evacuee property" in Section 2 (f) (ii) of the Administration of Evacuee Property Act 1950 by way of comparison. Mr. Baptista, in his turn, also relied on this scheme in support of his contention that a company can be declared an evacuee and its properties evacuee property. Mr. Bhabha invited my attention to Clause 2 of the Goa, Daman and Diu Administration of Evacuee Property (Amendment) Bill 1969, which defines "person" as including an association of persons or a body of individuals whether incorporated or not. This amendment, according to the Statement of Objects and Reasons appended to the Bill, is clarificatory. The Bill has not yet become law in this territory. I do not wish to express any opinion on this question. The Custodian declared the petitioner-company an evacuee by an ex parte order. The Administrative Tribunal, an Appellate Authority, disposed of the appeal not on merits but on the above technical ground. The powers of superintendence over all Courts and Tribunals cannot be limited by finality of orders, as in Section 22. They can be corrected when the statutory provisions are misread, as in this case. It is for the Administrative Tribunal to entertain and adjudicate this question in the first instance, and, in this connection, Section 37 (a) of the Act is not without significance. This Court need not take upon itself the task of adjudicating it in this petition. The Act creates special remedies and, therefore, the parties are necessarily limited to those remedies. This aspect of the case need hardly be elaborated.

10. In the view taken of the matter that there is an error of law apparent on the face of the record, it is just and proper to direct that the order passed by the Administrative Tribunal dated 6th July, 1967, rejecting the appeal should be quashed. A writ of certiorari may accordingly issue. It may be emphasized that as in life so in law there is no virtue in short cuts. The Administrative Tribunal is vested with a discretion to decide whether the order passed by the Custodian is right or wrong, but this discretion, if I may say so, is to know through law what is just. (*Discretio est discerni per legem quid sit justum*). It is of the utmost importance that where a quasi-judicial function is being exercised, as in the instant case, with the result of depriving persons of their property, the persons aggrieved whether citizen or foreigner should be satisfied that they have been dealt with according to law and

not in disregard thereof. We may do what the law allows us to do. This is our sacred duty. It would be open to the Administrative Tribunal to hear and decide the appeal on merits. The petition is allowed for the reasons mentioned above. In the special circumstances of the case, there will be no order as to costs. Order accordingly.

Petition allowed.

AIR 1970 GOA, DAMAN & DIU 116
(V 57 C 20)

V. S. JETLEY, J. C.

Sri Ananta Datta Gaundalkar, Petitioner
v. P. V. Sinari Dy, Supdt. of Police, Margao
and others, Respondents.

Writ Petn. No. 35 of 1969, D/- 13-3-1970.

(A) Constitution of India, Article 226 —
Writ of certiorari — Principles of natural
justice.

In proceedings before a quasi-judicial authority material relied upon by the authority for its decision must be supplied to the petitioner even without his asking to enable him to make an effective representation — Failure to do so amounts to violation of principles of natural justice and the resulting order is void ab initio. (Para 3)

(B) Motor Vehicles Act (1939), Section 33
(1) (b) — Suspension of registration — Al-
leged use of vehicle for hire without valid
permit — Suspension of certificate of registra-
tion — Principles of natural justice must be followed.

Where the show cause notice did not give names of passengers carried and petitioner was not supplied copies of check report and statements of the passengers-witnesses recorded in his absence it was held that the statutory obligation under Section 33 (1) to give an effective opportunity to make representation was not properly discharged by the prescribed authority carrying out a quasi-judicial function of suspending certificate of registration and that the petitioner was denied the right to cross-examine the witnesses, AIR 1965 Mad 403, Foll. (Paras 3, 4)

(C) Motor Vehicles Act (1939), Section 35
— Appeal against order of suspension of
registration — Appellate Authority also a
quasi-judicial authority — Authority must fol-
low principles of natural justice — The appel-
late authority should have remedied the de-
fects in procedure followed by the original
authority. (Para 6)

Cases Referred: Chronological Paras

(1965) AIR 1965 Mad 403 (V 52) =

ILR (1965) 2 Mad 211, Ramaswami
v. Regional Transport Officer

(1965) AIR 1965 Raj 149 (V 52) =

ILR (1965) 15 Raj 100, Bhagatpura

M. T. Co-operative Society v. K.

S. Jhala

(1963) 1963-2 All ER 66 = 1964 AC

40, Ridge v. Baldwin

(1960) AIR 1960 Punj 8 (V 47),

State v. Onkar Nath

S. K. Kakodkar, for Petitioner; J. Dias
Govt. Pleader, for Respondents.

ORDER:— The short question for consi-
deration in this petition under Articles 226
and 227 of the Constitution is whether there
was compliance with the provisions of Sec-
tion 33 (1) (b) (ii) of the Motor Vehicles
Act, 1939, before the certificate of registra-
tion of the car belonging to the petitioner
was suspended for the maximum period of
120 days.

2. The material facts leading to the peti-
tion may be briefly stated: On 14th August
1969, at about 10.30 a. m. the car of the
petitioner (GDL 1018) driven by his driver
Murlidhar Redcar was checked by Margao
Police on Margao-Colva road and was found
carrying 7 passengers illegally. A 'show
cause' notice dated 21st August, 1969, was
issued to the petitioner requiring him to
show cause as to why the certificate of re-
gistration granted to him should not be sus-
pended. On 1st September, 1969, the peti-
tioner, in reply to this notice, wrote that on
enquiry from his driver Redcar he under-
stood that a few persons including 3 to 4
fisherwomen begged of him to give them a
lift. The driver, on humanitarian grounds,
seeing that it was heavily raining, gave them
a lift. The driver had been asked by him
to contact a mechanic of the petitioner
before these persons were carried in the car.
The petitioner denied that the driver car-
ried them for any fare. The respondent
No. 1, after considering the representation of
the petitioner, found that the driver had car-
ried 7 passengers in the car not on huma-
nitarian grounds but for hire. In this view
of the matter he passed an order suspending
the certificate of registration for the maxi-
mum period mentioned above. The peti-
tioner felt aggrieved by this decision and
preferred an appeal to the respondent No. 2.
This respondent did not accept the version
of the petitioner that 7 persons were carried
on humanitarian grounds. He agreed with
the respondent No. 1 that they were carried
for hire. He, therefore, upheld the order
passed by the respondent No. 1 suspending
the certificate of registration and dismissed
the appeal. The petitioner then approached
this Court for relief in the exercise of its
writ jurisdiction.

3. Section 33 (1) of the Motor Vehicles
Act, 1939, to the extent it is relevant for
the present purpose, reads thus:—

"If any registering authority or other pres-
cribed authority has reason to believe that
any motor vehicle within its jurisdiction—

(b) has been, or is being, used for hire or
reward, without a valid permit for being
used as such,

the authority may, after giving the owner
an opportunity of making any representation

he may wish to make (by sending to the owner a notice by registered post acknowledgement due at his address entered in the certificate of registration), for reasons to be recorded in writing, suspend the certificate of registration of the vehicle—

(ii) in any case falling under clause (b), for a period not exceeding four months." (hereinafter referred to as "the Act").

The respondent No. 1, a Deputy Superintendent of Police, is the "other prescribed authority", within the meaning of this section read with Rule 3 (20) of the Goa, Daman and Diu Motor Vehicles Rules, 1965 made under the Act. He was therefore competent to act under the section. The words "reason to believe"; "after giving the owner an opportunity of making representation"; and "for reasons to be recorded in writing" imply that the function of suspending the certificate of registration is quasi-judicial and not administrative. The words "reason to believe" mean that the prescribed authority should have sufficient cause to believe. Did the driver carry 7 passengers in the car for hire or reward? As the respondent No. 1 is invested with legal authority to determine and decide this question objectively, he is under a duty to act judicially, not like a judge but something analogous to the duties of a Judge, in suspending the certificate involving civil consequences. He is thus required to observe the principles of natural justice. The words "after giving the owner an opportunity of making his representation" are positive words requiring that these principles should be observed, but even when there are no such words in a statute, yet justice will supply the omission of the Legislature where rights of parties are affected: *Ridge v. Baldwin*, (1963) 2 All ER 66 (HL). No one is to be condemned unheard. What the section envisages is an effective opportunity and not a nominal opportunity. *Audi alteram partem* is one of the first principles of justice.

4. The material part of the order of the respondent No. 1 reads thus:—

"From the facts of the case it is found that the 7 (seven) persons who were carried in the car were passengers. The contention of the owner that they were taken on humanitarian grounds as they were stranded on the road is not at all supported by the passengers who on the contrary have categorically stated that they boarded the taxi at the Comunidade building Margao on the invitation of the driver. One of the passengers has even reiterated that on earlier occasions also she had travelled in the same car and had paid the fare. Furthermore none of the passengers are either related or acquainted with the driver so as to give them a free lift. All this goes to prove beyond doubt that the vehicle No. GDL-1018 was used illegally for hire."

This order is assailed by Mr. S. K. Kakodkar, learned counsel for the petitioner, on

the ground that it does not comply with the requirements of Sec. 33 (1) (b). According to him, in absence of the check report or the statements of 7 passengers, the petitioner had no effective opportunity to represent his case and, in support of this contention, he relies on *Ramaswami v. R. T. Officer*, AIR 1965 Mad 403. The facts of this case are on all fours with the facts of the present case. The learned Single Judge of the Madras High Court construed this section, in the context of the facts found, thus:—

"Such an opportunity must be an effective one and in order that it may be effective it is necessary that the owner must be given a copy of the check report or he must be told in some form the material on which the registering authority has formed its belief, so that he may have the opportunity of countering it, if he can. The requisite of giving an opportunity is not merely a formal thing, but it is a matter of substance, more especially when an elaborate enquiry, notwithstanding the fact that the charge will be of criminal nature, is not contemplated by the statutory provision

..... In this case, the registering authority merely referred to the explanation of the petitioner denying the use of the car as a taxi and declined to accept it on the ground that the check report of the Sub-Inspector gave clear details. The Collector, the appellate authority, also referred to the check report as containing details furnishing the reason why the petitioner's explanation should not be accepted. It is, therefore, obvious that both the authorities below relied on the check report, without furnishing a copy thereof to the petitioner. That clearly is a denial to the petitioner of the opportunity required by the law, to make his representation.

..... It is sufficient to say that failure to furnish a copy of the check report containing such information is contrary to the procedure prescribed by Section 33 (1)."

The justification for this passage is that it effectively rebuts the arguments of Mr. Dias, learned counsel for the respondents, that there was compliance with this section. Did the petitioner have an opportunity to represent effectively in absence of the check report or the statements of the 7 passengers? This was the material in support of the belief of the respondent No. 1 that these passengers had been carried for hire, and not on humanitarian grounds. Did they really state that they were carried for hire? Did the woman passenger in particular say what is attributed to her? What she is stated to have said, has, indeed, serious consequences for the petitioner. This section does not make the respondent No. 1 the sole judge to determine these facts on the basis of his own personal opinion. Mr. Dias, states that the 'show cause' notice served on the petitioner gives sufficient information for the purposes of representation. This is not correct. All that it intimates is that the driver

had carried these passengers illegally and that is all. The names of the passengers are not mentioned. The substance of what they are reported to have said is also not mentioned. What the prescribed authority did was to merely refer to the explanation of the petitioner denying the use of the car for hire. This explanation he declined to accept on the ground that it was not borne out by the statements of the passengers. In *Bhagat-pura M. T. Co-op. Society v. K. S. Jhala*, AIR 1965 Raj 149, this section also came up for consideration and the learned Judges of the Rajasthan High Court observed:—

“Now the opportunity of making the representation can, by no means, become effective unless there is the opportunity to make good that representation and in a fit case where evidence can alone make good the representation the opportunity to adduce evidence will have to be afforded. The decision that the authority has to reach is not contemplated to be a capricious or an arbitrary one, but should only be reached in a reasonable manner after the required opportunity of making the representation to the owner of the vehicle is given.”

5. It is next argued by Mr. Dias that the petitioner could have asked for the check report and the statements of these passengers and since he did not do so therefore the respondent No. 1 was not under a duty to disclose this material. This approach is wholly misconceived. It is a legal duty of a quasi-judicial authority to disclose to the party affected the material which forms the basis of his decision. The principles of natural justice require performance of this duty. It is not for the party affected to ask for it. It is a prejudice to any man to be denied justice. It is also said by Mr. Dias that the result would not have been different if the check report or the substance of the statements of the passengers had been supplied to the petitioner. In other words, it may be said that nothing the petitioner could have said could have made any difference. It is doubtful if this argument can be regarded as a valid excuse for not giving an effective opportunity to the petitioner to represent his case. What his defence would have been need not be speculated. A similar argument, in a different context, was advanced at the Bar in (1963) 2 All ER 66 (Supra), at p. 81 and it was negated by Lord Reid in the following words:—

“I need not consider what the result would have been if the Secretary of State had heard the case of the appellant and then had given his own independent decision that the appellant should be dismissed. But the Secretary of State did not do that. He merely decided “that there was sufficient material on which the watch committee could properly exercise their power of dismissal under Section 191 (4)” of the Municipal Corporations Act, 1882. So the only operative decision is that of the watch

committee, and if it was a nullity, I do not see how this statement by the Secretary of State can make it valid.”

This was a case where in exercising the power of dismissal of the Chief Constable conferred under the Municipal Corporations Act 1882, there was infraction of the principles of natural justice. In *State v. Onkar Nath*, AIR 1960 Punj 8, cited by Mr. Kakodkar, while considering a similar argument in the light of Article 311 of the Constitution, that the Government servant did not ask for reasonable opportunity, Grover, J., (as he then was) said:—

“The requirement of reasonable opportunity does not depend upon the Government servant asking for it. It is a statutory protection that is afforded to the servant and a statutory obligation cast upon the State and it is for the State to discharge that obligation irrespective of whether the protection is claimed by the servant or not. If the Court holds that reasonable opportunity was not given the order of dismissal must be set aside and the Court cannot be influenced by the consideration that the dismissed servant did not ask for a reasonable opportunity.”

There is a statutory obligation under Section 33 (1) (b) imposed on the prescribed authority to give the owner an opportunity of making any representation he may wish to make. This obligation has to be discharged by the State, and in the absence of the check report or the statements of the witnesses, it cannot be said that an effective opportunity was given to the petitioner to substantiate his representation. The statutory protection will be rendered ineffective if the statutory obligation is not discharged. In the light of these decisions, Mr. Dias was left with no alternative but to concede that the check report should have been supplied and since this was not done, there was violation of the principles of natural justice, but he repeats his earlier argument that the ‘show cause’ notice satisfies the requirements of this Section. This does not call for any further comment. In the counter-affidavit it is affirmed that the petitioner did not ask for an oral hearing or an opportunity to cross-examine the passengers. It was not possible for the petitioner to ask for this opportunity in absence of the check report or the statements of the passengers. It was for the respondent No. 1 to have performed the statutory duty imposed upon him.

6. The next question for consideration is whether the serious defects noticed in the order of the respondent No. 1 were remedied, in an appeal under Section 35 (1) of the Act, by the respondent No. 2. The respondent No. 2 also is a quasi-judicial authority. It is true that he is not required to administer justice as a Court of law but he is undoubtedly required to apply his mind to the facts of the case and then decide the appeal on merits. The appellant and the respondent No. 1 appeared before him in accordance with the provisions of Sec. 35 (2)

of the Act, and placed their respective points of view before him. I shall briefly examine the order passed by him and endeavour to show that he did not seriously apply his mind. The first part of the order sets out the rival contentions of the parties. The second part deals with the arguments urged before the respondent No. 2 and the third part gives reasons. In the memo of appeal preferred, it was pleaded that the petitioner was not given an opportunity of a personal hearing; he was not shown the statements of the passengers which were recorded in his absence; and the respondent No. 1 relied upon these statements and the check report which were not recorded in the presence of the driver of the petitioner. It was further pleaded that the petitioner is a well-to-do businessman in Margao, having an established firm and that "the very charge of 'hire' is something which degrades his prestige in the business market". Section 33 (1) (b) was inserted to check the growing abuse on the part of the owners of private cars to carry passengers for hire without a valid permit, but cases for suspension of certificates of registration are to be decided on the basis of the evidence and not on irrelevant considerations. They affect the right of the car owners to ply their vehicles. The respondent No. 2 may not be wrong when he speaks from experience that "carrying passengers on hire unauthorisedly is a lucrative business". The fact that the car had carried seven occupants or passengers when it was intercepted is not in dispute, but what is seriously disputed by Mr. Kakodkar is the conclusion recorded by the respondent No. 2:—

"It is difficult to believe that such a large number of passengers were being carried by the driver purely on humanitarian grounds. The collection of these passengers from a point only about 50 yards from the regular taxi stand and the destination at Colva, lend weight to the contention of the Sub-Divisional Police Officer."

Mr. Kakodkar submits that the petitioner was not even informed that his driver had collected these passengers in the manner pointed out by the respondent No. 2. This is so. According to the respondent No. 2:—

"One of the passengers is said to have stated before the Sub-Divisional Police Officer that she had travelled in the same car on earlier occasions on payment of fare".

As an appellate authority, the respondent No. 2 should have known that it is not fair to the petitioner that he should be acting on the basis of the information given by the passenger whose name and address are not disclosed to the petitioner. This is an elementary principle of law. He should have called upon the respondent No. 1 to furnish to the petitioner a copy of this information and also the statements of the other occupants before deciding the merits of the appeal. It may be said that the inquiry con-

templated by this section is broad-based, but even so, the elementary principles of law are to be observed. He also committed the same error as the respondent No. 1. It need hardly be emphasized that as an appellate authority he should not have acted mechanically in upholding the order of the respondent No. 1. He could have remedied the defects of the respondent No. 1 pointed out earlier, at the appellate stage, but he failed to do so. One thing more. It is also stated by him while considering the question of the status of the petitioner that:—

"No certificate of payment of income-tax has been adduced on behalf of the appellant to show his status".

This requirement was a common feature during the British regime but not thereafter. A party is not necessarily respectable because he pays a large amount of tax. Payment of tax is not an index to respectability. A careful perusal of the order passed by the respondent No. 2 would seem to show that as an appellate authority he failed in his statutory duty to correct the errors of the respondent No. 1, which go to the root of the matter. The respondents acted on the basis of information not disclosed to the petitioner. This they could not.

7. To sum up: there was no compliance by the respondents with the requirements of Section 33 (1) (b) as rightly stressed by Mr. Kakodkar on behalf of the petitioner, and, therefore, the order passed by the respondent No. 1 suspending the certificate of registration of the petitioner, and upheld in appeal by the respondent No. 2, is void ab initio, for want of observance of the principles of natural justice, and, therefore, must be quashed. This case is far too clear for any argument by Mr. Dias. What is void ab initio cannot be quashed any more than it can be upheld. This was also the view of the Executioner in 'Alice In Wonderland' when he refused to execute the Cheshire Cat on the ground that "you can't cut off a head unless there is a body to cut it off from". A direction in the nature of certiorari may issue quashing the orders passed by the respondents. The petition is accordingly allowed with costs. Mr. Kakodkar on behalf of the petitioner does not press the allegations of malice against the respondents.

8. It may be stated that the concerned department is not prevented from starting another inquiry in accordance with the procedure prescribed by law, but it would be in the ends of justice that this inquiry is dealt with by persons other than the respondents. This is because the respondents have expressed their views in clear terms. It is a well settled principle of law that justice must not only be done but should manifestly be seen to be done. It is also a matter for consideration by the Government whether a police officer should be exercising a quasi-judicial function as in this case under Section 33 (1) (b). Rule 3 (20) also enables

any persons other than a police officer to exercise this function.

Petition allowed.

AIR 1970 GOA, DAMAN & DIU 129
(V 57 C 21)

C. M. RAO, ADDL. J. C.

Mukund Porobo Colvalkar, Petitioner v. Union of India and another, Respondents.
Writ Petn, No. 21 of 1969, D/- 2-2-1970.

(A) Land Acquisition Act (1894), Section 5-A — Hearing of objections — Decision on land owner's objections not communicated to him — Non-communication per se is no proof of lack of bona fides or absence of public purpose — Govt. is not bound to communicate or even decide on the objections.

(Para 5)

(B) Land Acquisition Act (1894), Section 6 — Declaration of requirement for public purpose — Questionability — In cases of lack of bona fides and other colourable exercise of power, the declaration is justiciable.

(Para 5)

Cases	Referred:	Chronological	Paras
(1963) AIR 1963 SC 151		(V 50)=	
1963-2 SCR 774, Smt. Somawanti v. State of Punjab			3, 5
(1954) AIR 1954 Assam 81		(V 41),	
Samiruddin Sheikh v. Sub-Divnl. Officer			5
(1952) AIR 1952 All 752		(V 39)=	
ILR (1953) 1 All 251, Ramcharan Lal v. State of U. P.			3, 5
(1952) AIR 1952 Trav-Co. 522		(V 39)=	
ILR (1952) TC 488, Mohammed Noohu v. The State of Trav-Co.			3, 5
Ataide Lobo, for Petitioner; Joaquim Dias, Govt. Pleader, for Respondents.			

ORDER:— This is a petition filed under Article 226 of the Constitution of India to quash the notification dated 3-5-69 issued by the Government of Goa, Daman and Diu under Section 6 of the Land Acquisition Act (hereinafter called 'the Act'). The facts stated in the petition are these:

In December 1967 the Municipality of Panjim called the petitioner to appear in its office on 15-12-67 to deal with the matter of amicable acquisition of the land destined for widening of a road which passes through 'Carmicheu-Bhat'. The petitioner and 65 others represented to the Minister for P. W. D. and Education, Government of Goa, Daman and Diu, on 14-12-67 stating that there was no need to acquire the land and that by acquiring the land a number of fruit bearing trees would be destroyed. The representation was forwarded by the Minister to the Municipality for necessary action. The petitioner attended the meeting held at the Municipal office at Panjim on 15-12-67 and expressed that he was not agreeable

to the acquisition proposal. The Municipality informed the Government about the talk in the committee, called for tenders for asphaltting the proposed road and accepted the tender of contractor, Mr. Jervajo Fernandes. The said contractor worked for 15 days and then stopped the work. After he suspended the work, representation was made by the petitioner to the Chief Minister of this Union Territory on 30-5-68 stating that it was not at all necessary to acquire the land to widen the road. Representation to that effect was also made to the Lt. Governor on 14-6-1968. In spite of all these representations notification dated 19-6-68 under Section 4 of the Act was published in the Gazette dated 27-6-68. The petitioner then submitted his objections under Section 5-A of the Act to the Dy. Collector, North Sub-Division, Panjim. That officer was dealing with the matter of acquisition of the land in question, and he issued notice to the petitioner that he would inspect the land on 24-9-68 at 10.30 a. m. It was mentioned in that notice that the petitioner should be present at the time of the inspection and should provide the relevant information regarding the difficulties, if any, that were likely to be experienced by the landowners and other people by the Government acquiring the land. The Dy. Collector, North Sub-Division, Panjim, inspected the land in question on 24-9-68 in the presence of the representative of the petitioner and others, took necessary measurements, heard the parties and opined that acquisition of the land was not necessary. In November, 1968 the Sub-Divisional Officer and Land Acquisition Officer wanted to inspect the land in dispute but he did not inspect. The petitioner has no knowledge whether any other enquiry was held by any other officer but notification under Section 6 of the Act was issued by the Government on 3-5-69, which was published in the Government Gazette dated 22-5-69, to the effect that the Government is satisfied after considering the report made under Section 5-A of the Act that the land specified in the schedule appended to the notification is needed to be acquired for the public purpose, viz., for construction and widening of the Municipal road. The petitioner is the owner of plots 8 and 9 mentioned in the schedule appended to the notification dated 3-5-69. Notice under Sections 9 and 10 of the Act was served on the petitioner on 26-5-69. The notification dated 3-5-69 issued under Section 6 of the Act was made with ulterior motive and is mala fide as the land proposed to be acquired is not necessary for any public purpose. There are number of palm trees, mango trees and other fruit bearing trees on the land proposed to be acquired and all of them will have to be destroyed if the land is acquired and the Government will have to pay lot of compensation. The road proposed to be widened is not Municipal road but it is a private road. The report of the Sub-Divisional Officer of Goa,

North Division (Shri M. R. Patel) is against the necessity mentioned in the notification, so the Government could not be satisfied that the land was needed for public purpose. Due to the notification issued by the Government rights of the petitioner under Articles 19 and 31 of the Indian Constitution have been affected. The notification dated 3-5-69 issued under Section 6 of the Act is fit to be quashed and set aside for the reasons mentioned in the petition.

2. Counter-affidavit has been filed on behalf of the respondents opposing the petition. They say that no right of the petitioner has been affected in any way, that the principles of natural justice were observed, that the land was acquired for the purpose mentioned in the notification, that the notification is not mala fide, that the road proposed to be widened is a Municipal road and that the petition is fit to be dismissed.

3. Even though number of grounds have been stated in the petition in support of the contention that the impugned notification is mala fide, illegal and unjust, the learned advocate for the petitioner argued before me only the following points and prayed to allow the petition. He relied on the decisions reported in AIR 1963 SC 151, AIR 1952 All 752 and AIR 1952 Trav-Co 522.

(i) The Government has not given decision about the objections of the petitioner submitted to the Dy. Collector, North Sub-Division, Panjim so the provisions of Section 5-A of the Act have been violated and the notification issued under Section 6 of the Act is invalid;

(ii) The Government had no material before it to hold that the land was needed for public purpose because the Dy. Collector had reported that there was no necessity to acquire the land; and

(iii) The road proposed to be widened is not a Municipal road as in the survey held in 1905 it was mentioned that no road exists in the land proposed to be acquired.

4. I have now to decide whether there is any force in the contentions of the petitioner and whether the notification issued by the Govt. of this Union Territory is in accordance with law.

5. It is a settled point of law that the declaration made by Govt. under Section 6 of the Act that a particular land is needed for public purpose or for a company is conclusive evidence that the land is needed for a public purpose or for a company but if it appears that the declaration that the land is needed for public purpose or for a company is a colourable exercise of power it can be held that the declaration is not a conclusive evidence that the land is needed for public purpose or for a company, as the case may be. Vide decision of the Supreme Court in Smt. Somawanti v. State of Punjab, AIR 1963 SC 151 and the decision of the High Court of Travancore-Cochin in Mohd. Noohu

v. State of Trav-Co, AIR 1952 TC 522. In this case the petitioner contends that the road proposed to be widened is not a Municipal road but that contention does not appear to be correct because he himself stated in Exh. 'B' i.e., the representation made on 14-12-67 to the Minister for Education and P. W. D. Goa that the Panjim Municipality had already constructed metal road of 3 to 3.50 meters wide at Mercas, 'Carminchem Bhat' about a month ago, that it was felt after consulting the owners of the land and residents of Mercas that only 3 meters wide road was quite sufficient and accordingly the Municipality ordered to construct the road and that the metalling work of that road was completed a month ago. When in the representation made to the Minister for P. W. D. and Education the petitioner admitted in December 1967, that the road is a Municipal road his contention now that the road is not a Municipal road cannot be considered correct. When the road proposed to be widened appears to be a Municipal road and when the Government by issuing a notification under Section 6 of the Act and acquiring the land wants to widen that road this Court cannot accept the allegations of the petitioner that the land is not needed for widening the Municipal road and cannot hold against the declaration made by the Government. Vide the decision of Assam High Court in Samiruddin Sheikh v. Sub-Divisional Officer, AIR 1954 Assam 81. Undoubtedly the Dy. Collector after making enquiries under Section 5-A of the Act opined that the proposed acquisition would not be in the interest of the larger public but the Govt. was not bound to accept his opinion. The petitioner has said in his petition "if the Govt. considered any other information the Govt. acted beyond the scope of Section 6 and such an information was not based on the true facts of the case." The Govt. was not bound to inform the land owners on what basis it declared that the land was needed for public purpose, viz., for laying the Municipal road and widening that road. It is for the petitioner to prove that the Govt. had not acted bona fide. The only ground on which the petitioner urged before me that the Govt. acted illegally or its notification dated 3-5-69 is not bona fide is that no decision was given by the Govt. about the objections raised by the petitioner under Section 5-A of the Act before the Dy. Collector. The decision in Ram Charan Lal v. State of Uttar Pradesh, AIR 1952 All 752 was cited on behalf of the petitioner in support of his contention that if provisions of Section 5-A of the Act have been violated then the notification issued under Section 6 of the Act becomes without jurisdiction. That decision was based on the fact that the petitioner was not given an opportunity of being heard in support of his objections under Section 5-A of the Act by the Collector. In this case it is not said that such an opportunity was not given to

the petitioner. The petitioner admitted in para 10 of his petition that the Land Acquisition Officer inspected the land in question, made necessary measurements, heard the parties and opined that it appeared to him that the acquisition was not necessary. When the Land Acquisition Officer gave the petitioner an opportunity of being heard in person about his objections raised under Section 5-A of the Act, made further enquiry and submitted his report to the Govt. it cannot be said that no proper enquiry was made under Section 5-A or that principles of natural justice have been violated. It is nowhere mentioned in Section 5-A of the Act that the Govt. should give in writing decision about the objections raised by the persons interested in the land. It is mentioned in sub-section (2) of that section that the Collector would submit his report to the appropriate Govt. and the decision of that Govt. on the objections raised shall be final. The Govt. need not write its decision after perusing the report of the Collector. If it comes to the conclusion after perusing the report of the Collector that the land should be acquired it will issue notification under Section 6 of the Act and otherwise it will drop the proceeding. I find practically no strength in the contention of the petitioner that the notification issued in this case under Section 6 of the Act is invalid for the Govt. not giving decision about the objections of the petitioner raised under Section 5-A of the Act, because in my opinion the Govt.'s decision is the notification issued under Section 6 of the Act.

6. Widening a public road is public purpose. Merely because the petitioner alleges that the Govt. will have to pay very much compensation it cannot be said that the land should not have been acquired. The rights of the petitioner either under Article 19 or Article 31 of the Constitution of India have not in any way been affected because following proper law and principles of natural justice notification dated 3-5-69 had been issued.

7. I find no reason to allow this petition. The petition is dismissed.

Petition dismissed.

AIR 1970 GOA, DAMAN & DIU 122
(V 57 C 22)

V. S. JETLEY, J. C.

Gulabhai Vallabhbhai Desai, Applicant v. H. A. Khan, Collector of Daman, and others, Respondents.

Civil Misc. Appln. No. 35 of 1969, D/- 18-2-1970.

(A) Constitution of India, Article 133 — Civil Proceeding — Final order in civil proceeding — Final Order is to be correlated to facts in dispute — Dispute disposed of in original civil proceeding under Article 226

CN/DN/B306/70/MVJ/D

involving assertion and enforcement of civil rights — Requirements of — Article 133 (1) held satisfied. AIR 1966 SC 1445, Foll.

(Para 2)

(B) Constitution of India, Article 133 (1) (a) — Value of subject-matter — Value envisaged is of the subject-matter of dispute.

The petitioner in proceeding under Article 226 claimed that he was entitled to retain 90 acres of grass lands held by him, by virtue of Section 4 (b) of Daman (Abolition of Proprietorship of Villages) Regulation 1962 as they were not grass and pasture lands. The High Court came to the conclusion that the revenue authorities had arbitrarily classified those lands as grass lands and issued a mandamus requiring them to act according to law and not to treat the lands as such till there was a quasi-judicial enquiry under Section 12-A of Regulation.

Held, that the value of the lands could not be taken into consideration for purposes of valuation under Article 133 (1) (a). There was a dispute in relation to the lands in petition under Article 226 when it was filed but it could not be said that at the time of the final order it was "still in dispute on appeal" for the purpose of sub-clause (a).

(Para 3)

(C) Constitution of India, Article 133 (1) (b) — "Property" — Meaning of.

Expression "property" in sub-clause relates to property other than which is the subject-matter of proceeding in which there is a final order passed. This sub-clause is alternative and independent of sub-clause (a). AIR 1965 SC 1440, Relied on. (Para 5)

(D) Constitution of India, Article 133 (1)

(e) — Certificate of fitness for appeal — Substantial question of law.

This sub-clause has been designedly worded in wide terms. Discretion conferred thereunder has to be judicially exercised along well settled lines. Sub-clause (c) may take in cases where the pecuniary value of the property concerned is less than Rs. 20,000/- but the questions involved are of general public or private importance. The requirement of fitness has no bearing with the requirement of a substantial question of law being involved. This later requirement is decisive when there is a decree, judgment or final order of affirmance and not variance. This sub-clause may not apply even though substantial questions of law are involved.

(Para 6)

(E) Constitution of India, Article 132 (1) — Substantial question of law.

Questions of law finally and authoritatively decided by the Supreme Court are no more substantial questions of law. They are only questions of law. AIR 1947 FC 37 & AIR 1958 SC 325, Foll.

(Para 7)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 1110 (V 54) =

1967-1 SCR 602, Gulab Bhai v.

Union of India

(1966) AIR 1966 SC 1445 (V 53) =

1966-3 SCR 198, Ramesh v. Gendalal

- (1965) AIR 1965 SC 1440 (V 52)=
1965-2 SCR 751, Chittarmal v. Pannalal
- (1965) AIR 1965 SC 1818 (V 52)=
1965-1 SCR 190, Narayan Row v. Ishwarlal Bhagwandas
- (1960) AIR 1960 SC 356 (V 47)=
1960-2 SCR 346, State of J. & K. v. Ganga Singh
- (1958) AIR 1958 SC 325 (V 45),
State of Mysore v. H. L. Chabiani
- (1953) AIR 1953 SC 210 (V 40)=
1953 SCR 1144, Election Commis-
sion v. Venkata Rao
- (1947) AIR 1947 FC 37 (V 34)=
1947 FLJ 70, Krishnaswami v.
Governor-General-in-Council
- (1945) AIR 1945 FC 47 (V 32)=
1945 FCR 103, Secy. of State v.
I. M. Lal
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1944-6 FCR 51, Jagannath Baksh
v. United Provinces
- (1901) 28 Ind App 11= ILR 23 All
227, Banarsi Prosad v. Kashi Krishna
Narain
- R. J. Joshi, for Applicant; J. Dias, Govt.
Pleader, for Respondents.

ORDER:— In his application dated 9th December, 1969, the petitioner — Gulabhai Vallabhbhai Desai — seeks a certificate for leave to appeal to the Supreme Court under Article 132 (1) and sub-clauses (a) to (c) of Art. 133 (1) of the Constitution. The proposed appeal is against the final order passed by this Court on 17th October, 1969 in a petition filed by the petitioner, under Article 226 of the Constitution. The material facts are explained at length in that order and therefore they need not be repeated. The following questions were decided by this Court in the said petition:—

“(1) Whether the petitioner is the proprietor of the village “Regunwada”, within the meaning of Section 2 (h) of the Daman (Abolition of Proprietorship of Villages) Regulation, 1962; (2) if the petitioner is not the proprietor as defined under the said Section 2 (h), whether the Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act, 1968, in so far as it retrospectively defines the word “village” in Section 2 (d) as including a part of a village, is invalid, Article 31A of the Constitution being inapplicable; (3) if the petitioner is the proprietor as defined under the said Section 2 (h), whether the 90 acres of land classified as the grassland and the 20 acres of land classified as the pasture land, on behalf of the respondents, are really grass and pasture lands as understood under the Regulation; (4) whether the view taken by the respondents 1 and 2 that they are the grass and pasture lands is in violation of the principles of natural justice; and (5) whether the proposed action of taking over the said lands is in violation of Article 14 of the Constitution, as similar action is not contemplated by these

respondents against other persons similarly situated.”

5 Question (No. 1) was answered in the affirmative. Questions (Nos. 2 and 5) in the negative. Question (No. 3) in the affirmative in relation to 20 acres of land classified as pasture lands. Question No. 4 in the affirmative in relation to 90 acres of land classified as grasslands.

2. In support of the application, Mr. R. J. Joshi, learned counsel for the petitioner, submits that the case of the petitioner falls under sub-clauses (a) and (b) of Article 133 (1) of the Constitution and, therefore, the Court is bound to grant the certificate applied for. The petitioner has a right to the certificates applied for provided his case falls under these sub-clauses. Sub-clause (c) confers no such right. Article 133 (1) of the Constitution may be read:—

“An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies — (a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or (c) that the case is a fit one for appeal to the Supreme Court; and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.”

As will appear from the final order passed, the disputes between the parties were finally disposed of in so far as this Court is concerned. The final order is to be correlated to the facts in dispute. The disputes were disposed of in an original civil proceeding under Article 226 of the Constitution involving the assertion and enforcement of civil rights. The words “civil proceeding” are not defined in the Constitution nor in the General Clauses Act. What is meant by “civil proceeding” is explained by the Supreme Court in *Ramesh v. Gendalal*, AIR 1966 SC 1445. Hidayatullah, J., (as he then was), speaking for the Supreme Court said at page 1447:—

“The term civil proceeding has been held in this Court to include, at least all proceedings affecting civil rights, which are not criminal. The dichotomy between civil and criminal proceedings made by the Civil Law Jurists is apparently followed in Articles 133 and 134 and any proceeding affecting civil i.e., private rights which is not criminal in nature, is civil. This view was expressed recently by this Court in *Narayan Row v. Ishwarlal Bhagwandas*, AIR 1965 SC 1818

Shah, J., speaking for the majority, first summarises all the provisions in the Constitution bearing upon appeals to this Court and after analysis, holds that the words "civil proceeding" are used in the widest sense, that in contradistinction to criminal proceedings they cover all proceedings which affect directly civil rights. A proceeding under Article 226 for a writ to bring up a proceeding for consideration must be a civil proceeding, if the original proceeding concerned civil rights."

The additional requirements in sub-clauses (a) and (b) are also to be satisfied before the petitioner could claim the certificates applied for as a matter of right. In relation to these sub-clauses, the relevant facts may be broadly stated.

3. In February, 1930, during the Portuguese regime, the petitioner purchased the village 'Rengunwara' measuring 320 acres of land for Rs. 50,051/-. As will appear from para 8 of the final order, the disputes between the petitioner on the one hand and the respondents on the other after liberation in December, 1961, related to 90 acres of grasslands and 20 acres of pasture lands. There was no dispute regarding remaining acres of land purchased by the petitioner. According to the petitioner, these 90 acres of grasslands and 20 acres of pasture lands are not grass and pasture lands and, therefore, he is entitled to claim them under sub-section 4 (b) of the Daman (Abolition of Proprietorship of Villages) Regulation 1962 (hereinafter referred to as the "Regulation"). Under that provision, a proprietor is permitted to retain land in his personal cultivation except grass and pasture lands. The respondents classified these lands as grass and pasture lands. In regard to 90 acres of grasslands the conclusion of this Court was that they had been arbitrarily classified as grasslands:—

"The view taken by the respondents that they are grasslands on the basis of an executive inquiry without conforming to the principles of natural justice and also in contravention of Article 31 (1) of the Constitution, has not the support of law. It is not binding on the petitioner. This question now has to be decided by the Mamlatdar and the Collector according to law. Mr. Bhabha submits — and rightly — that this Court is not the proper forum to decide the character of these lands. Evidence may have to be led and fact investigated."

In this view of the matter, a direction in the nature of mandamus was issued to the respondents requiring them to act according to law and not to treat these lands as grasslands, unless, as a result of a quasi-judicial inquiry envisaged in Section 12-A of the Regulation, as amended by the Daman (Abolition of Proprietorship of Villages) Regulation (Amendment) Act 1968, these lands are regarded as grasslands (hereinafter referred to as the "Amendment Act"). It will thus be clear that in regard to these lands, there is

really no dispute and therefore for the purposes of valuation in sub-clause (a), their value is not to be taken into consideration. The value envisaged is of the subject-matter of the dispute. There has to be a difference or an issue between the parties before the "dispute" could arise. The finality has to be in relation to the dispute. According to Mr. Joshi, the petitioner is interested in getting a decision from this Court that they are really not grasslands. This may be so, but as rightly submitted by Mr. Bhabha, this Court is not the proper forum to decide the character of these lands. There was a dispute in relation to these lands in the petition under Article 226 when it was filed, but it cannot be said that at the time of the final order it is "still in dispute on appeal" for the purposes of sub-clause (a).

4. In regard to 20 acres of pasture lands the finding of this Court was:—

"As regards 20 acres of pasture lands in view of the clear admission made by the petitioner in the petition before the Supreme Court that they are "no doubt pasture lands but the same were used by the petitioner for the purpose of grazing his cattle", it is not now open to the petitioner to turn round and say that this admission is not correct. He has to abide by that admission. In the result these lands are to be regarded as pasture lands included in the definition of "estate" under Article 31 (2) (a) (iii) of the Constitution, and, therefore, they have the protection of this Article. Their taking over cannot be questioned on the ground of contravention of Articles 14, 19 and 31. The contention of Mr. Joshi that this Article takes in only public pasture lands and not privately owned pasture lands does not impress me. The tenor of this Article indicates that, within its wide sweep, it does take in privately owned estates including lands for pasture. The petitioner has no case in so far as this category of land is concerned. It vested in the Central Government under the Regulation."

The decision of the Supreme Court referred to in this passage is Gulabhai v. Union of India, AIR 1967 SC 1110. The petitioner had not mentioned the value of 90 acres of grasslands and 20 acres of pasture lands separately or jointly in the proceeding under Article 226. This omission was not even rectified in the application for the certificate applied for except for the statement in general terms in para 4 "that the amount or value of the subject-matter of the dispute in this Court and still in dispute in appeal to the Supreme Court was and is not less than Rs. 20,000/-". It is argued by Mr. Joshi that considering the fact that the above village measuring 320 acres of land was purchased as early as February 1930 for Rupees 50,051, its value at the time of the petition under Article 226 and also at the time of the final order ought to be much more and, on that basis, it should be held that the value of these 20 acres is Rs. 20,000/- or

more. I am afraid this basis is not a safe criterion for the purposes of the certificate applied for under sub-clause (a). A number of factors, for example, situation, produce, etc., are to be taken into account for the purposes of valuation. The case of the petitioner has to be brought within the four corners of this sub-clause. I would concede that the question of valuation is not to be considered in a narrow sense for the purposes of an appeal, but, at the same time, I would not resort to surmises and conjectures. The test of valuation in sub-clause (a), in my opinion, is not satisfied.

5. Sub-clause (b) also, it appears, will not be attracted. In *Chittarmal v. Pannalal*, AIR 1965 SC 1440 Shah, J., speaking for the Supreme Court construed this sub-clause as under:—

“To attract the application of Article 133 (1) (b) it is essential that there must be — omitting from consideration other conditions not material — a judgment involving directly or indirectly some claim or question respecting property of an amount or value not less than Rs. 20,000/-. The variation in the language used in clauses (a) and (b) of Article 133 (1) pointedly highlights the conditions which attract the application of the two clauses. Under clause (a) what is decisive is the amount or value of the subject-matter in the Court of first instance and “still in dispute” in appeal to the Supreme Court; under clause (b) it is the amount or value of the property respecting which a claim or question is involved in the judgment sought to be appealed from. The expression “property” is not defined in the Code, but having regard to the use of the expression “amount” it would apparently include money. But the property respecting which the claim or question arises must be property in addition to or other than the subject-matter of the dispute. If in a proposed appeal there is no claim or question raised respecting property other than the subject-matter, clause (a) will apply; if there is involved in the appeal a claim or question respecting property of an amount or value not less than Rs. 20,000/- in addition to or other than the subject-matter of the dispute clause (b) will apply.”

This decision is relied upon both by Mr. Joshi for the petitioner and Mr. Dias for the respondents. Mr. Joshi is asked as to how the principle enunciated by the Supreme Court really helps the petitioner. He contends that what is challenged in the petition is the validity of the orders made under the Regulation, which are made applicable to the lands of the petitioner valued, according to the petitioner, for more than Rs. 20,000/- and, therefore, sub-clause (b) applies. It is somewhat difficult to appreciate this contention. The final order passed by this Court does not involve directly or indirectly “any claim or question respecting property of the like amount or value”, in addition to

or other than the subject-matter of the dispute and consequently sub-clause (b) will not apply. The expression “property” in this sub-clause would seem to relate to property other than that which is the subject-matter of the proceeding under Article 226. Beyond the subject-matter of the dispute in relation to 20 acres of pasture lands, there is no other property in regard to which claim or question arose apart from the fact that it is not proved that the value of these lands is Rs. 20,000/- or more. Sub-clause (b) is alternative and independent of sub-clause (a). In the proposed appeal there is no claim or question raised respecting property other than these 20 acres. Assuming for the sake of argument that the subject-matter of the dispute is the validity of the orders made under the Regulation and not these lands, even then there is no claim or question respecting them or any other land valued at Rs. 20,000/- or more. The test of valuation for the purposes of sub-clause (b) also is not satisfied.

6. Sub-clauses (a) and (b) being inapplicable, we may now turn to sub-clause (c) which, as the phraseology shows, is designedly worded in very wide terms. A discretion conferred thereunder has to be exercised judicially along well settled lines. In the words of the Federal Court in relation to Section 208 (B) of the Constitution Act 1935, providing for leave to appeal to His Majesty in Council it was said:—

“The question of grant of leave to appeal to His Majesty in Council must be dealt with on the facts and circumstances of each case. It is neither possible nor desirable to crystallise the rules relating to the exercise of the Court’s discretion in the matter.” (*Jagannath Baksh v. United Provinces*, AIR 1944 FC 23).

Sub-clause (c) may take in cases where the pecuniary value of the property concerned is less than Rs. 20,000/-, but the questions involved are of general public or private importance. The requirement of fitness has no bearing with the requirement of a substantial question of law being involved. This later requirement is decisive when there is a decree, judgment or final order of affirmation and not variance. It is possible to conceive of cases where this sub-clause may not apply even though substantial questions of law are involved. This would depend upon the facts and circumstances of each case. In *Banarsi Prosad v. Kashi Krishna Narain*, (1901) ILR 23 All 227 (PC), Cl. (c) of Section 109 of the Civil Procedure Code similar to sub-clause (c), was construed by the Privy Council thus:—

“That is clearly intended to meet the special cases; such, for example as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind though it is left entirely in the discretion of the Court, is a judicial process which could not be perform-

ed without special exercise of that discretion, evinced by the fitting certificate."

A question which does not affect a large number of persons cannot be regarded as one of great public importance. This proposition is well settled. Does the issue in regard to these 20 acres of pasture lands affect a large number of persons? Is it likely to affect numerous cases? Mr. Joshi is unable to satisfy the Court on these points. The fact is that it concerns the petitioner and none else. Mr. Joshi, however, states that as the question of interpretation of the Regulation and retrospective operation of the Amendment Act is involved in this case, therefore, this is a fit case for the certificate applied for under this sub-clause. This consideration, by itself, is not enough. The Legislature has power to legislate prospectively and retrospectively. The retrospective operation is clear from the language of the Amendment Act. This has not been construed so as to have greater retrospective operation than its language renders it necessary. The Amendment Act was enacted by the State Legislative Assembly. Is this issue of private importance? According to Mr. Joshi it is. Mr. Dias is of the contrary view. By "private importance", submits Mr. Dias, what is meant is importance to the petitioner and the respondents and not merely to one of them. I agree. For my part as I see this matter, the issue in relation to 20 acres of pasture lands does not survive in view of the clear admission made by the petitioner in the Supreme Court, apart from the fact that from the point of view of the respondents it has no importance. The petitioner is interested in keeping this issue alive, but not the respondents. I agree with Mr. Dias that this is not a fit case for invoking this sub-clause.

7. The petitioner has also applied for a certificate under Article 132 (1) of the Constitution. This Article reads:—

"An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution."

It is well settled that the construction of a statute and its scope and effect is a question of law. As will appear from the final order, Article 31A of the Constitution came up for consideration in relation to 90 acres of grasslands and 20 acres of pasture lands, and it was held by this Court, relying upon various decisions of the Supreme Court, that the Regulation and the Amendment Act relate to agrarian reforms, land tenures and the elimination of intermediaries, and, therefore, they have the protection of this Article and consequently challenge on the ground of contravention of Articles 14, 19 or 31 cannot prevail. It may be said that a question of law is not the same thing as a sub-

stantial question of law. A substantial question of law, in its turn, is not the same thing as a substantial question of law as to the interpretation of the Constitution. Constitutional appeals are placed in a special category irrespective of the nature of the proceedings in which they may arise and the right of appeal of the widest amplitude is allowed in cases involving such questions (*Election Commission v. Venkata Rao*, AIR 1953 SC 210). By merely invoking constitutional provisions appeals not otherwise constitutional will not partake of the character of constitutional appeals. In *State of J. & K. v. Ganga Singh*, AIR 1960 SC 356, Subba Rao, J., (as he then was), speaking for the Supreme Court, while construing similar words in Article 132 (2) of the Constitution, in the context of Article 14, observed at page 360:—

"The interpretation of Article 14 in the context of classification has been finally settled by the highest Court of this land and under Article 141 of the Constitution that interpretation is binding on all the Courts within the territory of India. What remained to be done by the High Court was only to apply that interpretation to the facts before it. A substantial question of law, therefore, cannot arise where that law has been finally and authoritatively decided by this Court."

Applying the aforesaid observations to Article 31A in the light of various decisions of the Supreme Court, what remained for consideration of this Court was to apply the general principle declared therein to the facts of the present case. In *Krishnaswami v. Governor-General-in-Council*, AIR 1947 FC 37, the only question involved in the appeal to the Federal Court was whether the appellant had been given a reasonable opportunity of showing cause against his dismissal from service within Section 240 (3). The Federal Court observed:—

"It was urged before us that the case involved a question relating to the interpretation of sub-section (3) of Section 240 of the Act. To the extent to which any guidance might have been needed for the purposes of this case on the interpretation of that sub-section that guidance was furnished so far as this Court is concerned in its judgment in 1945 FCR 103=(AIR 1945 FC 47). The rest was a simple question of fact. In our judgment no "substantial question of law" as to the interpretation of the Constitution Act was involved in this case, which could have formed the basis of a certificate under Sec. 205 (1) of the Act."

In *State of Mysore v. H. L. Chabiani*, AIR 1958 SC 325 a similar view was taken in relation to Article 311 of the Constitution. Questions of law finally and authoritatively decided by the Supreme Court are no more substantial questions of law. They are questions of law, and that is all. What is true of Articles 14 and 311, in my opinion, is equally true of Article 31A. There is suffi-

cient guidance from the Supreme Court on Article 31A. The law is in some respects a stream that gathers accretions with time from new circumstances and conditions, but even so, like all mundane matters, it has its limits. I am unable to agree with Mr. Joshi that this case involves a substantial question of law as to the interpretation of Article 31. I have nothing more to say on Article 132 (1).

8. To sum up: the conclusion is that the case of the petitioner does not fall under sub-clauses (a) to (c) of Article 133 (1) and Article 132 (1) of the Constitution and, therefore, the prayer for the certificate applied for on behalf of the petitioner cannot be entertained. Order accordingly.

Leave to appeal rejected.

AIR 1970 GOA, DAMAN & DIU 127 (V. 57 C 23)

V. S. JETLEY, J. C.

M/s. Chowgule and Co. Pvt., Ltd., Appellants v. Smt. Felicidade Rodrigues, Respondent.

First Civil Appeal No. 2 of 1969, D/- 11-4-1970.

(A) Workmen's Compensation Act (1923), Section 30 (1), Proviso 3 — Appeal by employer under clause (a) — Certificate of deposit of compensation not attached to memorandum of appeal nor filed within the period of limitation — Appeal is incompetent under Proviso 3 to sub-section (1) which is mandatory — Omission due to mistake in Counsel's office and not due to negligence of party — Sufficient cause exists and delay can be condoned under Section 5, Limitation Act (1963). Case law discussed.

(Paras 4, 5)

(B) Workmen's Compensation Act (1923), Section 3 — Arising out of and in the course of his employment — Death of workman — Onus is on claimant for compensation to prove accident arose out of and in the course of employment — Proof may be by direct evidence or from inferences drawn from facts found.

(Para 8)

(C) Civil P. C. (1908), Pre. — Judicial precedents — A case is an authority for what it decides.

(Para 10)

(D) Workmen's Compensation Act (1923), Section 30 — Appeals — Powers of the High Court — Findings of fact — Commissioner is judge of facts — Unless his findings are perverse, not based on evidence or are influenced by irrelevant considerations High Court will not interfere — Held his findings in the case that the deceased workman died by an accident arising out of and in the course of his employment was supported by evidence. Case law discussed.

(Paras 10 and 11)

(E) Workmen's Compensation Act (1923), Section 30 — "Substantial question of law is involved" — Commission to take plea in memo of appeal — Not serious, provided appellant is able to satisfy Court from facts found that appeal involves a substantial question of law.

(Para 6)

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1958 BLJR 726, Bihar Journals Ltd.
v. Nityanand 4
(1958) AIR 1958 SC 687 (V 45) =
1958 SCJ 680, Kamraj Nadar v.
Kunju Thevar 4
(1958) AIR 1958 SC 881 (V 45) =
(1958-59) 14 FJR 351, S. S. Manu-
facturing Co. v. Bai Valu Raja 8
(1958) AIR 1958 All 564 (V 45) =
1958 All LJ 269, Jawli v. Babulal 12
(1957) AIR 1957 Him Pra 26 (V 44),
Sada Ram v. Chhotu Ram 4
(1956) AIR 1956 Pat 299 (V 43) =
1956 BLJR 288, Bhurangya Coal
Co. v. Sahebjan 4
(1954) AIR 1954 SC 411 (V 41) =
1955 SCR 150, Dinabandhu v.
Jadumoni 5
(1954) AIR 1954 Cal 435 (V 41) =
58 Cal WN 488, Nandy v. G. M. E. I.
Rly. 4
(1951) AIR 1951 Pat 260 (V 38),
Ramniwas v. Mariyan 4
(1949) AIR 1949 Bom 134 (V 36) =
50 Bom LR 744, Kaikhushroo Piroj-
sha v. C. P. Syndicate Ltd. 12
(1942) AIR 1942 Bom 175 (V 29) =
ILR (1942) Bom 225, Vishram Yesu
Haldankar v. Dadabhoy Hormosji
and Co. 10
(1940) 1940-2 All ER 383 = 1940
AC 583, Noble v. Southern Rly. 11
(1940) 1940-3 All ER 157 = 1940 AC
955, Weaver v. Tredegar Iron and
Coal Co. Ltd. 8
(1938) 1938-4 All ER 831 = 55 TLR
302, Harris v. Associated Portland
Cement Manufacturers Ltd. 8
(1935) AIR 1935 PC 5 (V 22) =
1935 All LJ 44, Ohene Moore v.
Akessch Tayee 2
(1933) 1933 AC 494 = 148 LT 532,
Rosen v. S. S. Quercus (Owners) 9, 10

- (1931) 1931 AC 351= 144 LT 730,
Simpson v. L. M. and S. Rly. Co. 9, 10
(1929) 1929 AC 570=141 LT 300;
Stephen v. Cooper 8
(1918) 1918 WC Rep 345=120 LT 3,
Lancaster v. Blackwell Colliery Co.
Ltd. 10
(1917) 1917 AC 352= 116 LT 767,
Lancashire and Yorkshire Rly. Co.
v. Highley 8
(1917) 1917-2 Ir Rep 318=51 ILT
158, Rourke v. Holt and Co. 9
(1915) 1915 AC 217=111 LT 875,
Kerron Lendrum v. Ayr. Steam Ship-
ping Co. Ltd. 9, 10
(1912) 1912 AC 238, Rice v. Owners.
of Ship Swansea Vale 9, 10
(1910) 1910-2 IR 561, Catten v.
Limerick Steamship Co. 9, 10
(1909) 1909-2 KB 41= 78 LJKB 533,
Bender v. Owners of S. S. Zent 8, 9
(1909) 1909-2 KB 46, Marshall v.
Owners of S. S. "Wild Rose" 9, 10, 11
Ataide Lobo, for Appellants; S. K. Kakod-
kar, for Respondent.

JUDGMENT:— The appellants — M/s. Chowgule and Co. (Pvt.) Ltd. — prefer this appeal against the order passed by the Commissioner for Workmen's Compensation awarding compensation of Rs. 9,630/- inclusive of interest to the respondent widow Smt. Felicidade Rodrigues.

2. The material facts leading to this appeal may be stated before the rival contentions raised at the Bar are considered. The deceased — Santana Rodrigues — was in the employment of the appellants for about 15 years as a barge engine driver. On 22nd May, 1967, he left his home for duty on barge No. 20 belonging to the appellants. This barge loaded with iron ore left Sirigao at about 9 p. m. for Marmagoa. The duration of the journey was about 3½ hours. The deceased after starting the engine, went to attend to other work in the engine-room.

When the barge reached Britona at about 10-30 p.m., Waman Shambu Porob, Tindel, was at the wheel and deck-hand Janardhan was in charge of lighting work. Waman Shambu Porob then saw the deceased leaving the wheelhouse. He thought the deceased was going to the engine-room. The sea was slightly rough at that time. Waman Shambu Porob asked Janardhan to call the deceased so that they may decide whether the barge should proceed on its way to Marmagoa. The barge was slowed down. Janardhan reported that the deceased was missing. Waman Shambu Porob turned the barge back in search of the deceased. The crew of barges Nos. 14, 22 and 23 following this barge, were also asked to help in the search.

The crew of the barge No. 12 found the corpse of the deceased next day at about 4 p.m. at Penha de Franca. There was post-mortem of the corpse at Panjim. The appellants were afterwards called upon to pay

compensation, but they disowned their liability. The respondent thereafter moved the Commissioner by an application with a prayer that the appellants be directed to deposit the compensation due to her. The learned Commissioner after recording evidence adduced on behalf of the parties came to the conclusion that the accident arose out of and in the course of the employment of the deceased within the meaning of Section 3 of the Workmen's Compensation Act 1923 (hereinafter referred to as "the Act"), and, therefore, the appellants were liable and accordingly they were asked to pay compensation of Rs. 9,630/-, to the deceased's widow. The appellants felt aggrieved and moved this Court in appeal under Section 30 of the Act.

3. The crucial question for decision is whether the death of the deceased arose out of and in the course of his employment within the meaning of Section 3 (1) of the Act. This question would be considered after preliminary objections to the maintainability of the appeal raised by Mr. S. K. Kakodkar on behalf of the respondent are considered. The first preliminary objection is that the appeal under Section 30 is barred by limitation. Section 30 (1) (a), to the extent it is material for the present purpose, reads thus:—

"An appeal shall lie to the High Court from the following orders of a Commissioner, namely: (a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum."

It is common ground that compensation awarded by the Commissioner is a "lump sum" and, therefore, Clause (a) applies. The third proviso and sub-sections (2) and (3) of Section 30 have also materials bearing for the present purpose. The third proviso reads:—

"Provided further, that no appeal by an employer under Clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against."

Sub-section (2) provides that the period of limitation for an appeal under this Section shall be 60 days. Sub-section (3) states that the provisions of Section 5 of the Indian Limitation Act 1908 shall be applicable to appeals under this Section. This Act is repealed by Section 32 of the Limitation Act 1963. Section 5 of the repealed Act is re-enacted on the modifications and by virtue of Section 8 of the General Clauses Act, 1897, what is now applicable is the 1963 Act and not the 1908 Act.

The order passed by the Commissioner awarding compensation is dated 2nd January 1969. The memo of appeal was received in this Court on 6th February, 1969, within the aforesaid period of limitation. This was

5. That leaves the last point raised on behalf of the petitioners. In *Hiralal v. State*, (1964) 5 Guj LR 924, the same point came to be considered and it was observed that under Section 17(1) and (4) of the Act, before an appropriate Government can direct that Section 5-A is to be dispensed with, the Government has to be satisfied that it is a case of urgency, and that the land in question is either waste or arable land. Though the satisfaction under Section 17(1) and (4) is a subjective one and is not open to challenge before a Court of law, it must be the satisfaction of the appropriate Government and that satisfaction is in respect of an objective fact, namely, the existence of an urgency and the fact that the land in question is either waste or arable land. It is obvious that such satisfaction can only be arrived at by the appropriate Government applying its mind and taking into account relevant considerations as to whether the land is waste or arable and without such application of mind there can clearly be no satisfaction which is a condition precedent to the dispensing of an inquiry and a report by the Collector under Section 5-A.

6. Relying upon this decision, Mr. Mehta has urged that in the present case there is nothing in the impugned notification to show that mind was applied by the authority issuing the notifications as to whether the petitioners' lands were waste or arable lands. It is true that though the notification on the face of it may not indicate any such application of mind, it would be open to the Government to establish that as a matter of fact before the notifications were issued, and the urgency clause was introduced in Section 4 notification, mind was applied by the authority and thereafter the notifications were issued. For that purpose, Government may rely upon any documents in their possession to satisfy the Court about the application of mind to these relevant facts. In the present case, we find that no such documents have been produced on behalf of the respondents. However, in the affidavit in reply filed on behalf of the respondents by S. R. Pradhan, Under Secretary to the Government of Gujarat, Revenue Department, it is stated that the Commissioner of Ahmedabad Division, Mr. J. D. Kapadia had issued the notifications under Section 6 of the Act without urgency clause on the 21st February. In 1964 the office of the Commissioner of Divisions was abolished by the Government of Gujarat. The closed file of the Commissioner which also contained the two notifications under Section 4 could not be located in spite of their efforts and, therefore, their inability is pleaded and that under the circumstances it was not possible to state at this stage on what material the former Bombay Government was satisfied as to the nature of the land. But at the same time it is stated that a strong presumption arises that the Gov-

ernment was satisfied as to the nature of the land because on the same date two notifications under Section 4 were issued and published, one without urgency clause and one with urgency clause. We are not satisfied that any such presumption would arise merely from the fact of publication of two notifications, one with the urgency clause and the other without the urgency clause. It is a condition precedent to the application of this extraordinary power of depriving the subject of the advantage of an inquiry under Section 5-A that the subjective satisfaction by the authority issuing the notification must be reached and in any case such a satisfaction cannot be presumed from such flimsy material. We are, therefore, not prepared to raise any such presumption in favour of the Government in this case. It may be that because of circumstances, the Government would not be able to place before the Court for its satisfaction, that the prerequisites to the use of the urgency clause were complied with. But for whatever reasons if no such evidence can be placed before the Court, the result can be only one that it cannot be held that the requirements of law were complied with by the authorities. Under the circumstances, the result is that the 4th contention raised on behalf of the petitioners has to be upheld. The question, however, arises as to what extent. We are clear in our mind that para 3 of the notification under Section 4 whereby the direction was given under subsection (4) of Section 17 that the provisions of Section 5-A of the Act shall not apply, is distinctly severable from the rest of the notification under Section 4. Taking out of para 3, in no way, would mutilate the remaining part of Section 4 notification so as to hold that it becomes a useless piece of paper. This being so, the only part of Section 4 notification which has to be struck down is para 3 and we shall order accordingly. The remaining part of Section 4 notification remains intact to be enforced if at all available to the Government to do so under law.

7. As regards Section 6 notification dated 5th of August 1958, the whole of that notification is invalid as Section 5-A inquiry has not been held.

8. In the result, the petition succeeds. Para 3 of Section 4 notification dated 19th December 1957 is quashed without affecting the rest of the Section 4 notification, so far as it affects the lands of the petitioner and Section 6 notification dated 21st February 1959 is also quashed so far as it affects the lands of the petitioners. No order as to costs.

Petition allowed.

AIR 1970 GUJARAT 178 (V 57 C 29)*

J. B. MEHTA AND A. D. DESAI, JJ.

Ghanchi Vora Samsuddin Isabhai, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 895 of 1968, D/- 11-2-1969, against judgment of S. J., Surendranagar, in Sessions Case No. 28 of 1968.

(A) Evidence Act (1872), S. 35 — Entry of birth date in non-Government School's General Register under Statutory Rules — Entry admissible under Section 35 — However, its evidentiary value depends on other factors — Kidnapping case — Parents of girl not examined as to her age — Entry held could not be held to have proved the age. (Penal Code (1860), S. 366); (Bombay Primary Education Rules, 1949, Rr. 129 and 130). AIR 1961 Pat 21, Distinguished.

(Para 3)

(B) Criminal P. C. (1898), Ss. 236, 237 and 342 — Accused charged under S. 361, Penal Code for kidnapping — On facts disclosed he could also have been charged under S. 366, Penal Code for abduction — Explanation under S. 342, Criminal P. C. also sought in connection with facts constituting offence under S. 366, I.P.C. — Age of victim not being proved, accused could be convicted for abduction under S. 366. (Penal Code (1860), Ss. 361 and 366). AIR 1955 SC 574 at p. 576 & (1957) 58 Cr LJ 674 at p. 676 (Orissa), Dist.; AIR 1942 Bom 71 (FB) & AIR 1956 SC 116 & AIR 1965 SC 706, Foll.

(Para 4)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 706 (V 52) =
1965 (1) Cri LJ 630, Sunil Kumar Paul v. State of W. B. 4
(1961) AIR 1961 Pat 21 (V 48), Bhim Mandal v. Magaram Gorain 3
(1957) 58 Cr LJ 674 = ILR (1957) Cut 53, Bhagaban Mahakud v. State 4
(1956) AIR 1956 SC 116 (V 43) = 1956 Cri LJ 291, Willie (William) Slaney v. State of M. P. 4
(1955) AIR 1955 SC 574 (V 42) = 1955 Cri LJ 1296, Smt. Ram Devi v. State of U. P. 4
(1942) AIR 1942 Bom 71 (V 29) = 44 Bom LR 27 (FB), Emperor v. Kasamalli Mirzalli 4

N. N. Gandhi, for Appellant and J. U. Mehta, A.G.P., for Respondent-State.

MEHTA, J.:— 1-2. x x x x

3. Mr. Gandhi for the accused raised the most important question in this appeal as to the age of Sheela and argued that this important ingredient in the offence of kidnapping under Section 361

that Sheela was under 18 years age was not brought home to the accused. The learned Sessions Judge has in this connection relied upon the statement of Sheela at Ex. 9 in her evidence that her father when he visited at Wadhwan before this incident told her that this was her birth date. This reported statement of the father would be no evidence, when the father has not been examined. The learned Sessions Judge further relied upon the birth date certificate issued by the Head Master of the Vikas Vidyalaya, Wadhwan, at Ex. 6, which certifies that the birth-date of Sheela was entered in the General Register of the School was 8th August 1951. The witness Jayantilal Nagardas, the Teacher in the Vidyalaya (Ex. 12) was examined and according to him the certificate was as per general register. Entry Ex. 13. This entry in its turn was made from the School Leaving Certificate Ex. 18 issued by Shishu Mangal, Junagadh by the Head Master of the Primary School. Sheela had proved the said School Leaving Certificate Ex. 18 which also mentions the said birth date. On this evidence, the learned Sessions Judge held that there was satisfactory proof as regards the age of Sheela as the birth date was proved to be 8th August 1951. Mr. Gandhi vehemently argued that this School Leaving Certificate was not from any official register and even under Section 35 of the Evidence Act it would not be relevant evidence. As regards the birth date of Bai Sheela it is true that this being not a Government school, the document can go in under Section 35 of the Evidence Act, if it is shown that the headmaster who had issued this certificate was in the discharge of his duties specially enjoined by law to make these entries in the school register. The learned Assistant Government Pleader, Mr. Mehta, in this connection pointed out the relevant rules from the Bombay Primary Education Rules, 1949. Under Rule 129 the school leaving certificate has to be issued. Under Rule 130, the provision is made for the age certificate to the effect that every child seeking admission for the first time into an approved school shall produce a certificate of age signed by its parent. In the case of illiterate parents, the certificates shall bear their thumb impression, attested by a literate person other than a teacher of the school to which the child seeks admission. The date of birth given in this certificate shall be entered in the School General Register. No subsequent change or alteration therein shall be made except with the sanction of the School Board Chairman. In the case of transfer of pupils from one place to another, the age given in the leaving certificate shall be entered in the register of the new school. From these two rules, and the

* (Only portions approved for reporting by the High Court are reported here.)

other relevant rules, laying down duties of the teachers and headmasters to maintain the relevant registers and making proper entries therein. Mr. Mehta argued that by a statutory provision the school authorities were enjoined to maintain the General Register and to issue the school leaving certificate. Mr. Mehta is right in this connection that such duty being imposed by law, the entry of the birth date in the School Leaving Certificate from the General Register would be relevant evidence even under Section 35 of the Evidence Act. The difficulty, however, which still arises, is as to the evidentiary value that can be given to the statement of age in this entry made in the School Register. Mr. Mehta pointed out that because of Rule 130, a presumption would arise under Section 114 of the Evidence Act that the parent had given this age. In the present case even though both the parents are alive and are staying at Ahmedabad and at Surat, none of them was examined to prove the truth of this entry. The prosecution relied on this entry for proving the truth of the statement of the age of Bai Sheela. No connective evidence was led to show that this entry was made on the statement of the parent. No birth register entry or vaccination certificate was even produced. Besides, when both the parents were living and were not shown to be incapable of giving evidence their reported statement would hardly have any higher evidentiary value than hearsay evidence. Mr. Mehta in this connection vehemently relied upon the decision in *Bhim Mandal v. Magaram*, AIR 1961 Pat 21, by Raj Kishore Prasad J. That decision cannot help Mr. Mehta for the simple reason that in that case the statement of the parent, proved by the relevant entry in the school register maintained under the Bihar and Orissa Education Code, could prove the truth of the contents, because the case was covered under Section 32(5) of the Evidence Act as the concerned parent was proved to be incapable of giving evidence and, therefore, the recognised exception to the hearsay rule came into play. Therefore, on the evidence on record in this case, the prosecution has failed to prove that Bai Sheela was under the age of 18 on the date of the offence and the charge under Section 366 for kidnapping therefore cannot be brought home to the accused. The conviction on that count of kidnapping must, therefore, be set aside.

4. Mr. Mehta, however, next argued that as the offence of abduction would be by way of alternative charge to one of kidnapping, the case would clearly fall under Section 236 of the Criminal Procedure Code and in such a case, it is open to the Court under Section 237 of the

Criminal Procedure Code to convict the accused for the offence of abduction under the same Section 366 of the Indian Penal Code, if the facts proved established that charge, as the accused met that charge right from the beginning and his explanation was even sought under Section 342. In *Smt. Ram Devi v. State of U. P.*, AIR 1955 SC 574 at p. 576, the Supreme Court had to consider this question as to whether the accused could be convicted for abduction under Section 366, when the prosecution failed to prove the ingredient of age for the offence of kidnapping under Section 361. Their Lordships of the Supreme Court held at page 576 that apart from the fact that that was not the charge under Section 366, the evidence on record did not warrant the conclusion that the concerned lady was either compelled by force or induced by any deceitful means to go from her father's place by the accused, nor was any question put to the accused in the examination under Section 342, Cr. P. C. in that connection. In these circumstances, the Supreme Court did not accept that argument. The fact of absence of a specific charge of abduction would not be material in this case as the accused at the initial stage on the facts disclosed in the charge-sheet could have been alternatively charged both for kidnapping and abduction under Section 366. After the decision in *Emperor v. Kasamalli Mirzalli*, 44 Bom LR 27=(AIR 1942 Bom 71) (FB) by the Full Bench consisting of Sir John Beaumont, Kt. Chief Justice, Wadia J. and Sen J., it is well settled that if the prosecution had been doubtful whether they could prove that the girl was under the relevant age they could put up alternative charge of kidnapping and abduction for Section 236 of the Criminal Procedure Code would be clearly applicable. In view of this specific provision of Section 237, the want of a specific charge could not by itself be treated as any prejudice to the accused. The position of law in this connection is also well settled after the decision of the Supreme Court in *Willie (William) Slaney v. The State of Madhya Pradesh*, AIR 1956 SC 116. In the majority judgment, by His Lordship Chandrasekhar Aiyar J., on behalf of himself and Jagannath Das, J. and with which Inam, J. agreed, at page 137, it is in terms held that there may be cases where a trial, which proceeds without any kind of charge at the outset, can be said to be a trial wholly contrary to what is prescribed by the Code and in such cases, the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration, it is in terms pointed out that where the conviction is for a totally different offence from the one charged and not covered by Sections 236 and 237 of the Code, the omis-

sion to frame a separate and specific charge would be an incurable irregularity amounting to an illegality. When the charge is of a minor offence, there would be no conviction for a major offence, e.g., grievous hurt or rioting and murder. Therefore, where a charge is not for such a distinct offence, which would not be covered by Sections 236 and 237 of the Criminal Procedure Code, the conviction for the other charge which could have been made in the alternative would always be legal, provided no prejudice has resulted to the accused. On that principle, in *Sunil Kumar Paul v. State of West Bengal*, AIR 1965 SC 706, the Supreme Court held that the accused could be convicted for the offence under Section 420, I.P.C., even though he was charged only for the offence under Section 409 because that alternative charge could have been framed under Section 236 of the Criminal Procedure Code on the basis of the allegation in the charge-sheet. Such conviction would be in accordance with the provision of Section 237 of the Criminal Procedure Code. The Supreme Court further held at p. 712 that in the circumstances of the case the accused could not be said to have been prejudiced in his conviction under Section 420, I.P.C. on account of non-framing of the charge, and consequent non-trial, under Section 420, I.P.C. Their Lordships further observed that in the circumstances of the case no question of irregularity in the trial arose. The framing of the charge under Section 420, I.P.C. was not essential and Section 237, Criminal Procedure Code itself justified his conviction of the offence under Section 420 if that be proved on the findings on the record. Mr. Gandhi, in this connection, relied upon the decision in *Bhagaban Mahakud v. State*, in (1957) 58 Cri LJ 674 (Orissa) at p. 676 holding that where the charge of kidnapping is not proved, the conviction could not be had for the offence of abduction under Section 366. That decision cannot help Mr. Gandhi as in that case the accused was held to be prejudiced, if he was convicted for abduction, because the original charge of kidnapping was one read with Section 149. As the prejudice had been duly established, the conviction could not be on the basis of abduction which was found on the record. In view of this settled legal position, as the accused had met the charge right from the beginning of abducting Sheela by deceitful means, with the same intention with which he was charged for kidnapping, and as the explanation under Section 342 was also taken in that connection, no question of prejudice could arise. Under Section 237 Criminal P. C. the accused could, therefore, be convicted for the offence under the said Section 366, I. P. C., even if in-

stead of kidnapping, the offence of abduction with the same intention is proved.

5-9, x x x x x
Appeal dismissed.

AIR 1970 GUJARAT 180 (V 57 C 30)

B. J. DIVAN AND S. H. SHETH JJ.

Bachubha Ramsinhji, Applicant v. Shri Shivlal I. P. S. Kutch and others, Opponents.

Spl Civil Appln. No. 1038 of 1964, D/- 26-6-1969.

Constitution of India, Art. 311(1) — Petitioner appointed constable in Gujarat by D. S. P. but promoted as Head Constable by D. I. G.—D. S. P. also competent under the Rules to promote petitioner as Head Constable — Order of promotion amounts to fresh order of appointment — **Dismissal from service by D. S. P. violates Art. 311(1) —** But D. S. P. competent to suspend or order departmental inquiry against petitioner — (Bombay Police Manual (as applied to Gujarat) R. 97).

In the light of the different provisions of Rule 97 of the Bombay Police Manual (which applies to the Police Force in the state of Gujarat) it is clear that whenever any constable is promoted from the rank of constable to the cadre of Head Constable, a fresh appointment takes place as such. Under these circumstances, where the petitioner appointed an ordinary constable by the District Superintendent of Police, was promoted to the post of Head Constable, by the Deputy-Inspector General of Police, the order dismissing the petitioner from service could only be passed by an officer not subordinate in rank to Deputy Inspector General of Police. The order of dismissal passed by the District Superintendent of Police violates Art. 311(1). It is true that it was competent to the District Superintendent of Police to promote the petitioner from the rank of constable to the cadre of Head Constable; but, under Art. 311(1), in order to judge as to whether the petitioner was dismissed from service by an authority not subordinate in rank to the Authority that appointed him, the factum of appointment as Head Constable has to be looked to and not to the competent authority who could have appointed the petitioner as Head Constable. AIR 1956 Mad 419 & AIR 1964 SC 787. Rel. on.

(Paras 7, 10)

Under the provisions of Art. 311 (1) it is only when at the end of departmental enquiry, a decision has to be taken regarding the dismissal or removal from service, that the question has to be considered as to which was the authority that actually as a matter of fact appointed that parti-

LM/FN/G171/69/VBB/T

cular Government Servant. So far as the order directing that the particular Government servant be suspended or that a particular departmental enquiry should be held against a particular Government Servant is concerned, it is the competency of the authority concerned that has to be looked at in the light of the rules as they stand; and the question does not arise at that stage as to whether the officer who appointed the Government servant concerned was subordinate in rank to the officer ordering interim suspension or directing Departmental Enquiry. Under these circumstances, the contention that the order of suspension passed by the District Superintendent of Police against the petitioner is vitiated, cannot be sustained. (Para 11)

Cases Referred: Chronological Paras
 (1964) AIR 1964 SC 787 (V 51) =
 1964-5 SCR 431, R. P. Kapur v.
 Union of India II

(1956) AIR 1956 Mad 419 (V 43) =
 1956-1 Lab LJ 537, N. Soma-
 sundaram v. State of Madras 6
 K. N. Mankad, for Applicant; -G. N.
 Desai, Govt. Pleader, for Opponents.

DIVAN, J.:— The petitioner in the present case was working as an Unarmed Head Constable in Kutch District and was at the relevant time attached to Kandla Police Station in Kutch District. An incident took place on April 2, 1963, in connection with a sailor, by name Jorgenson v. Sherman, of S. S. Marine Ranger; and it was alleged against P. S. I. Mehta of Kandla Water Police Station, the present petitioner and against another Head Constable attached to the Police Station, Head Constable Chandgiram that they accepted in concert with each other a bribe of Rs. 500/- for not instituting a case against the said Sherman even though he was found drunk in the territories which were within the jurisdiction of the Police Station and even though he was carrying a bottle of liquor with him. By the Order, dated July 30, 1963, passed by the District Superintendent of Police, Kutch, the petitioner was suspended for his alleged part in this incident and thereafter by the order, dated September 3, 1963, the first respondent, the District Superintendent of Police, Kutch District, served a charge-sheet on the petitioner in connection with the Departmental Enquiry that was instituted against the petitioner. Thereafter respondent No. 1 held the Departmental Enquiry against the petitioner and after the evidence was recorded and the first stage of the enquiry was over, on February 29, 1964, the petitioner was served with a show-cause notice by the first respondent asking the petitioner to show cause why he should not be dismissed from service. Originally the time fixed for submitting the reply to the show-cause notice was a period of 7 days from the date of the

receipt of the show-cause notice. Thereafter the time for submitting the reply to the show-cause notice was twice extended for a period of 10 days each and the last date for submitting the reply was April 17, 1964. The reply was presented by the petitioner in person on April 21, 1964, but the first respondent did not accept the reply on the ground that it had not been submitted within the stipulated time. The first respondent by his Order, dated April 18, 1964, dismissed the petitioner from service. Thereafter the petitioner filed an appeal to the Deputy Inspector General of Police, Rajkot Range, the second respondent herein, and the appeal was disposed of by the second respondent by his order, dated August 26, 1964. The second respondent confirmed the conclusion of the first respondent that the charge against the petitioner had been established and he also confirmed the order of punishment passed against the petitioner by respondent No. 1 and the appeal filed by the petitioner was, therefore, dismissed. The present petition has been filed by the petitioner challenging the order of dismissal.

2. Various contentions have been set out in the petition challenging the legality of the order passed against the petitioner but at the hearing of the petition before us Mr. Mankad, appearing on behalf of the petitioner, has confined arguments mainly to one argument. We must make it clear that he has not given up his other contentions but he has indicated that if we were in a position to accept his contention on that one point, it is not necessary for us to go into other contentions set out in the petition. It is possible that if we accept that main contention of Mr. Mankad and set aside the order of dismissal, another Departmental Enquiry may be held against the petitioner and in the course of that second Departmental Enquiry some thing that we might say or observe regarding the other points set out in the petition might prejudice the case of the petitioner. The circumstance which has induced us to consider this one point, which has been mainly urged before us by Mr. Mankad, is that if we come to the conclusion that the petitioner is entitled to succeed on that one point, we need not express any opinion in the course of this judgment regarding any of the other contentions set out in the petition.

3. This contention which has been principally relied upon by Mr. Mankad is set out in Para 1 of the petition and the statement therein that the petitioner was appointed Head Constable in Kutch District Police Force by the Deputy Inspector General of Police, Rajkot. Mr. Mankad has contended that under Art. 311(1) of the Constitution, the petitioner should have been dismissed only by an authority

not subordinate to that by which he was appointed. Mr. Mankad's contention is that the petitioner was appointed Head Constable in Kutch District by the Deputy Inspector General of Police, Rajkot Range and, therefore, the order dismissing him from service could only have been passed by an authority not subordinate to the Deputy Inspector General of Police. The contention in this connection is that inasmuch as the order of dismissal was passed in the first instance by the District Superintendent of Police, Kutch, who clearly is an officer subordinate in rank to Deputy Inspector General of Police, Rajkot, the order dismissing the petitioner from service violates Article 311 (1) of the Constitution. In this connection, we may point out that though this particular data is not available from the materials on record, it is common ground between the parties that the petitioner was appointed in the first instance as a Police Constable by the D. S. P. of Madhya Saurashtra District in the former State of Saurashtra and he was so appointed on March 8, 1950. It is not in dispute before us that on May 25, 1957, the Deputy Inspector General of Police, Rajkot Range, issued an Office order to the following effect:—

"Following Constables are promoted as Head Constable and transferred to Kutch District in the interest of public service." And the name of the present petitioner is set out in the list of constables who were so promoted from Madhya Saurashtra District and transferred to Kutch District. A copy of that order of the Deputy Inspector General of Police, Rajkot, is annexed to the affidavit-in-rejoinder filed by the present petitioner in these proceedings.

4. It is, therefore, clear that though the original appointment of the petitioner as a constable was by the District Superintendent of Police, Madhya Saurashtra District, the order promoting him and at the same time transferring him to Kutch District was passed by the Deputy Inspector General of Police, Rajkot. This order of the Deputy Inspector General of Police is a composite order by which there had been both promotion and transfer so far as the petitioner was concerned.

5. Under Article 311 (1) of the Constitution of India, it has been provided that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. Therefore, it is clear that it is the factum of appointment of the particular Government servant that is to be considered and the question is not whether any officer lower in rank to that officer who actually appointed the

Government servant could have made that appointment.

6. In *N. Somasundaram v. State of Madras*, AIR 1956 Mad 419, Rajagopalan J. has rightly pointed out:—

"The competence of the authority to order removal or dismissal will have to be determined with reference to the requirements of Art. 311(1) of the Constitution; and one of the requirements is that the authority that orders the dismissal or removal should not be one subordinate in rank to that by which the civil servant in question was appointed.

And the principle would appear to be that it is the factum of the appointment of the civil servant, who claims the guarantee, that determines the scope of the guarantee conferred by Art. 311(1).

Where an authority, higher than the one entitled under the statutory rules to order an appointment, in fact orders a valid appointment, it is the factum of that appointment that controls the scope of the guarantee conferred by Art. 311(1) of the Constitution and if such a civil servant is dismissed or removed from service by an authority, no doubt, competent under the rules to order the appointment and also to order dismissal, which however, is lower in rank than the authority which in fact ordered the appointment, such an order would contravene the provisions of Art. 311(1) of the Constitution."

In the instant case, it is clear that a District Superintendent of Police is competent under the provisions of the Bombay Police Act, 1951, and the statutory rules made thereunder to promote a constable to the post of Head Constable and also to initiate disciplinary proceedings against a Head Constable and to dismiss him from service. Thus, so far as a Police Head Constable is concerned, it is competent to a District Superintendent of Police both to promote an individual Police Constable to the post of Head Constable and also to dismiss him after holding an appropriate Departmental Enquiry against him. But the question at controversy before us is whether the order passed by the Deputy Inspector General of Police in the instant case promoting the present petitioner from Constable to Head Constable and by the same order transferring him to Kutch District from Rajkot District, amounted to an order of appointment or a mere order of promotion without having an element of fresh appointment in it. It is clear that if an order promoting a Constable to the post of a Head Constable amounts to fresh appointment then, in the light of the above interpretation of Art. 311(1) and the above decision of the Madras High Court in *N. Somasundaram's case*, AIR 1956 Mad 419 (supra), with which we are in agreement, it is clear that the order dismissing the petitioner from service could have been

passed by an Officer not subordinate in rank to the Deputy Inspector General of Police; and the order in the instant case having been passed by the District Superintendent of Police, Kutch, who was admittedly an officer inferior in rank to the Deputy Inspector General of Police, the impugned order would be clearly violative of Art. 311(1) of the Constitution and would, therefore, be bad.

7. The learned Government Pleader appearing on behalf of the State has contended that the power to promote a constable to the post of a Head Constable rests with the District Superintendent of Police in each district and further that when an order of promotion in such a case is passed, there is no fresh appointment but there is a mere promotion from a lower post to a higher post. We are unable to accept this contention of the learned Government Pleader because we find from the Bombay Police Manual, 1959, Vol. I, dealing with administration, that under R. 97, at Page 72, provision has been made for cadres of Head Constables and Constables and sub-rule (1) of R. 97 provides:

"The cadre of Head Constables is divided into three Grades."

And thereafter that sub-rule lays down the proposed percentages for the three different grades of the cadre of Head Constables. It is clear from sub-rule (4) of Rule 97 and also from sub-rule (6) of Rule 97 that appointments to the cadre of Head Constables can be made either by promotion from constables or by direct appointment as Head Constables of any grade (Armed or Unarmed). The appointments as Head Constables under sub-rule (4) of candidates either promoted from the rank of constables or directly appointed is made for a probation for two years. Sub-rule (6) provides that Constables and directly recruited Head Constables will be confirmed, if found fit by the Superintendent of Police, at the expiration of the period of probation; and sub-r. (2) provides that the appointment of the Head Constables by promotion will be made by Superintendent of Police. Thus, Rule 97 makes it abundantly clear that there is a separate cadre of Head Constables and the appointments in this cadre are from two different sources—(1) by promoting constables and (2) by directly recruiting persons as Head Constables and so far as the appointments by promotion are concerned, the power to make such appointments has been conferred on the Superintendents of Police in each district. In view of these provisions of Rule 97 of the Bombay Police Manual, it is difficult to accept the contention of the learned Government Pleader that when a constable is promoted to the cadre of Head Constable, there is no fresh appointment in that cadre. Judging from the provisions of Rule 97, which we have set out hereinabove, it is clear that from

whatever source a candidate is recruited in the cadre of Head Constables, every Head Constable is to be appointed as such, first on probation for a period of two years and thereafter if he is found fit by the Superintendent of Police on the expiration of the period of probation, he is to be confirmed as Head Constable. In the light of these different provisions of Rule 97 providing for a separate cadre of Head Constables and providing for recruitment from two different sources, promotion and direct appointment, and further providing for confirmation as Head Constable after the probation for a period of two years and that every candidate, from whatever source recruited as Head Constable, has to undergo a probationary service in that cadre for a period of two years, it is clear that whenever any constable is promoted from the rank of constable to the cadre of Head Constable, a fresh appointment takes place as such and under these circumstances, it is clear that the promotion of the present petitioner from an ordinary constable attached to the Police Force of Madhya Saurashtra District as it then was, to the post of Head Constable, Kutch District, was a new appointment for him; and inasmuch as that appointment was made by the Deputy Inspector General of Police, Rajkot, the order dismissing the petitioner from service could only have been passed by an officer not subordinate in rank to Deputy Inspector General of Police. It is true, as was emphasized very strenuously by the learned Government Pleader that it was competent to the District Superintendent of Police to promote the petitioner from the rank of constable to the cadre of Head Constables; but as we have pointed out above, under Article 311(1), in order to judge as to whether the petitioner was dismissed from service by an authority not subordinate in rank to the authority that appointed him, we have to look to the factum of appointment as Head Constable and not to the competent authority who could have appointed the petitioner as Head Constable.

8-9. In support of his arguments that the promotion of the petitioner from the rank of constable to the cadre of Head Constables did not involve a fresh appointment, the learned Government Pleader drew our attention to Section 14 of the Bombay Police Act, 1951. Sub-section (1) of that section is in these terms:—

"Every Police Officer of the grade of Inspector or below, shall on appointment receive a certificate in form provided in Schedule II. The certificate shall be issued under the seal of such officer as the State Government may by general or special order direct."

The provisions of sub-section (2) of Section 14 are not relevant for the purposes of this judgment. In Schedule II to the

Bombay Police Act, the form of certificate of appointment in the Police Force has been set out. It was contended by the learned Government Pleader that if in fact the promotion of the petitioner from the rank of constable to the cadre of Head Constables amounted to a new appointment, a new certificate of appointment in the form set out in Schedule II in accordance with the provisions of Section 14 would have been issued to him. He further contended that since the petitioner did not bring before the Court any such fresh certificate of appointment as Head Constable, the order promoting the petitioner to the cadre of Head Constables should not be considered to be an order of fresh appointment. This contention must be rejected because even assuming that a fresh certificate of appointment in the form set out in Schedule II had not been issued to the petitioner after his promotion as Head Constable by virtue of the order of the Deputy Inspector General of Police, the omission on the part of the authorities concerned to issue such a certificate cannot be of any assistance to us in deciding whether the promotion from the rank of constable to the cadre of Head Constable is or is not a fresh appointment for the purpose of deciding the question under Art. 311(1) of the Constitution. If in fact in the light of the provisions of the statutory rules and regulations, the order promoting a constable to the post of a Head Constable amounts to an order of fresh appointment, the mere fact that a fresh certificate of appointment in connection with such promoted Head Constable is not issued can never mean that such an order of promotion does not amount to an order of fresh appointment. In our opinion, the real effect of an order promoting a constable to the post of a Head Constable has to be decided independently of the provisions regarding the issuing of certificate of appointment, which is a mere documentary evidence of the factum of appointment and does not in any way elucidate as to what are the legal consequences of an order promoting a constable to the cadre of Head Constables.

10. In our opinion, the only conclusion that one can reach in the light of the provisions of Rule 97 of the Bombay Police Manual, which applies to the Police Force in the State of Gujarat, is that when any person is appointed in the cadre of Head Constable either by promotion or by direct appointment, there is a fresh appointment in that cadre and it cannot be said that simply because out of the two sources of recruitment to the cadre of Head Constable, one source, viz., promotion, is resorted to, there is no fresh order of appointment as Head Constable. Under these circumstances, we have come to the conclusion that the order promoting the petitioner from the rank of constable to the

rank of Head Constable and transferring him from Madhya Saurashtra District to the Kutch District amounted to a fresh order of appointment. We have further come to the conclusion, in the light of the provisions of Art. 311(1), that since that order of appointment of the petitioner as Head Constable was passed by the Deputy Inspector General of Police, Rajkot, in 1957, the petitioner should not have been dismissed from service by an officer subordinate in rank to the Deputy Inspector General of Police. It is not in dispute before us that in the instant case, the order dismissing the petitioner from service has been passed in the first instance by the District Superintendent of Police, Kutch. The fact that there was an appeal and that appeal was disposed of by the Deputy Inspector General of Police, Rajkot, does not mean that the order of dismissal passed by the District Superintendent of Police, Kutch, as the authority in the first instance, is not vitiated as being in contravention of Art. 311(1). In our opinion, since the order of dismissal in the instant case was passed by an officer subordinate in rank to the officer who actually appointed the petitioner as Head Constable, the order of dismissal is vitiated and, therefore, it must be set aside.

11. In *R. P. Kapur v. Union of India*, AIR 1964 SC 787, it has been held by the Supreme Court:—

"On general principles the Government like any other employer, would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings; this may be called interim suspension. Or the government may proceed to hold a departmental enquiry and after his being found guilty order suspension as a punishment if the rules so permit. This will be suspension as a penalty. These general principles will apply to all public servants but they will be subject to the provisions of Art. 314.

The authority entitled to appoint a public servant would be entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. This general principle is illustrated by the provision in Section 16 of the General Clauses Act which is in consonance with the general law of master and servant. But what amount should be paid to the public servant during interim suspensions will depend upon the provisions of the statute or rule in that connection. If there is such a provision the payment during suspension will be in accordance therewith. But if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension.

This suspension must be distinguished from suspension as a punishment which is a different matter altogether depending upon the rule in that behalf."

It may be pointed out that under the provisions of Art. 311(1) of the Constitution, it is only when at the end of departmental enquiry, a decision has to be taken regarding the dismissal or removal from service, that the question has to be considered as to which was the authority that actually as a matter of fact appointed that particular Government servant. So far as the order directing that the particular Government servant be suspended or that a particular Departmental Enquiry should be held against a particular Government servant is concerned, it is the competency of the authority concerned that has to be looked at in the light of the rules as they stand; and the question does not arise at that stage as to whether the officer who appointed the Government servant concerned was subordinate in rank to the officer ordering interim suspension or directing Departmental Enquiry. Under these circumstances, the contention urged on behalf of the petitioner that the order of suspension passed by the D. S. P. Kutch, on July 20, 1963, is vitiated, cannot be sustained and that contention of the petitioner must fail.

12. The result, therefore, is that the challenge to the order of suspension fails but the petitioner succeeds in his challenge to the order of dismissal passed against the petitioner and confirmed in appeal by the second respondent. We, therefore, set aside the order of dismissal passed against the present petitioner. We wish to make it clear that we do not express any opinion regarding any other point urged in this petition; and if the Government are so advised, it would be open to them to pass such order as they may think proper in accordance with law. The petition is allowed to this extent and the rule is made absolute. The respondents will pay the costs of this petition to the petitioner.

Rule made absolute.

AIR 1970 GUJARAT 185 (V 57 C 31)*

N. G. SHELAT, J.

Adam Ahmed, Appellant v. State, Respondent.

Criminal Appeal No. 178 of 1966, D/- 2-2-1968, against order of City Magistrate 10th Court, Ahmedabad, D/-15-2-1966.

Criminal P. C. (1898), S. 539-B — Local inspection — Failure to make memorandum and keep it on record of case — Trial or proceeding is not vitiated unless it has resulted in failure of justice or caused prejudice to accused in his defence. (Para 5)

(*Only portions approved for reporting by High Court are reported here).

CN/DN/G189/69/JHS/C

N. N. Dave, for Appellant; H. V. Bakshi, Asstt. Govt. Pleader, for Respondent.

JUDGMENT:—

1-4. x x x x x

5. Mr. Dave, the learned advocate for the appellant, has pointed out that at the request of the accused during the course of the trial, the learned Magistrate had inspected the place of incident and that he has kept no notes whatever about the same on the record of the case. According to him, therefore, he has violated the mandatory provisions contained in Section 539-B of the Criminal P. C. On that basis, he further urged that the defence of the accused is materially prejudiced and the appreciation of the evidence could not be made in a proper manner by the learned Magistrate. It appears no doubt true that an application was presented by the accused on 20-1-1966 to the Court requesting the Court to take local inspection of the place of the incident and other places referred to in the evidence. From the order passed therebelow, it appears that the learned Magistrate granted that request and fixed 22-1-1966 for going for local inspection. From the proceedings it appears that it was on 29-1-1966 that the local inspection of the site was taken and then he adjourned the case to 2-2-1966. The arguments in the case were heard on 9-2-1966 and the judgment was thereafter delivered on 15-2-1966 in the case. From the record and proceedings of this case it further appears clear that no notes of the local inspection made by the learned Magistrate have been kept on the record of this case. At the same time he has made no reference whatever about the same in his judgment. Now, S. 539-B of the Criminal P. C. provides as under:—

"539B. (1) Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant, or accused so desires, a copy of the memorandum shall be furnished to him free of cost.

x x x x x"

It follows therefrom that if any local inspection is made by the learned Magistrate in relation to any case before him under Section 539-B of the Criminal P. C., it is required of him to record the memorandum of any relevant facts observed at such inspection without unnecessary delay and any such memorandum made by him

would form part of the record of the case. The learned Magistrate has, however, not chosen to keep any record of what he observed in the local inspection made by him under Section 539-B of the Code. This section, however, does not lay down the effect that would flow therefrom when no such memorandum has been kept on the record of the case. Non-compliance thereof cannot have therefore, the effect of vitiating any trial or the proceeding unless it is shown that it has resulted in any failure of justice in the circumstances of the case. Unless, therefore, any prejudice is caused to the accused in his defence, or has resulted in failure of justice on that account, the decision in the case, otherwise arrived on appreciation of evidence cannot be set aside. It is not an illegality so committed as to vitiate the trial.

6. Now it was after the local inspection was made by the learned Magistrate that the matter was set down for arguments and the arguments were heard. The learned advocate appearing for the accused in that Court made no request whatever to have the notes of inspection placed on record. Nor is there any material to show that the learned Magistrate has made use of any observation to the disadvantage in appreciating the evidence in the case. It is not suggested, and at any rate it does not appear that no cross-examination was done of the witnesses, as the local inspection was to be made. On the other hand, the grievance of Mr. Dave is that the learned Magistrate has not at all chosen to appreciate the evidence and has given no reasons in coming to the conclusion that he arrived at in the case. According to him, except narrating the facts in judgment, no reasons have been given which led him to accept the evidence led by the prosecution and for coming to the conclusion that he did in the case. That criticism levelled by Mr. Dave cannot be said to be altogether without any force, but that does not in any way affect the decision in the case. At any rate, I am not show how the appreciation of evidence by the learned Magistrate has been so affected by reason of his not keeping notes of inspection made by him in the case.

x x x
Appeal dismissed.

AIR 1970 GUJARAT 186 (V 57 C 32)
J. M. SHETH, J.

Patel Bechar Narsinh, Petitioner v. The State of Gujarat and another, Opponents.

Criminal Revn. Appln. No. 145 of 1969, D/- 19-8-1969, against judgment and order of Judicial Magistrate 1st Class, Mangrol, in Criminal Case No. 2678 of 1968.

FN/GN/C797/70/RGD/P

(A) **Bombay Probation of Offenders Act (19 of 1938), S. 5(1)** — "Offence not punishable with death or transportation for life" — Expression means offence not punishable with death or offence not punishable with transportation for life — Under S. 53-A, Penal Code transportation for life means imprisonment for life — Accused convicted under S. 326 Penal Code cannot be given benefit of S. 5(1). AIR 1928 Bom 244, Foll. Case law Referred. (Paras 7, 8, 14)

(B) **Criminal P. C. (1898), S. 439(6)** — Right of accused "to show cause against enhancement of sentence" — Notice why order releasing him on probation of good conduct should not be set aside, order being illegal and invalid and pass sentence in lieu of it — This is not a case of enhancement of sentence passed by Court recording Order of conviction and releasing accused on probation of good conduct — Accused has no right to be heard in regard to order of conviction against him, since there was no sentence awarded either under S. 439(6) or under S. 7(1), Bombay Probation of Offenders Act. AIR 1943 Mad 521 & AIR 1939 Sind 339 & AIR 1950 Raj 28, Rel. on; (1949) 2 Sau LR 48 observations in dissented from. (Para 18)

(C) **Bombay Probation of Offenders Act (19 of 1938), S. 7(2)** — Accused convicted and released on probation of good conduct — Appellate Court in exercise of powers of revision can set aside order of probation and pass sentence in lieu thereof not greater than that which trial Court could have awarded — It is not necessary to remand case to trial Court for passing sentence — High Court is not restricted to passing non-appealable sentence. (Paras 27, 28)

(D) **Penal Code (1860), S. 326** — Offence under — In considering sentence to be passed, nature of injury, weapon used and part of body on which injury was caused are important factors to be considered — (Sentence of one year's R. I. and fine of Rs. 125 passed — Sentence of fine of Rs. 125 was passed in view of the order of the trial Magistrate for paying the amount as compensation to the victim keeping in view the provisions of Section 6 of the Bombay Probation of Offenders Act (1938)). (Paras 29, 36)

Cases Referred: Chronological Paras
(1965) AIR 1965 Orissa 106 (V 52) =
1965. (2) Cri LJ 51, Jogi Nahak v. The State 13
(1964) 1964 (1) Cri LJ 460 = ILR (1963) Mys 929, State of Mysore v. Saib Gunda 12
(1959) AIR 1959 Madh. Pra 291 (V 46) = 1959 Cri LJ 989, Chetti v. State of Madhya Pradesh 11
(1956) AIR 1956 All 326 (V 43) = 1956 Cri LJ 659, State v. Sheo Shankar 10

- (1950) AIR 1950 Raj 28 (V 37) =
51 Cri LJ 1332, Sarkar v. Jalam-
singh 22
- (1949) 2 Sau LR 48, United State of
Saurashtra v. Koli Ganga Kana 23
- (1943) AIR 1943 Mad 521 (V 30) =
44 Cri LJ 774, In re: Varadaraja
Padayachi 20
- (1939) AIR 1939 Sind 339 (V 26) =
41 Cri LJ 187, Emperor v. Miro
Ghulam Hussain 21
- (1932) AIR 1932 Nag 130 (V 19) =
33 Cri LJ 844, Emperor v. Mt.
Janki 9
- (1928) AIR 1928 Bom 244 (V 15) =
29 Cri LJ 901, Naranji Premji v.
Emperor 3
- (1927) AIR 1927 Rang 205 (V 14) =
28 Cri LJ 773 (FB), Emperor v.
Nga San Htwa 8
- (1926) AIR 1926 Rang 51 (V 13) =
27 Cri LJ 401, Mohammad Eusoo
v. Emperor 8
- G. C. Patel, for Petitioner; J. U. Mehta,
Hon. Asstt. Govt. Pleader, for Respondent
No. 1—State; B. R. Shelat (Appointed),
for Respondent No. 2.

ORDER:— This is a revision petition filed by the original complainant (first informant) against the order passed by the learned Judicial Magistrate, First Class, Mangrol, Mr. R. C. Shah, in Criminal Case No. 268 of 1968, releasing present opponent No. 2, Maiya Dolu Kar-san, who was original accused No. 2, on probation of good conduct. Opponent No. 2 has been convicted of an offence punishable under Section 326 of the Indian Penal Code. He was ordered to be released on probation under Section 5(1) of the Bombay Probation of Offenders Act, 1938 (which will be hereinafter referred to as the Act), on furnishing a bond of Rs. 1,000/- for a period of one year with a solvent surety for the like amount to keep and maintain peace during the aforesaid period and to receive the sentence when called upon during the aforesaid period. This order was passed on 30th December, 1968.

2. Mr. G. C. Patel, learned Advocate appearing for the petitioner, submitted that the offence under Section 326 of the Indian Penal Code is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years, and is also liable to fine. Maximum punishment provided for such an offence being imprisonment for life, it was submitted by Mr. Patel that the trial Court has committed an error in giving benefit of Section 5(1) of the Act to opponent No. 2. He, therefore, submitted that the order passed by the learned trying Magistrate, releasing Opponent No. 2 on probation of good conduct, be set aside and in lieu of it, proper and adequate sentence be passed.

3. Mr. J. U. Mehta, the learned Hon. Assistant Government Pleader, who appeared for Opponent No. 1 (State of Gujarat), supported the submissions made by Mr. Patel.

4. Mr. B. R. Shelat, learned Advocate (appointed) for Opponent No. 2 (accused No. 2) submitted that Opponent No. 2 had a right to challenge the order of conviction recorded against him on facts in view of the provisions of Section 439, sub-section (6) of the Criminal Procedure Code (which will be hereinafter referred to as the Code). It is further contended by him that this Court cannot award sentence and the case should be remanded to the trying Magistrate for awarding proper and adequate punishment. It was further submitted by him that at any rate, the Court should not award punishment which is more than non-appealable sentence. It was also submitted by him that the provisions of Section 5(1) of the Act have application as the offence under Section 326 of the Indian Penal Code is not punishable with death or imprisonment for life; it being punishable with imprisonment for life, the provisions of Section 5(1) of the Act could be made applicable.

5. I will first consider the submission made by Mr. Shelat: whether the provisions of Section 5(1) of the Act could be made applicable in a case where the offence regarding which the order of conviction is recorded is punishable with imprisonment for life or imprisonment for any other term. The material part of Section 5(1) of the Act for our purposes reads:

"Notwithstanding anything contained in any enactment for the time being in force when—

(a) any male person is convicted of an offence not punishable with death or transportation for life, or if it appears to the Court by which the offender is convicted, that regard being had to the age, character, antecedents or physical or mental condition of the offender, or to the circumstances in which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court may, for reasons to be recorded in writing instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not being less than one year and not exceeding three years as the Court may direct, and in the meantime to keep the peace and be of good behaviour."

6. The interesting question that arises for consideration is what is the meaning to be assigned to the words, "of an offence not punishable with death or transportation for life."

7. The material part of Section 53-A of the Indian Penal Code for our purposes, reads:

"(1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to 'imprisonment for life'."

In view of these provisions of Sec. 53-A we have to read "imprisonment for life" for the words "transportation for life" in Section 5(1) (a) of the Act.

8. In Section 497, sub-section (1) of the Code, similar wording in regard to this material phrase is found. It reads:

"When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life."

These words came to be interpreted by a Division Bench of the Bombay High Court in *Naranji Premji v. Emperor*, AIR 1928 Bom 244. Fawcett, J., speaking for the Division Bench, made the following observations:—

"The first point taken by Mr. Jinnah in this application for bail is that in sub-section (1) of Section 497, Criminal Procedure Code, the words

"if there appear reasonable grounds, for believing that he has been guilty of an offence punishable with death or transportation for life"

only cover offences punishable with death or in the alternative with transportation for life, such as cases of murder and of waging war under Sections 302 and 121, I.P.C., and that they do not include offences merely punishable with transportation for life. Although no authority has been referred to in the argument before us, there is, in fact, a ruling that does support Mr. Jinnah's contention, viz. *Mohammad Eusof v. Emperor*, AIR 1926 Rang 51. But that has been overruled by a Full Bench of the same Court in *Emperor v. Nga San Htwa*, AIR 1927 Rang 205 (FB). In my opinion, this is a construction which cannot be adopted. If one refers to the definition of "warrant case" in Section 4(1) (v), Criminal P. C., it will be seen that it is defined as a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. The legislature obviously does not there mean an offence which is punishable with those

kinds of different punishments in the alternative, and they do not put the word "with" before "transportation" or before "imprisonment". Therefore, I do not attach any importance to the argument that in sub-section (1), Section 497 the word "with" does not appear before "transportation for life," and, therefore, the reference is merely to an offence which is punishable with death or in the alternative with transportation for life."

9. In *Emperor v. Mt. Janki*, AIR 1932 Nag 130, Grille, Acting Judicial Commissioner, observes:

"The phrase "punishable with death or transportation for life" must be interpreted disjunctively and women convicted of an offence for which transportation for life is one of the punishments provided are eligible for release on probation under Section 562. The words "death or transportation for life", must be read as referring to offences the penalty for which provided by the Penal Code contains either death or transportation for life as one of the punishments awarded and not necessarily both."

The learned Acting Judicial Commissioner has referred to several provisions of the Code like, Sections 4(1) (w), 31 and 34 in support of his reasoning. I am in respectful agreement with it.

10. A Division Bench of Allahabad High Court in *State v. Sheo Shanker*, AIR 1956 All 326, has also taken the same view. The relevant observations made therein are:

"The words "punishable with death or transportation for life", cannot mean "punishable with death or in the alternative with transportation for life". The plain meaning of the words "an offence not punishable with death or transportation for life" is "an offence not punishable with death or an offence not punishable with transportation for life."

Death or transportation for life must not be a punishment that can be legally inflicted for the offence; if death can be inflicted or if transportation for life can be inflicted, it is not "an offence not punishable with death or transportation for life" regardless of whether any other punishment can be inflicted either in the alternative or in addition to the punishment of death or transportation for life, as the case may be. Since the offence of Section 409, Penal Code is punishable with transportation for life or imprisonment and fine, the accused could not be released on probation of good conduct."

11. Same view has been taken by a Division Bench of Madhya Pradesh High Court in *Chetti v. State of Madhya Pradesh*, AIR 1959 Madh Pra 291, observing:

"Section 562 of the Criminal Procedure Code and Section 4(b) of the C.P. and Berar Probation of Offenders Act are an exception to the general scheme of

punishments awardable under the Indian Penal Code and the Criminal Procedure Code. The phrase "not punishable with death or imprisonment for life" ought to be interpreted in its ordinary disjunctive sense. Its scope cannot be permitted to be expanded by giving a strained meaning, by reading it conjunctively. AIR 1932 Nagpur 130 was affirmed; AIR 1927 Rangoon 205 (FB) was relied on; AIR 1927 Nagpur 53 was not approved."

12. H. Hombe Gowda, Officiating C. J. of Mysore High Court, in *State of Mysore v. Saib Gunda*, 1964 (1) Cri LJ 460 (Mys), has taken a similar view, observing:

"The provisions of Section 4 are not applicable to a case where a person is found guilty under Section 326, Penal Code, inasmuch as the maximum sentence prescribed for the offence is imprisonment for life."

13. A Single Judge of Orissa High Court, in *Jogi Nahak v. The State*, AIR 1965 Orissa 106, has taken a similar view, observing:

"The provision for punishment in Section 394, Penal Code for imprisonment for life or imprisonment for ten years and fine cannot be read conjunctively so as to mean that it provides an alternative sentence for the offence concerned. Hence, where the accused is convicted under Section 394, Penal Code, the accused cannot be given the benefit of the provisions of Section 4 or 6 of the Probation of Offenders Act and released on probation of good conduct, on the ground that the offence did not provide for punishment for imprisonment for life."

14. Taking into consideration the wording of Section 5(1) of the Act and the aforesaid decisions, it is evident that the learned Magistrate has committed an error in giving opponent No. 2 the benefit of releasing him on probation of good conduct. The reasoning adopted in these decisions, in my opinion, is quite correct. Furthermore, I am bound by the decision of the Bombay High Court, the decision being given before the date of bifurcation.

15. I will now consider the submission made by Mr. Shelat for opponent No. 2, that in view of the provisions of Section 439(6) of the Code, he has a right to challenge the order of conviction on facts and he has a right to show cause against his conviction. Section 439 of the Code deals with High Court's powers of revision. Sub-section (2) of it states:

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

Sub-section (1) of it reads:

"In the case of any proceeding the record of which has been called for by

itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence"

Sub-section (6) of it reads:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause be entitled also to show cause against his conviction." We have to read these sub-sections (2) and (6) of Section 439 of the Code in conjunction. Sub-section (2) of it contemplates issue of a notice to the accused before any order to his prejudice is being passed. It contemplates that he should be given an opportunity of being heard either personally or by a pleader in his own defence before any order is passed to his prejudice. In the instant case, such a notice has been given to opponent No. 2 and the notice has been served. An Advocate is also appointed for him and is heard.

16. A short, but interesting question that arises is whether the present case will be covered to sub-section (6) of Section 439 of the Code. The wording of that sub-section (6) clearly indicates that the accused is entitled to show cause against his conviction when an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced. It, therefore, means that the Legislature has given him an opportunity to challenge his conviction when a notice has been given to him to show cause why his sentence should not be enhanced. In the instant case, no notice has been given to opponent No. 2 to show cause why his sentence should not be enhanced. The notice has been given to him as to why this order of releasing him on probation of good conduct should not be set aside, the order being illegal and invalid and pass sentence in lieu of it.

17. The interesting question, therefore, that arises is whether it can be said that this is a case of enhancement of any sentence passed by the Court recording the order of conviction and releasing opponent No. 2 on probation of good conduct.

18. Section 53 of the Indian Penal Code which falls in Chapter III relating to punishments, enumerates different punishments provided in the Indian Penal Code. It reads:

"Punishments" — The punishment to which offenders are liable under the provisions of this Code are, —

First — Death;

Secondly — Imprisonment for life;

Thirdly — Repealed by Act No. 17 of 1949;

Fourthly — Imprisonment, which is of two descriptions, namely—

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly — Forfeiture of property;

Sixthly — Fine."

That Section 53 of the Indian Penal Code does not indicate that this order of releasing opponent No. 2 on probation of good conduct was an order inflicting any punishment.

19. We will now consider the relevant provisions of Sections 5 and 7 of the Act. I have already quoted the material part of Section 5(1) of the Act. The wording of it clearly indicates that when the Court comes to the conclusion that in view of the conditions specified in that sub-section (1) of Section 5 of the Act, the offender should be released on probation of good conduct, the Court has to record reasons in writing and the Court instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period not being less than one year That wording clearly indicates that in such a case, the Court, after recording the order of conviction, postpones the passing of sentence, meaning thereby, postpones inflicting of any punishment and instead of passing any order of sentence, the Court directs that he should be released on his entering into a bond with or without sureties to appear and receive sentence when called upon during such period not being less than one year but not exceeding three years as the Court may direct and in the meantime, to keep peace and be of good behaviour. It is, therefore, evident that when such an order of releasing on probation of good conduct is passed, there is no order of sentence passed. No punishment is visited upon him. On the contrary, that order is postponed. It could not, therefore, be said that any order of sentence was passed or any punishment was visited upon the accused as contemplated by Section 53 of the Indian Penal Code.

20. Section 7 of the Act reads:

"(1) Notwithstanding anything contained in the code except in cases in which the offender has pleaded guilty, or where the order is passed by the High Court, an appeal shall lie from an order of conviction in every case in which an order is passed under Section 4 or 5 to the Court to which appeals ordinarily lie under the Code."

A perusal of the wording of this sub-section (1) of Section 7 of the Act clearly

indicates that by not passing an order of sentence and by postponing the order of punishment, the accused is not in any way prejudiced. Even though no order of sentence is passed and he is released on probation of good conduct, he has been given a right to appeal from an order of conviction and such appeal is to be filed to the Court to which such appeals ordinarily lie under the Code.

21. Sub-section (2) of Section 7 of the Act reads:—

"The Appellate Court or the High Court in the exercise of its powers of revision may pass any such order as it could have passed under the Code, or may set aside an order under Section 4 or 5 and in lieu thereof pass sentence on such offender according to law."

This sub-section (2) makes it quite clear that this Court is entitled to set aside such an order in exercise of its powers of revision, and is further entitled in lieu thereof to pass sentence on such offender according to law. No doubt, that power vested in this Court is circumscribed by a proviso added to it. That proviso reads:

"Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted."

This Court cannot inflict punishment higher than the punishment that could have been inflicted by the Court by which the offender was convicted. This is another safeguard to protect the interest of the offender as the powers of this Court are curtailed and this Court cannot award punishment higher than the punishment that could have been awarded by the Court by which the offender was convicted. This Court, in revision, is entitled to set aside such order and in lieu thereof, it is empowered to pass sentence on such offender according to law. It further indicates that the order that was passed by the trying Magistrate, namely, releasing Opponent No. 2 on probation of good conduct was not an order of sentence. An order of sentence was postponed. If such an order was not warranted by law, this Court can set aside that order in the exercise of its revisional powers and this Court, in lieu thereof, can pass sentence on such offenders according to law. What this Court, therefore, does is awarding sentence according to law in lieu of the order passed, namely, the order of releasing the offender on probation of good conduct. It could not, therefore, be said that this Court, while exercising this power vested in it under this sub-section (2) of Section 7 of the Act in the exercise of its revisional powers, is enhancing sentence. As no sentence was awarded by the trying Court, there could not be any ques-

tion of enhancement of sentence. What this Court does is that the Court finds that this order of releasing the offender on probation of good conduct is illegal, it being not warranted by law and in lieu thereof, passes sentence on the offender according to law. No doubt, while passing that sentence, the Court has to keep the aforesaid proviso in mind, as the powers of this Court are curtailed by that proviso. There being no question of enhancement of sentence, provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. That being the position, opponent No. 2 has no right to be heard in regard to the order of conviction passed against him.

22. It was contended by Mr. Shelat that this would be against the principles of natural justice. If the accused had been awarded even a nominal sentence and this Court had issued a notice for enhancement of sentence, the accused would have been in a position to challenge this order of conviction in view of the provisions of Section 439, sub-section (6) of the Code. In the instant case, the trying Court did not find necessary even to award a nominal sentence to opponent No. 2 and thought that it was a fit case to release the offender on probation of good conduct. When this Court is trying to set aside that order in the exercise of its revisional powers, and is awarding him substantial sentence, he cannot challenge conviction. If the interpretation placed by Mr. Patel and Mr. Mehta is accepted, the result would be that such a person will not have any right to be heard against his order of conviction. The Legislature could have hardly contemplated such a result.

In my opinion, this argument is not well founded. In a case where this Court is exercising its revisional powers under Section 439 of the Code, to enhance the sentence awarded, the offender has been given a statutory right under sub-section (6) of Section 439 of the Code to challenge the order of conviction. In a case like the instant case, when this Court is exercising its revisional powers under Section 439 of the Code, in view of the provisions of sub-section (2) of Section 7 of the Act, this Court has got power to set aside such an order of releasing the offender on probation of good conduct and it has got further power to pass sentence according to law in lieu thereof. If the legislature really intended to give any statutory right to the accused that he should be heard against the order of conviction, the legislature could have very well made such provision in Section 7 of the Act. The legislature has not made any such provision. This Court has not to make the law. It has to interpret the law as it is. If there is any such grievance, appeal should be to the legis-

lature and not to the Court. In my opinion, there being no question of any enhancement of sentence, the provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. This conclusion of mine gets support from several decisions which I will presently refer to.

23. In *re Varadaraja Padayachi*, AIR 1943 Mad 521, Horwill, J., has observed:

"Where an illegal order under Section 562 is passed by a Magistrate and on appeal the Sessions Judge affirms the conviction but refers the case to the High Court as to the sentence, the case should not be regarded as one for enhancement of the sentence, entitling the accused to agitate findings of fact."

It is true that detailed reasons are not recorded in that decision to support the aforesaid reasoning.

24. In *Emperor v. Miro Ghulam Husain*, AIR 1939 Sind 339, the pertinent observations made are:

"The learned Advocate who appeared for this Miro, who is a young man of, as the Magistrate says, about 25 years of age, claimed to be heard on the merits of the case, because he said that under Section 439(6), Criminal P. C., he could show, in case of enhancement of a sentence, cause against the sentence itself. But we do not see how it can be said here that we are enhancing a sentence or acting under Section 439(6) because the enhancement of a sentence presumes there is a sentence to be enhanced, but under Section 562, Criminal P. C., it is clear that what is done is done in lieu of sentence."

After quoting the wording of Section 562 of the Code, which is substantially similar to the wording of Section 5(1) of the Act, it is observed:

"So it is clear to us that under Section 562, Criminal P. C., when an accused is released on probation of good conduct no sentence is passed by the Court. Therefore, when, as under Section 562(3) we are entitled to do, we set aside an order and pass a sentence in lieu thereof, it cannot be said that we enhance a sentence within the meaning of Section 439(6), Criminal P. C., and however unfair this may appear to the learned Advocate, we are here to interpret the law and not to make it. Therefore, we are not prepared to hear the learned Advocate upon the merits of the case, though we have heard him on all matters material to the question before us, that is the passing of a sentence of imprisonment in lieu of the order passed by the Magistrate under Section 562, Criminal Procedure Code."

25. A Division Bench of Rajasthan High Court, in *Sarkar v. Jámalsingh*, AIR 1950 Raj 28, has observed:

"When an accused is released under Section 562(1) on probation of good con-

duct no sentence is passed by the High Court. Therefore, when a case is referred to High Court for passing a sentence under Section 562(3), the case is not one for enhancement of sentence within the meaning of Section 439(6) entitling the accused to show cause against the conviction."

In my opinion, the reasoning adopted in these decisions is correct, if we bear in mind the wording of the relevant provisions of Section 439 of the Code and that of Sections 5 and 7 of the Act and the provisions of Section 53 of the Indian Penal Code.

26. Mr. Shelat. In support of his argument, relied upon a decision of the Saurashtra High Court in United State of Saurashtra v. Koli Ganga Kana, (1949) 2 Sau LR 48. That decision lends support to my conclusion that the benefit of Section 562 of the Code cannot be given to the accused who has been convicted of an offence which is punishable with transportation for life. So far as the second question is concerned, no doubt, that decision lends support to the argument advanced by Mr. Shelat. The observations made at pages 51 and 52 are as under:—

"The other question, i.e., the one under which the accused-opponent would be entitled to show cause against his conviction is a more important one, and the learned Government Pleader has pointed out two cases in support of his contention that the accused has no such right. He refers us to a Sind decision reported at page 339 in AIR 1939, Sind and another reported at page 521 in AIR 1943 Madras. Both the Courts have held that in a case under Section 562 accused has no right to show cause against his conviction. With great deference to their Lordships who decided both these cases, we have to observe that we are unable to agree with the narrow view of the law that they have taken. The ratio decidendi in those cases is that the case in question is not a case of enhancement of the sentence and hence the provisions of Section 439 which enable the accused to show cause against his conviction do not operate, in favour of the accused who has not been sentenced at all. Technically speaking, their Lordships may be right, but such a construction of Section 439 offends against the principles of natural justice, and in our opinion, such a construction would be both too technical and too narrow. To illustrate our point of view it amounts to this that a person who has been barely convicted and not sentenced is on a worse footing than a person who has been sentenced, and given an inadequate sentence; or to be more clear as to what we mean, such an interpretation would react very unfavourably against those persons

who are convicted and dealt with under Section 562. The result in such a case will be that a person who has been let off with a binding over order against him, and who naturally would be under a sort of confidence that in case in future he behaves better, there is no apprehension of any sentence whatsoever, would be taken by surprise by an order from the High Court calling upon him to appear before it and receive conviction. To give an arithmetical illustration, if when the unit of sentence already inflicted is 1, 2, 3 etc., and if the same is sought to be enhanced to 4, 5, 6 etc., the person has a right to show cause, while if the unit of the sentence is zero and is yet sought to be substituted by any other arithmetical figure, he has no right to show cause against his conviction. This works as an absurdity. Moreover, on a careful perusal of Section 439 which has ample safeguards for the benefit of those accused against whom no order could be passed to their prejudice would be naturally deprived of those benefits which do exist in their favour as the section stands."

With due deference to the learned Judges of the Saurashtra High Court, I may say that the reasoning advanced does not appeal to me. When the language of the relevant sections does not admit of any ambiguity and the language clearly indicates that such a right is given to the offender only when a notice has been issued by this Court for enhancement of sentence, it will not be proper for this Court to take any such factors into consideration as has been done by the Saurashtra High Court and interpret the provisions of Section 439 of the Code in that manner when the language does not justify such interpretation. As said in the aforesaid Sind decision, the Court has not to make the law. It has to interpret the law as it is. There being no question of an enhancement of sentence, as no sentence was awarded by the trying Magistrate, the provisions of sub-section (6) of Section 439 of the Code cannot be pressed into service. As said by me earlier, if there be any such grievance, as has been suggested in this Saurashtra decision, there should be an appeal to the legislature and not to the Court. I am, therefore, of the view that in such a case, the accused is not entitled to show cause against his conviction.

27. The submission made by Mr. Shelat that this Court cannot award sentence and the case should be remanded to the trial Court for awarding sentence as it was that Court which had recorded the order of conviction, in my opinion, is not well founded. His argument was based on the ground that if the order of sentence is passed by the trying Magistrate, he will get a right to appeal against

to acquire any agricultural lands constituting an estate and any rights therein. Secondly, without acquiring the estate it might extinguish or modify any right in the estate. The legislation contemplated by Article 31A must be of the nature of an agrarian reform with the object of regulating the rights of a landlord and tenant or of conferring a more beneficial status or interest on the tenant with a view to achieve rural economy. Once this object is achieved then the legislation becomes completely immune from challenge on the ground that it infringes or destroys the fundamental rights of the property of a citizen as guaranteed under Articles 14, 19 and 31 of the Constitution of India. This Article was interpreted by their Lordships of the Supreme Court in *Kochuni v. State of Madras*, AIR 1960 SC 1080, 1087, where in their Lordships pointed out as under:—

“If an estate so defined is acquired by the State no law enabling the State to acquire any such estate can be questioned as inconsistent with the rights conferred by Articles 14, 19 or 31 of the Constitution. So too, any law extinguishing or modifying any such rights mentioned in Clause 1 (a) and defined in Clause 2 (b) cannot be questioned on the said grounds.

It is therefore manifest that the said Article deals with a tenure called estate and provides for its acquisition or the extinguishment or modification of the rights of the landholders or the various subordinate tenure holders in respect of their rights in relation to the estate.”

In that case, however, their Lordships struck down the law in question because they held that the Act impugned overstepped the limits of Art. 31A and sought to regulate inter se the rights of a proprietor and the junior members of a family and therefore could not be considered an agrarian reform. According to their Lordships the impugned Act sought to overreach the object implicit in the Article.

7. Similarly in AIR 1961 SC 288, the Act by which the right or interest of an Inamadar under the Bombay Personal Inams Abolition Act was abolished was upheld by the Supreme Court on the ground that it was protected by Article 31A, being in the nature of an agrarian reform.

8. In AIR 1961 SC 1649, the impugned Act sought to abolish the right of a landlord to hold property and acquire the same and it was upheld on the ground that this being a right in an estate it fell within the protection given by Article 31A and was constitutionally valid.

9. We might now refer to *Golak Nath's* case, AIR 1967 SC 1943, which appears to be the sheet anchor of the argument of the learned counsel for the petitioner. In this case the majority judgment no doubt held that fundamental rights were immutable and unamendable, and in fact could

not be amended by any amendment unless a fresh Constituent Assembly was constituted. Nevertheless Subba Rao, C. J., delivering the leading judgment clearly held that all the previous amendments including the First, Fourth and the Seventeenth Amendments did abridge the scope of fundamental rights but on the basis of the doctrine of prospective overruling their validity could not be touched and they would continue to be valid. Hidayatullah J. (as he then was) held that the First, Fourth and the Seventeenth Amendments became a part of the Constitution by acquiescence and as the previous amendments were saved by the principle of acquiescence, the Seventeenth Amendment also could not be questioned as it stood. The relevant point to note, however, is whether the doctrine of prospective overruling was invoked as adumbrated by Subba Rao, C. J. or the doctrine of acquiescence as held by Hidayatullah, J., all the amendments including the Seventeenth Amendment were held to be valid, by the majority decision Article 31A was brought into existence as pointed out by the First Amendment and further amended by the Fourth Amendment of 1955. In these circumstances therefore Article 31A also was clearly saved and held to be valid by the majority decision in *Golak Nath's* case, AIR 1967 SC 1943.

Summarizing the position, Subba Rao C. J. observed as follows:—

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Art. 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is law within the meaning of Article 13 of the Constitution and therefore if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955 and the Constitution (Seventeenth) Amendment Act, 1964 abridge the scope of the fundamental rights. But on the basis of earlier decisions of this Court they were valid.

(4) On the application of the doctrine of prospective overruling as explained by us earlier, our decision will have only prospective operation and therefore the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth) Amendment Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act, X of 1953 and Mysore Land Reforms Act, X of 1962 as amended by Act XIV of 1965,

cannot be questioned on the ground that they offend Articles 13, 14 or 31 of the Constitution."

Thus their Lordships clearly declared that all the previous amendments of the Constitution were valid and that Parliament would have no power from the date of the decision of the Court to amend any provision of Part III of the Constitution. Golak Nath's case, AIR 1967 SC 1943, was decided on 27-2-1967. It is therefore manifest that any Act which falls within the protection of Article 31A which was held to be valid and which was also passed before the date of the decision was clearly immune from challenge.

10. In the instant case the impugned amendment Act XIV of 1965 was passed about two years before this decision and since the Act was clearly covered by Article 31A its constitutionality could not be challenged on the ground that it infringed Articles 14, 19 and 31.

11. In a recent decision in Ramanlal v. State of Gujarat, AIR 1969 SC 168, the scope of Article 31A has been discussed and it was pointed out that extinguishment of a right to fall within the protection of Article 31A (1) (a) must be complete and unconditional. A mere suspension of the right would not attract the provisions of Article 31A.

12. In the instant case the effect of the amended Section 47 (3) would be to completely extinguish the right of the landlord and therefore it clearly falls within Article 31A (1) (a) of the Constitution of India. Since one of the important incidents of his ownership has been destroyed by the Act, it amounts to an undoubted modification of the proprietary right of the landlord as held by the Supreme Court in AIR 1953 SC 373.

13. In another recent decision of the Supreme Court in AIR 1969 SC 453, B. Shankar Rao v. State of Mysore, a legislation to abolish the rights of Inamdars in an Inam estate was held to be an agrarian reform and protected by Article 31A of the Constitution of India. In this case Ramaswami J. speaking for the Court observed as follows:—

"In the present case, it is plain that under Article 31A as introduced by the 1st amendment to the Constitution or as altered by the 4th Amendment, the impugned Act is protected from attack in any Court on the ground that it contravenes the provisions of Article 31 (2) of the Constitution. The reason is that the impugned Act is a law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of such rights as contemplated by Art. 31A of the Constitution. The impugned Act provides for acquisition of the rights in Inamdars in inam estates in Mysore State and it is intended to abolish all intermediate holders who were termed as supe-

rior holders and to establish direct relationship between the Government and the occupants of land in the Inam Villages in respect of which notification has been issued. The legislation was undertaken as a part of agrarian reform which the Mysore State legislature proposed to bring about in the former State of Mysore. The impugned statute, therefore, falls under the protection of Art. 31A of the Constitution and cannot be challenged on the ground that Article 31A has been violated, that no principle of compensation has been provided or that the compensation provided for is illusory or inadequate."

14. For these reasons, therefore, we are clearly of the opinion that the impugned legislation namely the Amendment Act XIV of 1965 being protected by Article 31A of the Constitution is immune from challenge on the ground that it infringes Articles 14, 19 and 31 and the amendment is perfectly valid and cannot be challenged by the petitioner on any legal ground.

15. The result is that this petition is dismissed but in the circumstances without any order as to costs.

16. J. N. BHAT, J.—I agree.

17. MIAN JALAL-UD-DIN, J.—I agree.
Petition dismissed.

AIR 1970 JAMMU AND KASHMIR 130
(V 57 C 24)

JASWANT SINGH AND
ANANT SINGH, JJ.

Mst. Bawi, Appellant v. Nath, Respondent.

Civil Misc. First Appeal No. 11 of 1969,
D/- 9-1-1970, against Judgment of Dist. J.
Kathua, D/- 27-2-1969.

(A) Hindu Marriage Act (1955), Sec. 12
(1) (a) — Words "at the time of marriage"
— Meaning — These words mean the time of first consummation after marriage —
Child marriage — Application for annulment on ground of husband's impotency —
First consummation taking place when husband was hardly fifteen years of age and wife eleven years — Husband and wife never sharing same bed thereafter — Statement by physician that husband is not impotent — Annulment cannot be granted.
(Paras 4, 8, 14)

(B) Hindu Marriage Act (1955), Sec. 12
(1) (a) — Individual generally potent but impotent with respect to his own spouse — He is impotent for purpose of the Act.
AIR 1966 All 150, Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1966) AIR 1968 All 150 (V 53) =
1965 All LJ 453, Jagadishlal v.
Smt. Shyama Madan

BN/CN/A839/70/DVT/P

R. P. Sethi, for Appellant; B. R. Sharma, for Respondent.

JASWANT SINGH, J.: This is a wife's appeal against the judgment dated 27th February, 1969 of the learned District Judge, Kathua, dismissing her application for annulment of her marriage on the ground that the husband (respondent) was impotent at the time of marriage and continued to be so till the filing of the application.

2. Mr. Sethi appearing on behalf of the appellant has vehemently urged that the words "at the time of marriage" as used in Section 12 (1) (a) of the Hindu Marriage Act, 1955 (Central Act No. 25 of 1955) as applied to the State by the Jammu and Kashmir Hindu Marriage Act, 1955 (Act No. VIII of 1955) (hereinafter referred to as the Act) mean the date of the first consummation after marriage, and although, a man may be generally potent, he may be impotent with respect to his own spouse in which case he has to be treated as impotent. He has further contended that it was proved from the material on the record that the respondent was impotent at the time of the consummation of the marriage and continued to be so till the date of the institution of the proceeding. He has further submitted that the respondent has been treating the appellant with such cruelty as to raise a reasonable apprehension in her mind, that it would be harmful and injurious for her to live with him.

3. Mr. Sharma appearing on behalf of the respondent has, on the other hand, contended that it was proved from the evidence adduced in the case including the medical evidence that the respondent has been potent throughout and the learned District Judge was perfectly justified in dismissing the appellants' aforesaid application.

4. We have given our careful consideration to the submissions made by the learned counsel for the parties and are of opinion that the judgment passed by the learned District Judge is correct and does not call for any interference. It is no doubt true that clause (a) of sub-section (1) of Section 12 of the Act is not very happily worded but keeping in view the well-recognized canon of construction that a statute should not be so construed as to make the meaning absurd or unworkable the clause has to be interpreted in a rational manner and the words 'at the time of marriage' occurring therein have to be understood in the sense in which they best harmonize with the subject-matter of the enactment and the object which the legislature had in view. Accordingly in our opinion the aforesaid words namely 'the time of marriage' in the context in which they are used imply and mean the time of first consummation after marriage. Any other interpretation of the words would make the provision absurd and unworkable and lead to

hardship and injustice presumably not intended.

5. We also agree with the learned counsel for the appellant that for a finding of potency what matters is ability to consummate the marriage with the other spouse and not ability to have intercourse in general. The following statement in Loistory on Divorce, fourth edition (1958), is helpful in this connection:—

"It sometimes happens that a person is capable of having intercourse, but incapable of performing it with the particular individual....."

This is sufficient to found a decree of nullity, 'as what matters is ability to consummate the marriage with the other spouse and not ability to have intercourse in general."

6. It would also be beneficial to refer to the following observations made by Gangeswar Prasad J. in Jagdish Lal v. Smt. Shyama, AIR 1966 All 150:

"In some cases a person may be capable of having sexual intercourse but incapable of performing it with a particular individual, and in such a case he must be regarded as impotent in relation to that particular individual regardless of his potency in general."

7. Thus we have no hesitation in holding that even when an individual is generally potent but is impotent with respect to his own spouse he has to be regarded as impotent, for purposes of the Act.

8. This, does not, however, conclude the matter. In order to be successful in this appeal the appellant has to show that the respondent was impotent at the time of first consummation after marriage and continued to be so till the institution of the present proceedings. The facts and circumstances proved in the case do not however lead us to the conclusion that the respondent was impotent at the time of the consummation of the marriage. The marriage between the parties to this case was according to the statement of Bua Ditta, the father, and Mst. Gangi, the mother, of the appellant took place when the appellant was hardly 7 years of age and the respondent 11 years of age. On the date of the consummation of the marriage, as alleged by the appellant, she could not be more than 10 or 11 years and the respondent could not be more than 15 years. They could not at this tender age be held to be capable of understanding the nature or implication of sexual intercourse nor could their genital organs be expected to have fully developed at that age. It also appears from the examination-in-chief of the appellant that she shared the bed of the husband only once. In these circumstances it cannot be said that the respondent continued to be impotent till the filing of the present application. On the contrary the statement of Dr. Jai Krishan who examined the respondent on 9-12-67 and appeared as

a witness on behalf of the appellant herself shows that the respondent was potent and was capable of performing sexual intercourse and procreating children. In these circumstances we are not in a position to hold that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding.

9. The other ground of ill-treatment of the appellant by the respondent was not seriously canvassed before us nor can it be a ground for annulment of the marriage.

10. For the foregoing reasons we do not find any merit in this appeal which is hereby dismissed but in the circumstances of the case, without any order as to costs.

11. ANANT SINGH, J.: I agree with my learned brother that the appeal be dismissed without costs.

12. I may only add that on the language of Section 12 (1) (a) of the Hindu Marriage Act, the ground of impotency of the husband existing "at the time of the marriage" can seldom be brought home to the husband in the case of children marriages, even if we were to stretch the interpretation of "the date of marriage" as the date of first consummation after the marriage.

13. Child marriages in spite of legislation to the contrary are very frequent particularly among the backward communities, when the manhood is yet in formation. The couple can hardly have at that stage any sense of sex. The wife even upto the age of 12 or 13, speaking generally, can hardly be able to appreciate the potency in her husband before he is a fully grown up man. In such contingencies, it will be well nigh impossible to prove the impotency of the husband "at the time of the marriage."

14. The wife appellant was only about 7 years old, and the husband respondent only about 11 years old at the time of their marriage. According to the appellant when they first met for consummation, she could not be more than 10 or 11 years, and her husband more than 14 or 15 years old. They were never on the same bed thereafter. I do not think the appellant had reached an age of maturity at her first consummation to appreciate, if really her husband was impotent. Having had no further opportunity to cohabit with her husband, it cannot be said that he continued to be impotent. On the other hand, the doctor on examination found the respondent to be quite potent. The application of the appellant was rightly dismissed by the District Judge.

15. The provisions of Section 12, as it stands, appear to be unworkable in so many cases, and with a view to making it a practical one, the legislature may consider the desirability of amending it suitably. The loss of potency of the husband occurring any time after the marriage up

to a certain age, and its continuance thereafter for a reasonable period should be made a good ground for annulment of marriage.

Appeal dismissed.

AIR 1970 JAMMU AND KASHMIR 132 (V 57 C 25)

FULL BENCH

S. M. FAZL ALI, C. J., J. N. BHAT AND
MIAN JALALUDDIN, JJ.

Aftab Ram and others, Appellants v. State of Jammu and Kashmir and others, Respondents.

Writ Petns. Nos. 80, 83, 230 and 35 of 1967, 1968 and 1969, D/- 9-1-1970.

Constitution of India, Articles 12, 226 — Words "other authorities" occurring in Article 12 — Interpretation — Against whom writ can be issued.

In order to categorise any person or authority within Article 12, the authority must be a statutory authority, must be set up under a statute with powers which include power to give direction, the disobedience of which is punishable as a criminal offence. If these two ingredients are wanting an authority cannot be construed as an authority for the purpose of Art. 12. No writ can issue against corporations, bodies of associations, individual or limited companies and companies which are not created under some statute and are not invested with powers to issue directions, the violation of which would amount to a criminal offence or unless they partake something of the sovereign powers of the State. Case law discussed.

(Paras 4, 6)

Cases Referred: Chronological Paras

- | | |
|-----------------------------------|---|
| (1968) AIR 1968 Pat 3 (V 55) = | |
| ILR 46 Pat 616 (FB), Umeshchandra | |
| Sinha v. R. N. Sinha | 5 |
| (1968) 1968 Lab IC 1123 = 1968 | |
| Kash LJ 271, Z. U. Ahmed v. | |
| G. M. Sadiq | 4 |
| (1967) AIR 1967 SC 1857 (V 54) = | |
| 1967-3 SCR 377, Rajasthan State | |
| Electricity Board v. Mohan Lal | 4 |
| (1967) 1967 Kash LJ 434, Moti Lal | |
| v. Managing Director | 4 |
| (1963) AIR 1963 SC 1811 (V 50) = | |
| 1964-2 SCA 201, State Trading | |
| Corpn. of India v. Commercial Tax | |
| Officer | 5 |
| (1963) AIR 1963 Cal 116 (V 50) = | |
| 67 Cal WN 361, Prafulla Kumar | |
| Sen v. Calcutta State Transport | |
| Corporation | 5 |
| (1962) AIR 1962 Mad 169 (V 49) = | |
| 1961-2 Mad LJ 279, C. Lakshminah | |
| Reddiar v. Perumbadur Taluk Co- | |
| op. Marketing Society | 5 |

(1961) AIR 1961 Andh Pra 400
(V 48) = 1961-1 Andh WR 81,
Maturi Durgaiiah v. Agent, Tandur
Collieries
(1959) AIR 1959 Madh Pra 218
(V 46) = 1959 Jab LJ 459, Ram-
nath Sharma v. State of M. P.
(1957) AIR 1957 Pat 10 (V 44) =
1956 BLJR 513, Subodh Ranjan
Ghosh v. Sindri Fertilizer and
Chemical Ltd.
(1957) AIR 1957 Trav. Co. 46 (V 44) =
1956 Ker LT 563, Dr. G. F. Papali
v. University of Travancore
H. N. Dhar, D. N. Mahajan and K. N.
Raina, for Appellants; S. P. Gupta, A. K.
Malik and S. L. Kana, for Respondents.

BHAT J.: These petitions were pending
before a Single Judge of this Court but by
means of an order dated 22nd August 1969
it was thought desirable to constitute a
Full Bench to decide the following point
of law, which arose in these cases:—

"Whether or not a writ lies against a
corporation or a Government undertaking
even if the Government owns the said
undertaking or corporation completely."

2. The brief facts which are necessary
for the disposal of these writ petitions and
the point of law referred are that the peti-
tioners are permanent servants employed in
the Government Arts Emporium. By
S. R. O. 27 of 1963 dated 3-10-1963 sanc-
tion was accorded by the Government to
the formation of a Company under the
Jammu and Kashmir Companies Act, 1977,
for running the industrial undertakings,
which included 21 establishments, one of
them being Kashmir Government Arts Em-
porium. The Articles and Memorandum of
Association of the said company were regis-
tered under the said Jammu and Kashmir
Companies Act and this Jammu and
Kashmir Industries was thus a pri-
vate limited company. The Revenues
and expenditures of Kashmir Govern-
ment Arts Emporium are being
shown in the Government Annual Budget.
The Jammu and Kashmir Civil Servants
(Classification, Control and Appeal) Rules,
1956 were made applicable to this com-
pany. The petitions quote certain Articles
of Association and in particular emphasis
is laid on Article 73 (5) which lays down
how appointments are to be made in this
company. The power of appointment is
given to the Directors except in the case
of an employee whose pay is more than
Rs. 2,000 per mensem, which has to be
made by the Sadar-i-Riyasat (now Governor)
and appointments carrying a salary of more
than Rs. 500 per month have to be made
with the consultation of or on the recom-
mendation of the Public Service Commis-
sion. The petitioners continued in the ser-
vice of this company till 1967 when two
orders were passed by the Manager Head
Office of the Government Arts Emporium
(1) HO/422 dated 12-4-1967 and (2) dated
8th May 1967, which form the two an-

nexures to these petitions. By the first
order the petitioners were given notice that
as on a particular date they would reach
the age of 55 years, their services would
be terminated from the particular date
ending with one month's notice and in the
second order it was said that as the Kash-
mir Arts Emporium was a temporary orga-
nization and the services of the petitioners
were of a temporary nature, their services
would be no longer required, they were as
such terminated with one month's notice as
already given. According to the petitioners
these two orders are inconsistent, self-con-
tradictory and ultra vires. The petitioners
claim to be the permanent Government ser-
vants whose services could not be terminat-
ed in the manner as has been done with-
out allowing them any pension, gratuity
etc.

3. We do not go into the other aver-
ments made in the petitions or the details
of the objections taken by the respondents.
One of the main objections on behalf of
the respondents is that a writ cannot be
issued against the General Manager, Gov-
ernment Arts Emporium or even the State
because the petitioners are employees of a
private limited company. The main em-
phasis on behalf of the respondents is on
the plea that the Kashmir Government Arts
Emporium is now a part of the Jammu and
Kashmir Industries Private Limited which
is a private limited company and therefore
not amenable to the writ jurisdiction of this
Court. It is not however denied that this
company is wholly owned, managed and
run by the Government. Therefore, the
question has been referred to the Full
Bench. The learned counsel for the peti-
tioners have argued that under Article 12
of the Constitution of India the words "the
State" includes the Government and... and
the Government and the Legislature of
each of the States and all local or other
authorities within the territory of India
or under the control of the Government of
India, and under Article 226 writ can be
issued "to any person or authority includ-
ing in appropriate cases any Government,
within those territories directions, orders or
writs" Article 12 of the Constitution
of India has been applied to the State of
Jammu and Kashmir and Article 226 cor-
responds to Article 103 of the Constitution of
Jammu and Kashmir, which reads as
under:—

"The High Court shall have power to
issue to any person or authority, including
in appropriate cases any Government with-
in the State, directions, orders or writs,
including writs in the nature of habeas
corpus, mandamus, prohibition, quo war-
ranto and certiorari, or any of them, for
any purpose other than those mentioned in
Clause 2 (A) of Art. 32 of the Constitution
of India."

4. Section 158 of the Constitution of
Jammu and Kashmir makes the General

Clauses Act applicable to the interpretation of the Constitution as it applies to the interpretation of the State Legislature. Under the General Clauses Act the word 'person' includes any company or association or body of individuals, whether incorporated or not. According to the learned counsel for the petitioners therefore the Jammu and Kashmir Industries Private Limited, being definitely and admittedly a company and incorporated company is a 'person' and therefore a writ shall issue against this company and its officers. This point has arisen for consideration in a number of cases, some cases have been decided by this Court also. Reference may be made to *Moti Lal v. Managing Director* reported as 1967 Kash LJ 484. In this case it was held that no writ can issue against the Managing Director of Jammu and Kashmir Minerals Limited. A number of authorities were cited in that case. The point came up for consideration again in *Z. U. Ahmed v. G. M. Sadiq*, reported as 1968 Kash LJ 271, where a writ was refused against the Board of Directors of the Regional Engineering College, Srinagar. It was suggested before the Single Judge who heard the writ petitions that the law had been now interpreted by the Supreme Court and the view earlier taken by this Court has not been accepted. Reference was made in this behalf to AIR 1967 SC 1857. In that case the writ was sought against Rajasthan State Electricity Board which came into being under the Electricity (Supply) Act, 1948 (54 of 1948). The case was heard by five Hon'ble Judges and Bhargava J., gave the judgment on behalf of Subba Rao C. J., Shelat and Mitter Judges and Shah J., appended a short separate judgment. The words 'other authorities' as used in Article 12 of the Constitution of India came up for interpretation in that case. Their Lordships considered various authorities of the different High Courts and quoted Craies on Statute Law and Maxwell's book on Interpretation of Statutes as also the meaning of the word 'authority' given in Webster's Third New International Dictionary and ultimately in Para. 6 laid down:—

"These decisions of the Court support our view that the expression 'other authorities' in Art. 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19 (1) (g). In Part IV, the State has been given the same meaning as in Article 12 and one of Directive Principles laid down in Article 46 is that the State shall promote with special care the educational and economic interests of the weaker section of the people. The

State, as defined in Article 12 is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The State as constituted by our Constitution, is further specifically empowered under Article 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word "State" as used in Article 12. On the other hand, there are provisions in the Electricity Supply Act which clearly show that the powers conferred on the Board include power to give directions, the disobedience of which is punishable as a criminal offence. In these circumstances, we do not consider it at all necessary to examine the cases cited by Mr. Desai to urge before us that the Board cannot be held to be an agent or instrument of the Government. The Board was clearly an authority to which the provisions of Part III of the Constitution were applicable."

Hon'ble Shah J., added that the Board being invested by statute with extensive powers of control over electricity undertakings, the power to make rules and regulations, and to administer the Act is in substance the sovereign power of the State delegated to the Board. At the end of the judgment his Lordship laid down:—

"In my judgment, authorities constitutional or statutory invested with power by law not sharing the sovereign power do not fall within the expression "State" as defined in Article 12. Those authorities which are invested with sovereign power i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens and others fall within the definition of 'State' in Article 12 and constitutional or statutory bodies which do not share that sovereign power of the State are not, in my judgment "State" within the meaning of Article 12 of the Constitution."

It is clear from this judgment of the Supreme Court that in order to categorise any person or authority within the Art. 12 of the Constitution of India, the authority must be a statutory authority, must be set up under a statute with powers which include power to give direction, the disobedience of which is punishable as a criminal offence. If these two ingredients are wanting an authority cannot be construed as an authority for the purpose of Art. 12. In this case it may be mentioned that the rule of ejusdem generis, the application of General Clauses Act and Webster's dictionary meaning of the word 'authority' also have been taken into consideration and then their Lordships have come to this conclusion. The Jammu and Kashmir Industries (P.) Limited, has not been admittedly created under any statute nor is it possess-

ed of any powers under which it can give directions, the disobedience of which is punishable as criminal offence.

5. After discussing this authority on which the petitioners mainly relied, there will be no necessity of multiplying authorities but a reference to a few more authorities which were discussed at the bar, may be mentioned. In another authority of the Supreme Court reported as AIR 1963 SC 1811, the State Trading Corporation of India Limited was not held to be a citizen of India and as such could not claim the enforcement of any fundamental right. In AIR 1963 Cal 116, it was held that Calcutta State Transport Corporation established under Section 3 of the Road Transport Corporation Act, 1950 is an incorporated body and is entirely different from the State Government, and therefore the employees thereof did not hold civil posts under the State Government within the meaning of Art. 311 of the Constitution of India. In AIR 1968 Pat 3 (FB), it was held that any public authority created by the statute on whom powers are conferred by law must be held to be a 'State' irrespective of whether the functions of that authority are sovereign functions or non-sovereign functions such as spreading of education etc. In AIR 1959 Madh Pra 218, it was held that some corporations created by statute, statutory corporations properly so called, were amenable to the writ jurisdiction of the High Court but the employee or a third party contracting with the corporation cannot seek the remedy of a writ against it, because the offending corporation is not State as defined in Article 12 of the Constitution and exercises no public functions.

In AIR 1957 Pat 10, it was held that no writ could issue against the Sindri Fertilisers and Chemicals Limited, as the servants of the company are not the servants of the Union Government although the Company was completely owned by the Union Government and that the Directors were appointed by the President who was also authorised to remove any Director from office in his absolute discretion and the President was authorised to issue such directives as he would consider necessary in regard to the conduct of the business of the company and under Article 110 of its articles a duty is imposed upon the Directors to give immediate effect to the directives so issued by the President. It was further held in this case that in the eye of law the company was a separate legal entity and had a separate legal existence. The Company was held not to be an agent of the Union Government or its trustees. In AIR 1962 Mad 169, it was held that no writ could issue against the Board of Directors of a Co-operative Society because it was a non-statutory body, no doubt, with authority to determine the rights of parties. In that case, as in the present case, the Board was entrusted with certain

powers by some regulations but these regulations were framed by the society itself and had no statutory force. In AIR 1957 Trav-Co, 46, it was held that a writ of certiorari would issue only against tribunals set up by law to determine the questions affecting rights of parties and a writ of mandamus would issue only to a person holding a public office but not to a private person. In that case a writ was refused against Fatima Mata National College, Quilon, a private educational institution, although it was affiliated to the University of Travancore and received grant from the University. In AIR 1961 Andh Pra 400, it was held that merely because a statute or a rule having the force of a statute requires a company or some other body to do a particular thing, it does not possess the attributes of a statutory body. A writ of mandamus can only be issued to inferior Courts, tribunals and bodies entrusted with powers by the law of the land to affect the legal rights of the parties. Colliery or the Agent thereof cannot be described as a tribunal or a body entrusted with powers by the law of the land to affect the legal rights of the parties and no writ can issue against it.

6. These authorities hold that no writ can issue against corporations, bodies of associations, individual or limited companies and companies which are not created under some statute and in the words of the majority judgment of the Supreme Court are not invested with powers to issue directions, the violation of which would amount to a criminal offence or in the words of Shah J. unless they partake something of the sovereign powers of the State. The result is that these writ petitions against the Jammu and Kashmir Industries (P.) Limited, Srinagar, or its Managing Director or any other officer cannot lie. On this point all these writ petitions fail. There is no use replying the question referred to the Full Bench in the abstract because on this ground alone all the writ petitions are entitled to dismissal and are hereby dismissed.

7. S. M. F. ALI, C. J.: I agree.

8. MIAN JALAL-UD-DIN, J.: I agree.

Petitions dismissed.

AIR 1970 JAMMU AND KASHMIR 135
(V 57 C 26)

ANANT SINGH, J.

Abdul Rehman and another, Accused v. State, Complainant.

Criminal Ref. Nos. 50 and 51 of 1969, D/- 26-5-1969.

(A) Criminal P. C. (1898), Section 263 — Summary trial — Examination of accused is not required to be signed by him in summary trial. (Para 7)

(B) Criminal P. C. (1898), Sections 263 (g) 242, 243, 251A (4) and (5) — Summary

HM/CN/C802/69/MBR/C

trial — Accused pleading guilty — Plea of guilt cannot be acted upon unless particulars of offence are clearly explained to him.

Even in a summary trial the accused must be told of the offence, and if he accepts it, he has to be told further, if he has any cause to show for it. On reading Sections 242, 243 and 251A (4) and (5) of Cr. P. C., it is clear that the plea of guilt under Section 263 (g) must be to an offence, which has to be clearly explained to the accused before his plea of guilt, can be acted upon. (Paras 8, 13)

The accused was tried under Sections 159/268 of the J. and K. Municipal Act. A question was put him whether on the particular day, he had brought within the Municipal area adulterated milk for sale, and the accused answered the question by saying 'yes' to it and he was convicted.

Held, the conviction was not proper inasmuch as the accused was not told that the carrying of adulterated milk within the Municipal Area was an offence and if he had any cause to show for it. It might be that the accused after admitting the facts constituting the offence, had some explanation for it. (Paras 14, 15)

Malik Abdul Karim, Dy. Advocate General, for State.

ORDER: These two References Nos. 50 and 51 of 1969 have been heard together and this judgment will govern both of them as they are on identical facts.

2. Abdul Rehman, and Abdul Gufar, were tried separately under the summary procedure by a Magistrate first class; both on a charge under Section 159/268 of the Municipal Act. Each was convicted, and sentenced to a fine of Rs. 100, in default to one month's rigorous imprisonment on their pleading guilty, as it is said.

3. The charge against each was that on a particular day, each of the accused was carrying adulterated milk for sale in Srinagar. Both were caught by the police in Ghota-bazar, and in due course, put on their trial.

4. The prosecution did not lead any evidence in support of the charge against either of the accused, but each of them was convicted, and sentenced in the manner aforesaid on his pleading guilty.

5. The learned Sessions Judge, in his reference, has pointed out that the confessional statement said to have been made by the accused before the trial court, was not signed by either of them, and hence the conviction of both was illegal inasmuch as the prosecution did not put in any evidence to support the charge.

6. The learned counsel Mr. Malik Abdul Karim, appearing on behalf of the State, has opposed the reference on the ground that a confessional statement of an accused, accepting his guilt, is not required to be signed by such accused in a summary trial, as this trial was. Section 364 of the Criminal

Procedure Code prescribes the manner of examination of an accused in a Criminal trial. Sub-clause (4) of Section 364 provides:

"Nothing in this section shall be deemed to apply to the examination of an accused person under section 263."

which in turn prescribes the procedure for recording of evidence in a summary trial including "the plea of the accused and his examination if any".

7. Section 364 supra, of course, requires an accused to sign his statement in ordinary trial, but as already pointed out, sub-cl. (4), of it does not apply to the examination of an accused under Section 263. It would thus appear that the learned counsel, Mr. Malik, is right in pleading that in a summary trial, the examination of an accused is not required to be signed by him.

8. The fact, nevertheless, remains that even in a summary trial the accused must be told of the offence, and if he accepts it, he has to be told further, if he has any cause to show for it.

9. For a summons trial, Section 242 of the Code requires that when the accused appears or is brought before the Magistrate "the particulars of the offence of which he is accused shall be stated to him, and he shall be asked, if he has any cause to show why he should not be convicted....."

10. The subsequent Section 243 then provides for the conviction of the accused on his admitting the offence, if he shows no sufficient cause, why he should not be convicted.

11. Again for the trial of warrant cases, sub-section (4) of Section 251-A of the Code requires the charge to be read, and explained to the accused when he is required to plead to the charge, admitting his guilt or claiming to be tried. As the subsequent sub-paragraph (5) provides, the Magistrate shall record the plea, and may in his discretion convict the accused, if he pleads guilty to the charge.

12. Sub-clause (g) of Section 263, which prescribes the mode of summary trial requires "the plea of the accused, and his examination, if any", to be recorded by the Magistrate.

13. Now the plea of guilt must be to an offence, which has to be clearly explained to the accused before his plea of guilt, can be acted upon.

14. In the two cases in hand, an identical question was put to each of the two accused, whether on the particular day, he had brought within the Municipal area adulterated milk for sale, and each of the two accused answered the question by saying 'yes' to it. I must observe that the examination of the accused was not sufficient inasmuch as none of the two accused was told that the carrying of adulterated milk within the Municipal Area was an offence, and if they had any cause to show for it. It may be that these accused after admit-

ting the facts constituting the offence had some explanation for it. This was not done, and it was prejudicial to the accused.

15. Thus the conviction of the two accused was not proper inasmuch as neither of them, apart from merely admitting the facts of the question put to them, pleaded guilty to the charge, after having been told that the facts alleged constitute an offence.

16. The conviction of both the accused, and the sentence imposed upon them must be set aside as illegal, and they are so set aside. The References are accepted, yet for other reasons as stated above. The cases are remanded to the Magistrate for fresh trial, and disposal according to law. If the accused do not plead guilty after their proper examination, the prosecution will be at liberty to lead its evidence in support of the charge. References accepted.

AIR 1970 JAMMU AND KASHMIR 137 (V 57 C 27)

S. M. F. ALI, C. J.

Prem Avtar Bakshi, Petitioner v. State of Jammu and Kashmir and others, Respondents.

Habeas Corpus Petn. No. 73 of 1969, D/- 18-11-1969.

(A) Public Safety — J. & K. Preventive Detention Act (13 of 1964) S. 3 (1) (a) (i) and (2) — Term "Public Order" — Is not synonymous with "law and order".

An order of detention passed on ground that detenu was acting in a manner prejudicial to the maintenance of law and order is invalid and cannot be supported under Section 3. Section 3 (2) of the Act does not authorise the detaining authority to detain any person for maintenance of law and order at all. The term "maintenance of public order" and maintenance of law and order are not synonymous but there is a well-marked distinction between these two terms. AIR 1966 SC 740, Foll. (Paras 3, 4 and 7)

While it may be necessary in the large interests of the country to detain a person whose activities are dangerous to the security of the State or whose existence may lead to public disorder affecting the entire community yet in the garb of exercising this power the executive should not be allowed to take recourse to the machinery of the Act, to solve law and order problem arising out of a local breach of the peace. Case law discussed. (Para 4)

(B) Public Safety — J. and K. Preventive Detention Act (13 of 1964), Sec. 3 (1) (a) (i) — Order of detention not in terms of section — Extraneous evidence cannot be given to cover up lacuna.

The provisions of S. 3 (1) (a) (i) of the Act empower the District Magistrate to pass an order of detention only on the limited

grounds mentioned in the section and it is not open to the District Magistrate to detain any person on a ground which is foreign to this provision and then later on seek to justify the same on the ground that he meant what was contained in the order. Such a course will amount to stultifying the right of liberty of a citizen. (Para 11)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1303 (V 55) =	
1968 Cri LJ 1490, Rameshwar Lal Patwari v. State of Bihar	4
(1967) AIR 1967 Punjab 125 (V 54) =	
1967 Cri LJ 510, Mohan Lal v. District Magistrate, Delhi	8
(1966) AIR 1966 SC 740 (V 53) =	
1966 Cri LJ 608, Ram Manohar v. State of Bihar	5, 7
(1960) AIR 1960 SC 633 (V 47) =	
1960 Cri LJ 1002, Supdt. Central Prison v. Ram Manohar Lohia	6
(1950) AIR 1950 SC 124 (V 37) =	
51 Cri LJ 1514, Romesh Thappar v. State of Madras	6

R. C. Mehta, for Petitioner; Addl. Advocate General, for Respondents.

ORDER: This is a writ of Habeas Corpus directed against an order of detention passed by the District Magistrate, Jammu dated 13-9-69. The petition arises in the following circumstances.

2. The petitioner is a journalist by profession and is the editor of a fortnightly news magazine called the Kashmir Post. The petitioner was arrested and detained in the Special Jail on the morning of 14-9-69 under a detention order passed by the District Magistrate Jammu dated 13-9-69. The petitioner seeks to challenge this order before me mainly on two grounds. In the first place the counsel for the petitioner submitted that the order not being in terms of Section 3 (2) of the Preventive Detention Act (hereinafter to be referred to as the Act) was clearly invalid and therefore the detenu was entitled to be released. Secondly it was submitted that the grounds served on the petitioner are extremely vague and ambiguous and on this ground also the order of detention was bad. In order to appreciate the contentions of the petitioner it will be necessary to quote the detention order passed by the District Magistrate which runs thus:

"Whereas I, Ashok Jaitly, District Magistrate, Jammu am satisfied that with a view to preventing Shri Prem Avtar Bakshi s/o Late Bakshi Hukum Chand r/o Moholla Pratap Garh Jammu P/S City Jammu, District Jammu from acting in a manner prejudicial to the maintenance of law and order, it is necessary so to do.

Now therefore in exercise of the powers conferred by Section 3 (2) read with Section 5 of the J. and K. Preventive Detention Act, 1964, I, Ashok Jaitly District Magistrate, Jammu, hereby direct that the said Shri Prem Avtar Bakshi be detained in Central

Jail, Jammu, subject to such conditions as to maintenance of discipline and punishment for breaches of discipline as have been specified in the Jammu and Kashmir Detenu's General Order of 1968. He be placed in Class (B)."

3. The relevant portion of this order which impelled the District Magistrate to detain the petitioner is that according to him the petitioner was acting in a manner prejudicial to the maintenance of law and order. Section 3 (2) of the Act under which the detention order purports to have been passed does not authorise the detaining authority to detain any person for maintenance of law and order at all, but the words used in Section 3 (1) (a) (i) of the Act are as follows:

"The Government may

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to

(i) the security of the State or the maintenance of public order

it is necessary so to do, make an order directing that such person be detained."

4. The District Magistrate appears to have been under the impression that maintenance of public order and of law and order are synonymous. In my opinion the view taken by the District Magistrate is wholly incorrect and cannot be supported. The right of liberty is an extremely valuable and cherished right of a citizen under our democracy. The right is a fundamental right and has been guaranteed by the Constitution of India. It is therefore manifest that any curb or restriction on a citizen's right to free movement or to the freedom of speech must be very carefully and cautiously scrutinized by the courts and if any technical flaw is found in the order of detention which does not fall within the spirit and letter of the law of detention, the detenu must be given the benefit of such a lacuna. While it may be necessary in the large interests of the country to detain a person whose activities are dangerous to the security of the State or whose existence may lead to public disorder affecting the entire community, yet in the garb of exercising this power the executive should not be allowed to take recourse to the machinery of the Act, to solve law and order problems arising out of a local breach of the peace. Furthermore, an order of detention is passed on the subjective opinion of the detaining authority and is incapable of being tested by cross-examination of that authority or by production of other evidence in defence. This is an additional reason why the orders of detention should be meticulously examined by the courts with a view to finding out whether or not they are within the ambit of the relevant law. In AIR 1968 SC 1303, 1305 their Lordships of the Supreme Court made the following observations:—

"However, the detention of a person without trial merely on the subjective satisfac-

tion of an authority however high is a serious matter. It must require the closest scrutiny of the material on which the decision is formed, leaving no room for errors or at least avoidable errors. The very reason that the courts do not consider the reasonableness of the opinion formed or the sufficiency of the material on which it is based indicates the need for the greater circumspection on the part of those who wield this power over others."

5. Similar observations were made by Sarkar J. in *Ram Manohar v. State of Bihar* AIR 1966 SC 740, 746 where his Lordship observed as follows:

"If a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. We are dealing with a statute which drastically interferes with the personal liberty of people, we are dealing with an order behind the face of which a Court is prevented from going."

6. I have already pointed out above that the order of detention (*Supra*) does not purport to be in terms of the Act and on this ground alone the order of detention cannot be supported. The Addl. Advocate General, however, submitted that the terms 'public order' and 'maintenance of law and order' connote one and the same thing and therefore even if the words 'maintenance of public order' have been inadvertently omitted by the District Magistrate in his order, that would not vitiate the detention of the petitioner. In support of his proposition the Addl. Advocate General relied on a decision of the Supreme Court in AIR 1950 SC 124. This decision appears to have been noticed by the Supreme Court on several later occasions particularly in *Supdt. Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633 where Subba Rao, J. (as he then was) observed as follows:—

"Public order is synonymous with public safety and tranquillity: it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State."

7. The term 'public order' was again considered by the Supreme Court in AIR 1966 SC 740 (*Supra*) and the previous decisions on the point were distinguished thus:

"These observations determine the meaning of the words 'public order' in contradistinction to expressions such as 'public safety', 'security of the State.' They were made in different contexts. The first three cases dealt with the meaning of the legislative Lists as to which it is settled, we must give as large meaning as possible. In the last case the meaning of 'public order' was given in relation to the necessity for amending the Constitution as a result of the pro-

nouncement of this court. The context in which the words were used was different, the occasion was different and the object in sight was different."

Their Lordships pointed out that on the previous occasions the court was considering the term 'public order' appearing in the Legislative Entry List and therefore a wider connotation had to be given to the words 'public order', but the definition of the term appearing in the Defence of India Rules or in any other provision relating to detention of a person would have to be construed differently. In this connection Hidayatullah, J. (as he then was) observed as follows:—

"We have here a case of detention under Rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other serious and cataclysmic happenings. Does the expression public order take in every kind of disorders or only some of them? The answer to this serves to distinguish 'public order' from 'law and order' because public order if disturbed must lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under Rule 30 (1) (b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances".

It is therefore clear that the terms public order and law and order cannot be regarded as synonymous, but there is a well-marked distinction between these two terms and this distinction must be clearly borne out when construing the provisions of a detention statute."

8. The Supreme Court decision (Supra) was followed by Bedi, J. in a decision of the Punjab High Court in AIR 1967 Punj 125.

9. For the reasons given above the argument of the Addl. Advocate General is overruled.

10. It was next contended by the Addl. Advocate General that even though the order of detention does not mention the words 'maintenance of public order', in his affidavit the District Magistrate has clarified the position that his intention was to detain the petitioner in order to prevent him from acting in a manner prejudicial to the maintenance of public order. In this connection my attention was drawn to para (9) of the counter-affidavit of the District Magistrate which runs thus:—

"Contents of paragraph 9 of the petition are denied. It is further added that the deponent after applying his mind independently was satisfied that with a view to preventing the petitioner from acting in a manner prejudicial to the maintenance of public order, it was necessary to detain him." I am of the view that where the order of detention itself is not in terms of the requirements of the statute, no extraneous evidence can be given to cover up the lacuna. The intention of the detaining authority has to be gathered from the language used by it in the detention order and not by what it would like to say at a later stage. It is well settled that where a statute requires certain things to be done in a particular manner, there can be no departure from such a manner.

11. In the instant case the provisions of Section 3 (1) (a) (i) of the Act empower the District Magistrate to pass an order of detention only on the limited grounds mentioned in the section and it is not open to the District Magistrate to detain any person on a ground which is foreign to this provision and then later on seek to justify the same on the ground that he meant what was contained in the statute and not what was contained in the order. Such a course will amount to stultifying the right of liberty of a citizen. This point was also taken by Hidayatullah J. (as he then was) in his majority judgment whose similar view was expressed in the following words:—

"Law and order represents the largest circle within which is next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression 'maintenance of law and order' the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."

"In our judgment the order of the District Magistrate exceeded his powers. He proposed to act to maintain law and order and the order cannot now be read differently even if there is an affidavit the other way."

12. In view of the reasons given by me the second contention of the Addl. Advocate General is also overruled.

13. As the petition, in my opinion, succeeds on the first point raised by the petitioner, it is not necessary for me to go into the other points relating to the vagueness of the grounds of detention at all. A bare perusal of the grounds of detention would leave no manner of doubt that the grounds are both vague and ambiguous. The petitioner is said to have incited some persons to indulge in acts of violence because their demands had not been met; but no details have been given in the grounds as to who these people were, what were the nature of the demands made by them, and why it was not possible to concede these demands. Unless these details are supplied to the detenu, it is not possible for him to make an effective representation to the Government against his detention.

14. For the reasons given above, the petition is allowed, the order of detention is held to be invalid and the petitioner is directed to be released from custody forthwith.

Petition allowed.

AIR 1970 JAMMU AND KASHMIR 140 (V 57 C 28)

S. M. FAZL ALI, C. J., AND JASWANT SINGH, J.

Prabh Dayal, Plaintiff v. Des Raj, Defendant.

Civil First Appeal No. 70 of 1968, D/- 8-12-1969, from decision of Sub. J. (Chief Judicial Magistrate) Jammu D/- 28-6-1968.

Civil P. C. (1908), Order 7, Rule 1 and Order 20, Rule 15 — Dissolution of partnership — Suit for accounts — Agreement outside Court to pay amount found due — Suit to recover such amount is maintainable — Section 69 of Partnership Act is not applicable — Partnership Act (1932), Section 69.

Where a suit for recovery of amount due to a partner is instituted on the basis of an oral agreement arrived at between the parties after the dissolution of the partnership on the basis of the account taken out of Court, such promise to pay the amount found due affords a fresh cause of action on which a suit can be based and Section 69 of the Partnership Act has no application. After the dissolution the taking of accounts merges into a separate agreement between the partners which forms a separate and independent transaction capable of being enforced by any of the parties to the agreement, AIR 1944 Nag 124 and AIR 1942 Mad 707, Rel. on; AIR 1940 Nag 78, Disting.

(Paras 3, 5)

Cases Referred: Chronological Paras
(1944) AIR 1944 Nag 124 (V 31) =
ILR (1944) Nag 101, B. M. S.
Agarwal v. A. R. Potdar.

(1942) AIR 1942 Mad 707 (V 29) =
1942-2 Mad LJ 309, Abdul Subhan
Sahib v. Abdul Ravoof Sahib 4
(1940) AIR 1940 Nag 78 (V 27) =
ILR (1940) Nag 130, Chhotelal
Nanakram Gujrathi v. Gopaladas
Gulabdas Baniya 3, 4
Ishwar Singh, for Plaintiff; V. B. Sudan,
for Defendant.

JUDGMENT: This is an appeal in a suit for the recovery of Rs. 3,100 brought by the plaintiff in the following circumstances:

2. The plaintiff and the defendant entered into a partnership by virtue of a document dated 11th September, 1959 for constructing the Partap Canal Akhnur. The canal was constructed in 1963 but the accounts between the parties could not be taken. Thereafter a suit was brought in the court of the Sub Judge, Jammu but during the pendency of the suit the parties settled their accounts outside the court and by an oral agreement they agreed that the plaintiff was entitled to a sum of Rs. 3100. On the basis of this oral agreement the plaintiff has now brought the present suit for the recovery of the amount mentioned above.

3. One of the objections which was taken by the defendant and on the basis of which a preliminary issue was framed was that the suit was not maintainable since the partnership was not registered under Section 69 of the Partnership Act. The learned Sub Judge (Chief Judicial Magistrate) held that as the Partnership was not registered, therefore, the suit was not maintainable and he accordingly dismissed the suit. The learned Judge relied on a decision of Nagpur High Court reported in AIR 1940 Nag 78. In our opinion the view taken by the learned Judge is legally erroneous. In the present case, the plaintiff has clearly instituted a suit on the basis of an oral agreement arrived at between the parties after the dissolution of the partnership on the basis of the account taken out of court. To such a case Section 69 of the Partnership Act would have no application. After the dissolution the taking of accounts merged into a separate agreement between the parties which now forms a separate and independent transaction capable of being enforced by any of the parties to the agreement. We are fortified in this view by a decision of Division Bench of Nagpur High Court reported in AIR 1944 Nag 124, where their Lordships observed as follows:—

‘Having come to the conclusion that the settlement of account between the partners of a dissolved partnership accompanied by a promise to pay the amount found due affords a fresh cause of action on which a suit can be based the contention of the appellant that the suit is barred by Sect. 69 (1) Partnership Act loses its significance.....’

As the terms of the partnership do not at all enter into consideration in such a suit,

the fact that the partnership was an un-registered firm has no bearing on the suit as laid."

4. This case also noticed a single bench decision reported in AIR 1940 Nag 78 and has distinguished the same. AIR 1940 Nag 78 referred to above was not a case of this type. The view taken by the Nagpur High Court is supported by a decision of the Madras High Court in AIR 1942 Mad 707.

5. Mr. Sudhan appearing for the respondent relied on some authorities of Bombay, Madras and Nagpur High Courts which are, however, distinguishable from the facts of the present case because in none of these cases the suit was based on a separate agreement coming into existence after the dissolution of the partnership. In the present case if the plaintiff is able to make out his case as alleged in para 6 of the plaint, he sues not as a partner of the firm but as one of the persons who entered into an agreement with the respondent and was entitled under this agreement to a sum of Rs. 3100. The cause of action alleged in the plaint in para 6 therefore is one to which Section 69 of the Partnership Act would not apply. Although an issue was raised by the trial court on the question as to whether or not the oral agreement relied upon by the plaintiff was proved yet no finding on that issue has been given by the Sub Judge in view of the fact that he dismissed the suit on a preliminary issue. If, however, the plaintiff fails to prove the existence of a valid agreement on the basis of which he was to recover Rs. 3100 then undoubtedly the suit would have to fail because in that case Section 69 of the Partnership Act would apply.

6. The appeal is accordingly allowed and the suit is remanded to the Sub Judge, Jammu for deciding the remaining issues in the light of the observations made above and in accordance with law. The parties are directed to appear before the Sub Judge (Chief Judicial Magistrate) Jammu on 10th December, 1969.

7. As the suit was decided on a preliminary issue we direct that the court-fees paid by the plaintiff-appellant on the memo of appeal be refunded to him.

Order accordingly.

AIR 1970 JAMMU AND KASHMIR 141 (V 57 C 29)

J. N. BHAT AND JASWANT SINGH, JJ.
Ghani and others, Petitioners v. Dharam Singh and others, Respondents.

Civil Revn. No. 94 of 1969, D/- 18-12-1969.

J. and K. Civil P. C. (10 of 1977 Smt.),
Section 20 — Decree for possession of

BN/CN/A883/70/MLD/M

land passed by High Court — Suit for cancellation of, presented before Sub-Judge in whose Court the decree is sought to be executed — Subject-matter of dispute and the residence of defendants situate within jurisdiction of that Court — Though the Sub-Judge has jurisdiction to hear the case, it will be proper that the case be heard by High Court, the decree being passed by it. Case law discussed. (Para 5)

Cases Referred: Chronological Paras
(1960) AIR 1960 J. and K. 76 (V 47),
Dukan Nand Lal Krishnen Chander
v. Abdul Hafiz 5
(1958) AIR 1958 Mad 516 (V 45)=
ILR (1958) Mad 657, Natrajan v.
Saraswathy Ammal 5
(1957) AIR 1957 Cal 317 (V 44),
Asgar Ali and Co. v. Vuppala Sat-
yanarayana 5
(1940) AIR 1940 Pat 444 (V 27)=
21 Pat LT. 259, Sampat Lal v.
Kaluram Brijmohan 6
(1933) AIR 1933 Cal 274 (V 20)=
ILR 60 Cal 98, Tarunanganath
Banerjee v. Prem Narayanlal 5
(1926) AIR 1926 Lah 277 (V 13)=
ILR 7 Lah 61, Jawahar Singh v.
E. D. Sassoon and Co. 5
(1924) AIR 1924 Pat 831 (V 11)=
75 Ind Cas 469, Benares Bank Ltd.
v. Surendra Narain Singh 5
(1923) AIR 1923 Mad 272 (V 10)=
1922 Mad WN 841, Parmeswara
Pattar v. Viyathan Mahadevi 5
(1917) AIR 1917 All 176 (2) (V 4)=
ILR 39 All 607, Khushali Ram v.
Gokul Chand 5
(1917) AIR 1917 Pat 598 (V 4)=
41 Ind Cas 161, Raj Kumar Singh
v. Raj Keswar Koeri 5
(1915) AIR 1915 All 163 (V 2)=
ILR 37 All 189, Jawahir v. Neki
Ram 5
(1915) AIR 1915 Mad 915 (V 2)=
28 Mad LJ 410, A. L. A. R. Aruna-
chellam Chettiar v. Vellappa Tham-
baram 5
(1903) ILR 25 All 48= 1902 All
WN 79, Banki Behari Lal v. Pokhe
Ram 5

I. K. Kotwal, for Petitioners; S. P. Gupta,
for Respondents.

BHAT, J.:— This revision is directed against the order of District Judge, Bhadarwah, dated 14th April, 1969, whereby he has upheld the order of the Sub-Judge, Kishtwar, dated 4th August, 1966, returning the plaint of the suit to the petitioner under Order 7, Rule 10, Civil Procedure Code for presentation before a proper Court. The suit of the plaintiff was for cancellation of a decree passed by the High Court on 19th November, 1963, whereby a decree for possession of land measuring 23 kanals 6 marlas in different survey numbers situate in village Lass, Tehsil Kishtwar was passed in favour of defendants and an injunction that

the defendants in that suit should not interfere with the possession of the plaintiffs over this land. It appears in some previous litigation between the parties, the matter was finally compromised in second appeal before the High Court on 19th November, 1963, and a decree was passed in terms of the compromise by a Division Bench of this Court. The plaintiffs feeling aggrieved by this decree, brought the suit for the cancellation of that decree and for the incidental relief mentioned above in the Court of the Sub-Judge, Kishtwar. It was held by the trial Court that it was the High Court alone which could grant the relief prayed for by the plaintiff and hence returned the suit. Against this order of return of the plaint by the trial Court, an appeal before the District Judge Bhadarwah, as already indicated was unsuccessful. A further revision has been preferred to this Court which was originally heard by a Single Judge of this Court. The Single Judge finding that the point involved in this case was of great importance and was likely to affect a large number of similar other cases, referred the matter to a Division Bench.

2. We have heard the learned counsel for the parties at length and bestowed our serious thought over the matter.

3. The argument of the learned Counsel for the petitioner is that the two Courts below have mis-applied the law. He contends that in this case the original litigation which culminated in the compromise before the High Court, had started from the Court of Sub-Judge, Kishtwar, that the subject-matter of the dispute i.e., the land in question was situated within the jurisdiction of Sub-Judge, Kishtwar, that the parties lived within his jurisdiction and lastly that on the basis of this decree, which was sought to be set aside, the respondent No. 1 had taken out execution before the Sub-Judge Kishtwar as stated by him in paragraph 8 of his written statement. Therefore even though the decree was passed by the High Court, the proper forum for the suit for the cancellation of that decree was Sub-Judge's Court at Kishtwar. On the other hand the argument of the respondent's learned Counsel is that the decree has been passed by the High Court, the cause of action, if any, that the plaintiffs can allege to have accrued to them, is in the High Court and the High Court is the only proper Court where the present suit can be lodged. This argument has found favour with the Courts below. In a ruling reported as AIR 1940 Pat 444 the case was that 'A' who was a resident of the district of Saran carrying on business in the town of Chapra had transactions with 'B' resident of Bombay and carrying on business in Bombay. 'A' mortgaged certain property situate in Saran to 'B' for the payment of debts due from him to 'B'. 'B' brought a mortgage suit at Bombay and got a decree. 'A' filed a suit at Saran for a declaration that the decree obtained at Bombay was illegal, and

a nullity. The Patna High Court held that the Court at Saran had no jurisdiction to try the case.

4. According to this authority the cause of action arose in Bombay and the Sub-Judge at Saran had no jurisdiction. This authority apparently would support the respondent's case. But it is distinguishable as the decree was not sent for execution to the Court at Saran. On the other hand various High Courts have uniformly held that when a decree is sought to be set aside, the Court before which execution of the decree is taken out, can hear a suit for cancellation of the decree although the decree has been passed by a different Court altogether or the Court which has no jurisdiction at the place where the execution of the decree is sought. Only a few authorities may be mentioned.

5. Let us start from AIR 1915 Mad 915 in which it was held that a Court within which major portion of property is situate is competent to set aside mortgage decree by a Court within which a small portion is situated. There was no absolute rule which made only the Court which passed the decree competent to hear the suit. In AIR 1917 All 176 (2) where a decree passed by one Court was sought to be executed by the arrest of the Judgment-debtor by a different Court, the Court executing the decree was held to be a competent Court where a suit to set aside the decree could be lodged. In AIR 1917 Pat 598 a decree was alleged to have been obtained by fraud in Bilaspur against the plaintiffs, who were the resident of Arrah District. The decree was transferred from Bilaspur to Arrah where warrants were issued for the arrest of the plaintiff. The plaintiffs brought a suit in the Munsiff's Court at Arrah to set aside the decree passed by Bilaspur Court. It was held that the Arrah Court had jurisdiction to entertain the suit. In ILR 37 All 189 = (AIR 1915 All 163) a decree was obtained in Bengal and was sought to be executed by attachment of property at Agra. A suit was brought for the cancellation of the decree at Agra and it was held that the Agra Court had jurisdiction to hear the suit. In ILR 39 All 607 = (AIR 1917 All 176 (2)) it was held that a decree obtained in Bengal and a suit in Agra would lie provided some part of the plaintiff's cause of action had arisen within the jurisdiction of Agra Court. In (1903) ILR 25 All 48 the plaintiff alleged that he was the adopted son of one Balmakund and the defendants fraudulently compromised and obtained a decree for a considerable sum payable out of the property of Balmakund the decree was sent for execution to Cawnpore. The previous decree had been passed in Calcutta but the suit to set aside the decree was brought in Cawnpore and it was held that though the decree was passed in Calcutta yet inasmuch as the property affected by the decree was in Cawnpore, and execution was being taken out there, a material

portion of the plaintiff's cause of action arose in Cawnpore, and the Subordinate Judge of that place had jurisdiction to try the suit. There are other authorities to the same effect and they may be mentioned as AIR 1923 Mad 272, AIR 1924 Pat 831, AIR 1926 Lah 277, AIR 1933 Cal 274, AIR 1957 Cal 817, and AIR 1958 Mad 516 and even an authority of this Court reported as AIR 1960 J. and K. 76 is to the same effect. All these authorities are for the proposition that if a decree is passed by a Court having one jurisdiction and is sought to be executed by another Court having a different jurisdiction the suit for cancellation of the decree can lie in the latter Court. In this case the decree is sought to be executed in the Kishtwar Court therefore that Court has jurisdiction to hear the suit. In this case there are further grounds why the Kishtwar Court should be held to have the jurisdiction. The landed property which is sought to be affected and which really is the subject-matter of the dispute between the parties is situate within the jurisdiction of that Court. That apart, the fact is that the defendants also reside within the jurisdiction of that Court. The orders passed by the lower Courts are therefore, not maintainable and are hereby set aside and it is held that the Sub-Judge's Court at Kishtwar has jurisdiction to hear the case between the parties.

6. But it would not be expedient or even proper to allow the case to remain on the file of the Sub-Judge Kishtwar. The decree has been passed by a Division Bench of this Court. To say the least it would be very embarrassing for the Sub-Judge to sit in judgment on the decree passed by this Court. Therefore, in our opinion, the suit should not be allowed to remain on his file but should be heard by a Judge of the High Court direct. We therefore, transfer this case from the file of the Sub-Judge Kishtwar to this Court. The suit shall be placed before His Lordship the Chief Justice for being allotted to any Judge of this Court for hearing.

7. The case however has disclosed utter carelessness on the part of the Presiding Officer as well as defendants. The suit is to set aside the decree but no copy of the decree sheet has been presented with the plaint. There is only a certified copy of the order of this Court dated 19th November, 1963. The suit should not have been entertained at all or at least not proceed with before the plaintiff was made to file a certified copy of the decree sheet passed by this Court. Even the defendants have not pointed out this fact to the trial Court.

Order accordingly.

AIR 1970 JAMMU AND KASHMIR 143
(V 57 C 30)

JANKI NATH BHAT AND JASWANT
SINGH, JJ.

Kundan Lal, Petitioner v. District
Magistrate and another, Respondents.

Writ Petn. No. 58 of 1969, D/- 18-12-1969.

(A) Constitution of India, Articles 370 (1) (c) (d), and 35 (c) — Application of Constitutional provisions to Jammu and Kashmir under Article 370 (1) (c) — Power of the President to make modifications under Article 370 (1) (d) — Power includes power to vary modifications — Section 21 General Clauses Act applies — Modifications in Article 35 (c) — Valid.

There is nothing in Article 370 of the Constitution which would exclude the application of Section 21 of General Clauses Act when interpreting the powers granted to the President under Article 370. The modification in Article 35 (c) of the Constitution of India extending its period from 5 to 20 years and thus saving the provisions of Section 8 of J. and K. Preventive Detention Act 1964 from being violative of Article 22 (5) of the Constitution of India is therefore, within the power of the President. AIR 1970 SC 1118, Rel. on. (Paras 8, 9)

(B) Public Safety — Constitution (Application to Jammu and Kashmir) Orders, 1959 and 1964 — Jammu and Kashmir preventive laws — Immunity to, from Fundamental Rights granted under Article 35 (c), Constitution of India — Period of immunity extended under the Orders 1959 and 1964 — No infringement of Fundamental Rights in Article 22 — (Constitution of India, Articles 35 (c) and 22).

Under Clause (c) of Article 35 of the Constitution of India immunity was granted to the preventive laws made by the State Legislature completely, though the life of the inconsistent provisions was limited to the period of five years. The extension of that life from five to ten years in 1959 and ten to fifteen years in 1964 cannot in the circumstances be held to be an abridgement of fundamental rights, as the fundamental rights were already made inapplicable to preventive detention law. (Para 11)

(C) Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Sections 14 and 3 — Detention order under Section 3 — Revocation of, under Section 14 (2) — Revocation for technical defect included — No fresh facts arising after revocation — Fresh order of detention under Section 3 not valid.

The provision of Section 14 (2) of the Act is of wide amplitude and applies to every case of revocation for any reason whatsoever including a technical defect — The provision envisages that no fresh order of deten-

tion would be issued against a person when the previous order of his detention is revoked unless new facts warranting the detention have come into existence. A fresh detention order immediately after revocation without new facts would therefore be illegal. AIR 1969 SC 43, Rel. on. (Para 12)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 1118 (V 57) =

W. P. No. 3 of 1968, D/- 10-10-1968,

Sampat Prakash v. State of J. & K. 7

(1969) AIR 1969 SC 43 (V 56) =

1969 Cri LJ 274, Hadibandhu v.

District Magistrate, Cuttack 12

R. P. Sethi, for Petitioner; Addl. Advocate-General, for Respondents.

ORDER:— This is a petition under Article 32 (2-A) of the Constitution of India as applied to the State of Jammu and Kashmir read with Section 103 of the Constitution of the State and Section 491, Criminal Procedure Code for issue of writ of Habeas Corpus directing the release from detention of the petitioner.

2. The material facts leading to this petition are:—

Pursuant to Order No. 13/PDA/69 dated 25-7-1969 issued under Section 3 (2) read with Section 5 of the J. and K. Preventive Detention Act, 1964 (hereinafter referred to as 'the Act'), by the District Magistrate, Poonch, respondent No. 1 therein, the petitioner was arrested by the police on 29-7-1969 at 7-15 A. M. and was detained in the Central Jail, Jammu, with a view to preventing him from acting in a manner prejudicial to the security of the State, the maintenance of public order and essential supplies. On the date of the passing of the aforesaid order of detention the District Magistrate also made an order under Section 8 read with Section 13-A of the Act directing that the petitioner be informed that it was against public interest to disclose to him the grounds on which his detention order was made. The order of detention was approved by the Government of Jammu and Kashmir's Order No. ISD-275-A of 1969 dated 14-8-1969. On 1-9-1969 the petitioner filed a writ petition in this Court challenging the validity of his detention. During the pendency of the petition, the aforesaid detention order was revoked by the Government vide its Order No. ISD-304 of 1969 dated 19-9-1969 on account of some "technical defect" under Section 14 (1) of the Act. On the same date a fresh Order No. ISD-305 of 1969 directing the detention of the petitioner in the Additional Police Lock Up attached to Saddar Police Station Jammu was issued by the Government under Section 3 (1) (a) (i) of the Act with a view to preventing him from acting in any manner prejudicial to the security of the State. By its No. 306 of 1969 of even date the Government also made an order under Section 8 read with Section 13-A of the Act informing the petitioner that it was against public interest to disclose the

facts and to communicate to him the grounds on which his detention had been made.

3. On 16-10-1969 the petitioner filed an amended petition challenging the fresh order of his detention averring that the order was illegal and void as it had been passed mala fide with ulterior motives, that the detention had been ordered without sufficient reasons and satisfaction as to the existence of facts warranting his detention; that the detention was violative of Section 14 (2) of the Act; that the fresh order of his detention could be justified only in case fresh facts had arisen after the date of the revocation of the previous order; that no such new facts had been mentioned by the detaining authority for issue of fresh order of his detention, that the issue of fresh detention order was also illegal and void as no grounds of detention as required by Section 8 of the Act had been supplied to him, that proviso to Section 8 of the Act was unconstitutional, illegal and void because it contravened the provisions of Article 22 of the Constitution of India, that the detention was illegal as he had not been afforded an opportunity of making a representation against the order to the Government as provided by Section 8 of the Act, and that the detention was also illegal as no reference under Section 10 of the Act had been made to the Advisory Board.

4. The petition was resisted by the Government inter alia on the grounds that the previous detention order had been revoked on account of technical defect and by its Order No. ISD-305 of 1969 dated 19-9-1969 it had ordered the detention of the petitioner under Section 3 (1) (a) (i) of the Act, that the petitioner was informed of the revocation of the order of the District Magistrate, Poonch, and in token thereof his signature was obtained on the order of revocation, that the petitioner was also informed of the fresh detention order and in obedience thereof was detained in the Additional Police Lock up attached in Police Station, Saddar, Jammu, that fresh order of petitioner's detention was passed as the Government was satisfied that with a view to preventing him from acting in any manner prejudicial to the security of the State, it was necessary to do and as the previous order passed by the District Magistrate was found to be defective in law, and that it was also intimated to the petitioner that it was against public interest to disclose to him the facts or to communicate to him the grounds on which his detention order had been made.

5. Mr. Sethi, learned Counsel for the petitioner, has raised the following contentions.

That the Act was not legally in force after the 8th of May, 1969 that the proviso to Section 8 of the Preventive Detention Act is violative of Article 22 (5) of the Constitution of India, that Article 35 (c) added by the President vide Constitution (Application to J. & K.) Order, 1964 with a view to save the provisions of the law relating to preven-

the right of administration of an educational agency has recognised the need to associate the University, the State Government and the teaching staff with the educational agency for the purpose of enabling those bodies merely to assist the educational agency in the proper conduct of the affairs of the institution. The decisive voice of the educational agency in the administration of the institution is secured by giving an overwhelming majority in the governing body or managing council to nominees of the educational agency and by the overriding provision contained in Cl. (7) of both Sections 48 and 49 that notwithstanding anything contained in sub-sec. (6), decisions of the managing council (governing body) shall be taken at meetings on the basis of simple majority of members present and voting. Under Section 48, the governing body consists of the manager of the college, who under Section 50 is appointed by the educational agency and also six persons nominated by the educational agency. It also includes the Principal of the College who is himself appointed under Section 53 (2) by the governing body. The other members of the governing body are one nominee of the University, one nominee of the Government and one teacher elected by the teachers of the college. Section 49 is modelled on the same pattern....(Paragraph 28.)

The State Government, besides its governmental responsibilities in relation to education, which is a State subject also incurs substantial expenditure by way of grants-in-aid to each private college. Likewise, the University is the custodian of the entire collegiate education within its jurisdiction and also gives diverse grants to private colleges. The teaching staff constitutes the instrument through which any educational agency runs an educational institution and the teachers therefore have a heavy responsibility in its working. Their participation in the governing body or managing council will enable the educational agency more effectively to contribute in the proper running of the institution without derogation of the right of the educational agency to administer it. Moreover it will give them the opportunity of keeping in close touch with the actual running of the institution thus enabling them to check any malpractices. Their function is largely informative, not administrative, in view of the overwhelming majority of the educational agency. They are merely the watch-dogs of the institution and can claim no effective share in the management. Malpractices such as the taking of premia from teachers and students for appointments and admissions, favouritism in appointments and promotions of teachers are likely to be eradicated in the set-up prescribed by the Act. These provisions will only effectuate the policy and purpose for which the educational institutions have been established and will not in

any way detract from their object or destroy or annihilate the power of administration which is left intact with the educational agency. It should be noted that the day-to-day administration of the college is left entirely to the manager who is appointed by the educational agencies. The decisive voice in the governing body or managing council is expressly reserved to the educational agency, and the representatives of the State and the University and the teaching staff cannot impair its right of administration. (Paragraph 29)

The allegation of the petitioner that Sections 48 and 49 have taken away the rights of administration from the educational agency and have vested it in an entirely different body is denied. While it is true that the governing body or managing council is clothed with corporate personality by the Act, in order to find out whether or not the educational agency's right of administration has been impaired, it is necessary to lift the corporate veil and determine the persons in whom the power of administration is effectively vested. Since the decisive voice of the educational agency is scrupulously preserved by the provisions of Sections 48 and 49, it is not correct to say that there is transfer of the right of administration or that the right of administration is vested in an entirely different body. It is well settled that in adjudging the constitutional validity of any provision regard must be had not to the form but to its substance and effect. The educational agency is still the decisive authority and the presence of representatives of the University or the Government or the teaching staff does not in any way detract from the substance of the educational agency's right of administration. There is no sharing of the administration with the other members of the governing body or managing council. (Paragraph 30).

.... Secondly, for reasons already stated, the managing council/governing body is not substantially different from the educational agency and therefore in essence the right to administer will remain in the hands of the educational agency. Thus, there is nothing in the Act to prevent or prohibit an educational agency from administering a college in its own way subject only to compliance with the Act and the regulations thereunder....(Paragraph 31)

The allegation that the provision in Section 49 (4) for a member of the governing body/managing council holding office for a period of four years from the date of its constitution has the effect of disabling the educational agency from removing any of its nominees from membership even if he has lost the confidence of the educational agency is misconceived....(Paragraph 32)

The allegations in Para. 14 are denied. The right given to representatives of the State, the University and the teaching staff to participate in the discussions or the

for him to prejudice the interests of the educational agency in a litigation without the educational agency knowing anything about it before it is too late to take action to safeguard its interests, if such action were possible. But the sub-section as it stands seems harmless because it is meaningless. A college is not a legal person or even a legal entity, and there is nothing in the Act which makes it one. That being so, it seems to us that no suit will lie by or against a college—there is nothing to show that the word “college” is used in the sub-section as a label for some legal person. A college as such has no property—as we have already explained, what is popularly called, and what we have called, the property of a college is really the property of the educational agency, used by it for running the college. It seems to us that a decree be obtained in the kind of suit contemplated by the sub-section, namely, a suit by or against a private college in the name of the manager, would be a useless decree binding on nobody, unless it is held on the facts of the particular case that the college or manager is only a label for some other legal person. But if the effect of sub-section (5) be that, willy-nilly, the rights of the educational agency would be affected by the sort of suit contemplated, we would have no hesitation in striking down the sub-section unless, in the view we have taken, the manager would be regarded as a person appointed by the educational agency itself to represent it in litigation.

35. The requirement of sub-section (1) of Section 50 that the educational agency shall appoint a manager, and of sub-section (2) that his appointment or removal shall be intimated by the agency to the University does not, of course, affect the agency's right of management. A like provision in clause 7(1) of the Kerala Education Bill, 1957, was easily passed in *In re Kerala Education Bill, 1957*, AIR 1958 SC 956, although the appointment there was subject to the approval of an officer of Government, not as under Section 50 a mere matter of intimation of appointment or removal. True, the clause said, “may appoint”, not as the section says, “shall appoint”, but, having regard to the provisions of the Bill imposing duties on the manager (with no provision made as to who is to perform those duties in cases where no manager is appointed), there can be no doubt that appointment was obligatory. After all, to insist that an educational agency shall appoint a sort of executive officer is only a regulatory and not a restrictive measure.

36. The rest of the impugned provisions of Chapter VIII affects that aspect of management that relates to the appointment of the staff of the colleges and their conditions of service including disciplinary control over them. The petitioners themselves recognise that a competent and contented

staff, assured of fair treatment and fair prospects, is essential for the proper functioning of a college. Any measure designed to secure this would be only regulatory and would not be a restriction on the right of management. But any measure which goes beyond this and is unnecessary for the proper functioning of a college would be an unwarranted interference with the right of management offending Article 30(1), and, since no consideration of public interest attracting clause (5) of Article 19 is put forward apart from the interests of the institutions themselves, it is not possible to justify a measure as a mere regulatory measure for the benefit of the institutions, offending Article 19(1)(f) as well.

37. No exception is, or indeed can be taken to Section 52 which, apart from requiring the statutes to prescribe the terms and conditions of affiliation of a college and the procedure for the grant of affiliation, enables the statutes to provide for the pattern of staff, scales of pay and terms and conditions of service of members of the staff, and admission and selection of students for courses and examinations. Of course, if any of the statutes prescribed for this purpose is unreasonable and offends the legal rights of the educational agencies, it will then be time enough for complaint.

38. Section 54 by which (read with Section 34(e)) the qualifications of teachers of private colleges are to be prescribed by the Regulations made by the Academic Council is likewise unexceptionable. The same cannot, however, be said about sub-sections (1), (2) and (3) of Section 53 which provide for appointment to the post of the principal of a college. The principal of a college is, as Section 2(12) recognises, the head of the college, and (adopting the words used in *A. M. Patroni v. E. C. Kesavan*, AIR 1965 Ker 75, with reference to the post of the headmaster of a school), the post of the principal is of pivotal importance in the life of a college; around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching; and the right to choose the principal is perhaps the most important facet of the right to administer a college. The imposition of any trammel thereon—except to the extent of prescribing the requisite qualifications and experience or otherwise fostering the interests of the institution itself—cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution, and, for the reasons we have already given, by Article 19(1)(f) as well. To hold otherwise would be to make the rights “a teasing illusion, a promise, of unreality”. Provision may, of course, be made to ensure that only proper persons are appointed to the post of principal; the qualifications necessary may be prescribed, and the mode of selection for the purpose of securing the best men may be laid down. But to go beyond that and

place any further fetter on the choice would be an unreasonable interference with the right of management. Therefore, so far as the post of principal is concerned, we think it should be left to the management to secure the services of the best person available. This, it seems to us, is of paramount importance, and the prospects of advancement of the staff must yield to it. The management must have as wide a field of choice as possible; yet sub-section (2) of Section 53 restricts the choice to the teachers of the college or of all the colleges, as the case may be, and enables the appointment of an outsider only if there is no suitable person in such college or colleges. That might well have the result of condemning the post to a level of dull mediocrity. A provision by which an outsider is to be appointed, or a junior member of the staff preferred to a senior member, only if he is of superior merit, the assessment of which must largely be left to the management, is understandable; but a provision which compels the management to appoint only a teacher of the college (or colleges), unless it pronounces all the teachers unsuitable, is clearly in derogation of the powers of the management, and not calculated to further the interest of the institution. Once sub-section (2) is struck down, sub-sections (1) and (3) serve no purpose — indeed the three are inextricably mixed and must stand or fall together. But we might say that there can be no objection to the appointment of the principal as of any other member of the staff being subject to the approval of some authority of the University so long as disapproval can be only on the ground that the person appointed has not the requisite qualifications. Also that, if disapproval is not to be only on some such stated ground, but is left entirely to the will and pleasure of the appointing authority, that would be to deprive the educational agency of its power of appointment and would be bad for offending Articles 19 (1) (f) and 30 (1). It is one thing to constitute an expert committee or other body to assist the management in selecting the best men as recommended in the several reports on University education to which we have referred (and as contemplated by clause 11 (1) of the Kerala Education Bill which passed the test of Article 30 (1) in AIR 1958 SC 956); quite another to say that some outside authority can disapprove of an appointment made by the management for any or no reason.

Sub-section (4) of Section 53 says that appointment to the lowest grade of teacher in each department of a college shall be made by the managing body by direct recruitment on the basis of merit. No one can object to this, although, since no appointment is likely to be made from the non-teaching staff, it was hardly necessary to say that it shall be by direct recruitment. Merit must of course be the criterion; but, as we have already indicated, beyond pre-

scribing the requisite qualifications and the mode of (including the machinery for) selection so as to ensure that merit prevails, the assessment of merit must be left to the management and not to any outside authority.

Sub-section (5) of Section 53 which requires all appointments made under sub-section (4) to be reported to the University for recognition, in other words, having regard to the definition of "recognised teacher" in Section 2 (17), for approval, must pass muster so long as it is clearly understood that approval can be withheld only on the ground that the person appointed has not the requisite qualifications.

Sub-section (6) of Section 53 only ensures that appointments are made only after due advertisement so that the best candidates are secured. The post has to be advertised in such manner as may be prescribed by the statutes. This seems to be only reasonable, and the sub-section does not prevent the management from advertising the post in such manner as it chooses in addition to the manner prescribed by the statutes.

About the wisdom of sub-section (7) of Section 53 which requires that appointments to the teaching staff including that of the head of a department should be made by promotion from among the teachers of the college or of all the colleges, as the case may be, and permits direct recruitment only if there is no person among the teachers of the college or colleges possessing the qualifications prescribed for the post, we are doubtful. We should have thought that, with regard to the head of a department in a first grade, and more so in a post-graduate college, it should be possible to secure the best talent without any closed-shop restrictions. That indeed would appear to be in keeping with the recommendations of the expert bodies to which we have already referred. But, wisdom or expediency is not for us to consider, and having regard to prevailing conditions and especially the conditions in this State—in matters of common knowledge we are not bound to exclude our own knowledge and experience and shut our eyes to realities, whatever the parties or even the experts might say—we are prepared to uphold this section as necessary to prevent favouritism and secure fair prospects of advancement for the teaching staff. In that view, we would have been prepared to uphold the provision in sub-section (9) for an appeal by a disappointed teacher but for that, for reasons we shall state in considering sub-section (4) of Section 56, we do not think that a body like the Syndicate would be a proper appellate forum. As it is, however, the provision for an appeal is so unreasonable as interference with the right of management that the attack both under Article 19 (1) (f) and under Article 30 (1) must prevail. At the same time, we would like to make it clear

that the test of seniority-cum fitness prescribed in the sub-section does not mean that promotion is to be on the principle of seniority subject to fitness which is the test adopted for "non-selection" posts in the several service rules of the State. Seniority-cum-fitness means that due and equal regard should be paid both to seniority and to fitness, and, since fitness is a matter of degree, it would appear that a senior person can be overlooked in favour of a junior who is demonstrably more fit for the appointment than he is. We also think that, notwithstanding the wording of the sub-section which would appear to permit of direct recruitment only if there is no person available for promotion possessing the necessary qualifications, if the basis of the promotion is to be seniority-cum-fitness, it would be open to the management to resort to appointment otherwise than by promotion if there is no person fit for promotion. An unfit person is not entitled to promotion merely because he possesses the necessary qualifications.

Sub-section (8) of Section 53 seems to us only reasonable. (But we might remark that the proviso thereto is not really a proviso but an independent provision). This sub-section only says that no course of study shall be abolished without the prior approval of the University, something to which no exception can be or is taken, and, further, that a teacher discharged from a college due to the abolition of a course of study shall be given preference in the matter of appointment if the course is restarted within a period of three years. That seems to us only fair, and the preference in favour of the discharged teacher does not mean that his qualifications and fitness for the post are not to be considered. The sub-section does not require the discharged teacher to be appointed if he is unqualified or unfit as might well happen if the qualifications for the post have been changed or the teacher has misconducted himself meanwhile.

39. Section 54 provides for the continuance of a teacher after satisfactory completion of probation and seems to us quite necessary for securing fair conditions of service for the teachers while at the same time ensuring their suitability, and for preventing abuses of the kind referred to in the counter-affidavits of the respondents which it is unnecessary to detail, but which it is a matter of common knowledge do exist in smaller or greater degree. The provisions of the section are similar to provisions for probation and confirmation in the rules for Government servants, and we are satisfied that they only ensure that security of tenure essential for a contented service—they are no more than a safeguard against mala fide, arbitrary or capricious discharge. Objection has been taken to sub-section (6) of the section which requires the managing body to make up its mind as to the suitability of a probationer within

a month of the expiry of the period of probation. This, we think, is an eminently reasonable provision; for, after having watched the work and conduct of a person for the prescribed normal period of one year, it should not take the managing body more than a month to decide whether that person is suitable or not. If it does not pronounce him unsuitable within that time, there is nothing wrong in presuming that it has found him suitable. It should not be open to the managing body to postpone its decision indefinitely with the Damoclean sword of discharge hanging over the probationer's head. That would do the institution no good.

The provision for an appeal in sub-section (7) of the section is also reasonable, and we note that the appeal is to a proper forum, namely, to the Vice-Chancellor. Whether the Vice-Chancellor will have the time for the purpose or whether his time should be taken up with such matters is not for us to consider.

It is pointed out that the section makes no provision for discharge before the expiry of the period of probation and it is said that this compels the retention, to the detriment of the institution, of a teacher who has earlier proved his unfitness. That is not so, for, there is nothing to prevent the removal of such a teacher, since proved unfitness, even if it be due only to incompetence, is a proper ground for what is commonly known as disciplinary action. It is really only a question of degree—a greater degree of incompetence will ordinarily be required for a removal. In the one case, the teacher has to prove his fitness; in the other, it has to be proved that he is unfit; and it is only fair that a man should be given at least a year's trial to prove his fitness.

40. No complaint is made that one year is too short a period to assess the suitability of a teacher and that, therefore, Section 55 compels the management to accept a person before it has had time to judge whether he is fit for continuance. Therefore, nothing need be said about the unworkable provision made by the proviso to sub-section (1) of the section for an extension of the period in exceptional cases with the prior approval of the Syndicate excepting that the effect of the insistence on such approval would be to deny the teacher the benefit of an extension even if the management were inclined to give him an extended trial.

41. Section 56 provides for the conditions of service of teachers. To sub-section (1) which says that these conditions, including conditions relating to the pay, pension, provident fund, gratuity, insurance and age of retirement, shall be such as may be prescribed by the statutes, no objection has been taken. Of course, if any condition prescribed is unreasonable, objection can be taken to that. But, serious objection is taken to sub-section (2) which says that no

teacher shall be dismissed, removed, or reduced in rank, or placed under suspension, for a continuous period exceeding fifteen days without the previous sanction of the Vice-Chancellor. This, it seems to us, would so affect disciplinary control as to be subversive of discipline and can hardly be regarded as a regulation or a restriction in the interest of the institution or of the general public. The Vice-Chancellor can hardly be expected to have the time to deal with such matters, and, in any case, the long delay that will necessarily be involved would, by itself, render the managing body's powers of disciplinary control largely ineffectual. The proper remedy against any abuse of the disciplinary power would be an appeal. An appeal has been provided for by sub-section (4) and why, in addition to this, there should be a previous sanction is more than we are able to understand. But, as we have already indicated, the appeal provided for by sub-section (4) suffers from the defect of the appeal being to a forum which seems to us entirely unsuitable for the purpose. Although the substantive right conferred, namely, the right of appeal, is proper—and if we may say so more satisfactory than the remedy of arbitration provided by the old Kerala University Act of 1957—the mode of the exercise of that right seems to us so unreasonable, and so much against the interests of the institution, that it can hardly be justified either as a regulation of, or a reasonable restriction on, the power of management. For, the appeal lies not, as one would have expected, to a judicial or quasi-judicial tribunal, but to a large body like the Syndicate comprising as many as seventeen members, twelve of them elected, some of them themselves teachers. It is an executive body which, having regard to its composition, would, in the ordinary course, be subjected to pulls and pressures including such pulls and pressures that either the punished teacher or the teachers as a body would be able to exert and does not seem to us to be a body which can properly be entrusted with a judicial function of this nature. We might also observe that it is a body that is in session only intermittently so that it can hardly be expected to dispose of the appeals before it within a reasonable time, and, since its powers would include the power to grant a stay pending an appeal before it, it might well be that teachers who deserve to be dismissed are continued in service for an indefinite period. Sitting as an appellate authority against a punishment, it is to function as a quasi-judicial authority and its decision would be subject to judicial review, and, how a body like the Syndicate would be able to produce what is ordinarily called a speaking order is more than we can see. As we have already observed, we are of the view that, although a right of appeal is unexceptionable, the right actually conferred by sub-section (4) of Section 56

is bad for offending both Article 19 (1) (f) and Article 30 (1).

It is true that a provision for previous approval before imposing serious punishment was passed in AIR 1958 SC 956. But it was passed only hesitantly and tentatively and the Bill contained no provision for an appeal. Therefore, that decision does not mean that such a provision is, in all circumstances, good.

To sub-section (3) of Section 56 which only requires that a reasonable opportunity of showing cause against the action proposed should be given to a teacher before any disciplinary action is taken against him, there can, of course, be no exception taken; and none is taken.

42. To Section 57, which provides for pending disputes between the management and a teacher relating to the latter's conditions of service being decided under the provisions of the Act and of the statutes made thereunder notwithstanding anything contained in any law for the time being in force or in any contract or in any judgment, decree or order of any Court or other authority, and for the reopening of any disposed of dispute which arose after the 1st August 1967, the date of the publication of the bill, we do not think any valid objection can be taken. If, in the result, any fundamental right is violated, it will be time enough to complain.

43. Section 58 is a very controversial section and we think it ought to be struck down, since, apart from not being a regulatory measure calculated to further the interests of the institutions, it is capable of much mischief. Its wording is not very clear; but both sides read it as meaning and we think they are right—that it entitles a teacher to stand for election to the Legislative Assembly of the State or to Parliament or to any local authority, irrespective of the wishes of the management, and to continue as a teacher while serving on those bodies, provided that if he becomes a member of Parliament or of the Assembly, he is to go on leave during the period the body is in session—he is bound to ask for leave and the management to grant it (though, perhaps, not leave on allowances except to the extent that he has earned such leave) whether he is attending the session or not. This means that he will be intermittently and frequently absent for short periods whenever the Legislature is in session; but can claim to return to duty during the intervals when it is not in session. Surely, he will be of little use as a teacher in the institution, and the management will have to appoint another teacher to do his work. How this can further the interests of the institution or of the general public, it is difficult to understand. Or, even if some public interest is served, how it can be regarded as a reasonable sacrifice of the rights of the management and the interests of the institution.

We are not unaware that an expert body like the Kothari Commission was of the view that teachers should be free to exercise all civic rights enjoyed by citizens and should be eligible for public offices at the local, district, State, or national levels, that the participation of teachers in social and public life was highly desirable in the interests of the profession and the educational services as a whole, and that such participation would enrich the social and political life of the country. Even so, it was of the view that teachers participating in elections should proceed on leave during the election campaign and relinquish their teaching duties temporarily if the requirements of public office interfered with the proper discharge of those duties. That, in the case of membership of the State Legislature or of Parliament, would mean that the teacher concerned should proceed on leave from the date he stands for election until the results of the election are announced, and, if he is successful, continue on leave until his membership of the Legislature expires. Or, what is much the same thing, give up his job with the right to return to it. But, as we have seen, what Section 58 provides for is an entirely different thing. It enables the teacher to absent himself intermittently for short periods and to return to duty during the intervals rendering himself useless as a teacher and putting the management to the additional expense of appointing some other teacher to do his work.

Teaching is a full-time vocation. Other preoccupations, however beneficial to himself or even to the general public they might be, that prevent a teacher from devoting his whole time to his teaching duties cannot be in the interest of the college he serves, nor, in the balance, in the interest of the general public since the colleges cater to a public need. With due respect to the views of experts in the field of education, the politician teacher can hardly be an asset to a college. On the other hand, he can be a great evil, for, he would tend to involve the pupils in his own politics and to assume a self-importance subversive of discipline.

Except to the extent that it relates to the membership of local authorities not involving absence from teaching duties at the college, we think that Section 58 is bad for offending Article 19 (1) (f) and, of course, Article 30 (1) as well.

44. Section 59 provides that the provisions of Chapter VIII shall apply *mutatis mutandis* to the non-teaching staff of the colleges. A competent and contented non-teaching staff is also a desideratum for the proper running of a college, and we can see no objection to such of the provisions of the chapter as we have upheld being applied *mutatis mutandis* to the non-teaching staff.

45. Section 61 which only provides for the disaffiliation of, and the withholding of

grant to, a college which fails to comply with the provisions of the Act (of course, only the valid provisions) after due observance of the rules of natural justice by giving the educational agency and the managing body an opportunity of being heard, seems to us unexceptionable.

46. The only provision that remains to be considered is Section 63 which appears in Chapter IX. As we have seen, even what is called a private college is really a public institution in the sense that it serves the public, and its proper running is a matter of public importance. We have no doubt that in the emergency contemplated by Section 63, when it has become impossible to run the college because of non-payment of the salary of the staff for a period of not less than three months, or the wilful closure of the college (which means the inexcusable closure) except during a vacation for a period not less than one month, or persistent (which means frequent and contumacious) default or refusal by the authorities of the college to carry out the duties lawfully imposed on them, there should be provision for the suspension or removal of the management and the appointment of some other management in its stead. (The section, it might be noted, also provides for a show-cause to all persons affected). That would be necessary in the public interest no less than in the interest of the institution itself and would come within the saving in Article 19 (5). But, it is to be noticed that, even so, it would not be a regulatory measure passing the test of Article 30 (1) (from which test Article 31-A gives no absolution) if it involves the taking over of the management, even for a temporary period, from the minority concerned. The like provision, like to Sec. 70 of the Act, in clause 14 of the Kerala Education Bill failed this test in AIR 1958 SC 956 and that was not and could not be, because of the provision for acquisition in some other clause, namely, clause 15.

The provision actually made in Section 63, however, involves the transfer of the right to possession of the properties of the college concerned to the University (which there can be no doubt answers the definition of the word "State" in Article 12—see *Electricity Board, Rajasthan v. Mohan Lal*, AIR 1967 SC 1857, where the Supreme Court held that an Electricity Board constituted under the Electricity (Supply) Act, 1948, was a "State" as defined by Art. 12, disapproving of the decision in *University of Madras v. Shanitha Bai*, AIR 1954 Mad 67, which had held that the Madras University was not a State). Else, the section would be altogether ineffectual. Therefore, the section does provide for compulsory requisitioning of the property within the meaning of Article 31 (2)—see clause (2A) of the Article—and it offends that Article since it makes no provision for compensa-

tion; nor can it have effect since there has been no compliance with clause (3). And, for the very same reason, namely, that it has not received the assent of the President—it was not reserved for his consideration—the saving in Article 31-A (1) cannot apply in view of the first proviso thereto.

47. In justifying the provisions of the Act, the University and the Government have alleged that various abuses, such as, favouritism and the extortion of so-called donations in connection with the admission of pupils, and the appointment and promotion of the staff, unfair treatment of the staff, breaches of statutory provisions governing them, and defiance of the authority of the University, are prevalent in the private colleges. They have also referred to want of adequate provision in the old University Act for the enforcement of orders and directions issued by the University authorities to prevent or remedy such abuses and to the absence of any legal remedy for the aggrieved party. The petitioners have, of course, denied that there have been any such abuses in the institutions they run. But, we have not thought it necessary to go into the merits of the charges, since the conclusions we are reaching are in no way dependent on that. We are not suggesting that the charges are unfounded; but, even if they are, such of the provisions as we have passed are mere regulatory provisions for the better running of the institutions which can lawfully be imposed on an institution which is being run well. And such of the provisions as we have struck down, would be bad even if the charges were well-founded. For this reason, we think it equally unnecessary to consider the criticism, not altogether unfounded, that the impugned provisions of the Act are scarcely calculated to obviate or remedy the alleged abuses, and we are, since no charge of mala fides as such can lie against a Legislature, in no way concerned with the inference sought to be drawn therefrom that the Act is not really intended to meet the alleged abuses, but is designed for some ulterior end.

48. The attack based on Article 14 of the Constitution is three-fold: First, that the Act treats colleges that are well run and colleges that are badly run alike. Secondly, that it results in discrimination as between the northern districts of the State, where the less stringent provisions of the Calicut University Act are in force, and the southern districts to which the more stringent (and, in so far as they are regulatory more beneficent) provisions of the Act apply. And thirdly, that it discriminates as between private colleges on the one hand and Government colleges on the other, in that the impugned provisions are made applicable only to private colleges.

49. With regard to the first contention, as we have already remarked, the provisions that we have passed are merely regu-

latory and equally salutary whether an institution be well run or badly run. No question of discrimination can, therefore, arise. So far as the second is concerned, it is true that the entire State was, at one time, governed by the same University Act, namely, the Kerala University Act, 1957, so that, *prima facie*, it might be difficult to justify the application of dissimilar provisions to the northern and southern districts on historical or geographical grounds. Nor is it pretended that the conditions in the northern districts are in any way different from those obtaining in the southern districts. Indeed, many of the abuses to which reference has been made are in respect of colleges in the northern districts. But, having regard to the circumstances to which we shall presently refer, we do not think we should consider this particular charge at this stage. While the bill in respect of the Act was pending consideration, it became so urgently necessary to establish a separate University for the northern districts—for what reasons it is not for us to inquire—that an Ordinance, namely, the Calicut University Ordinance replaced later by the Calicut University Act as a matter of course had to be promulgated for the purpose. That Ordinance, quite properly we think, adopted the provisions of the Kerala University Act, 1957, rather than those of the Bill which had not yet been passed by the Legislature. A Bill for the northern districts which is practically a copy of the Act is now before the Legislature, and we are assured will soon become law. These are the circumstances that dissuade us from considering the charge for the present. We think it will be time enough for any aggrieved party to urge it if the dissimilar treatment persists beyond the time reasonably necessary for according similar treatment and we decline the invitation to issue a writ, analogous, it is said, to a writ of prohibition, in effect staying the provisions of the Act until the new bill in respect of the northern districts becomes law. We must, at the same time, make it quite clear that we are expressing no opinion whatsoever on the question whether the dissimilarity in the provisions of the Calicut University Act and the impugned Act gives rise to a discrimination offending Article 14 of the Constitution.

50. We see little basis for the third head of the charge, for, by their very nature, private colleges form a different class from Government colleges and the application of the impugned provisions only to private colleges is obviously based on a reasonable classification. What is sought to be secured by the impugned provisions are, or should be, secured in the case of Government colleges by the very fact that they are run by the Government. This particular head was urged with special reference to the provisions relating to the appointment of the staff and their conditions of service. So far as that is concerned, more or less similar

provisions already exist in the case of Government colleges excepting with regard to what is contained in Section 58 which we have substantially struck down. But, even in regard to this, namely, membership of Legislatures and the like, it is obvious that Government servants do not stand on the same footing as private citizens.

51. There is yet another contention based on Article 14 urged on behalf of what we have called the majority institutions. This particular application of Article 14 would, if upheld, amount to a rewriting of the Constitution, for, it amounts to this, namely, that the protection of Article 30 (1) should be afforded not merely to minority institutions to which it is in terms confined but also to majority institutions. And, the protection of Article 19 to non-citizens although it is confined to citizens. The argument is that, having regard to the purpose of the Act, and, in particular, of the impugned provisions, no reasonable classification can be made as between the majority institutions and the minority institutions or between citizens and non-citizens. Hence, if certain provisions are applicable only to majority institutions and not to minority institutions or only to non-citizens and not to citizens, there would be discrimination offending Article 14. In other words, unless, having regard to the objects of a statute, a reasonable classification can be made between the majority and the minority or between citizens and non-citizens, like treatment must be accorded to both. This argument ignores the fact that whatever be the object of a particular law, the Constitution itself by Article 30 makes a classification as between the minority and the majority, and, by Article 19, a classification between the citizen and the non-citizen. Different treatment based on this classification is authorised by the Constitution itself and cannot be questioned under Article 14. The argument is virtually an invitation to strike down Articles 19 and 30 (1) for offending Article 14, or, rather, to extend the application of those articles to persons to whom they do not apply to save them from being struck down under Article 14.

52. There are two other contentions which deserve no more than passing notice. As we have seen, two of the petitioners, namely, the petitioners in O. P. Nos. 2839 and 2796 of 1969, are companies. It is said that in view of Entry 44 of the Union List it is not within the competence of the State Legislature to make provision for the management of these companies. But the Act does not make provision for the management of the companies. It does not, for example, say who shall act for the company and in what circumstances. All it does, so far as we are concerned, is to regulate the working of colleges affiliated to the University and this falls squarely and completely within Entry 11 of the State List,

irrespective of whether or not a college is run by a company or by any other person. The Act no more entrenches on Entry 44 of the Union List than, for example, legislation regarding land or its management would entrench on that entry because the land belonged to a company.

53. It has also been argued that, in view of the University Grants Commission Act of 1956, made under Entry 66 of the Union List, the State Legislature has not the competence to make any law which might even incidentally fall within that entry, and the decision in *Gujarat University v. Sri Krishna*, AIR 1968 SC 703 (paragraph 24) is relied on in this connection. We have been quite unable to appreciate this contention and must, therefore, content ourselves with saying that it was taken.

54. Our conclusion is that sub-sections (2) and (4) of Sections 48 and 49 of the Act, sub-sections (1), (2), (3) and (9) of Sec. 53, sub-secs. (2) and (4) of Sec. 56, Section 58 (except to the extent excepted in paragraph 43) are bad for offending Article 19 (1) (f) so far as the citizen petitioners are concerned; also for offending Article 30 (1) so far as minority institutions are concerned. Accordingly, in all the petitions excepting O.P. Nos. 2839 and 2796 of 1969 we grant a declaration that these provisions of the Act are void and unenforceable—no further relief than such a declaration seems necessary as against parties like the Government and the University. Section 68 of the Act is bad for offending Article 31 (2) (not being saved by Article 31A (1) (b)) as against all the petitioners; also for offending Article 30 (1) so far as minority institutions are concerned. Accordingly, in all the petitions we grant a declaration that that section is void and unenforceable. Otherwise, we dismiss the petitions. No costs.

Order accordingly.

AIR 1970 KERALA 218 (V 57 C 32)

FULL BENCH

T. C. RAGHAVAN, V. P. GOPALAN
NAMBIYAR AND P. UNNIKRISHNA
KURUP, JJ.

Yogesh Trading Co., Kotachery, Petitioner
v. The Intelligence Officer of Sales Tax Can-
nanore and another, Respondents.

O. P. Nos. 2642, 4977 and 4995 of 1967,
D/- 9-2-1970.

(A) Constitution of India, Articles 301 and 304 — Freedom of trade and commerce — Sales Tax Laws — Provision operating as restriction on free flow of trade — Test of Article 304 (b) should be satisfied if enacted by State.

Notwithstanding the unqualified nature of the provisions of Article 301, provisions merely regulating, as distinct from restricting,

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the free flow of trade do not offend the article, and only provisions which directly and immediately affect the free flow of trade or the movement part of the trade, would come into clash with it. AIR 1961 SC 232, Rel. on. (Para 6)

Sales Tax laws normally and generally do not violate Article 301 of the Constitution. But where any particular provision operates as a restriction on the free flow of trade, it should pass the test of Article 304 (b) if enacted by a State Legislature. (Para 10)

(B) Sales Tax — Kerala General Sales Tax Act (15 of 1963), Section 29 (3) and (4) and Rule 35 (3) to (12) — Provisions violate Article 301 and are bad for want of Presidential sanction under Article 304 (b) of Constitution — (1965) 16 STC 659 (Ker), Overruled.

Clauses (3) and (4) of Section 29 of the Act, and clauses (3) to (12) of Rule 35 framed thereunder, are violative of Article 301. The provisions cannot be regarded as merely regulatory of free flow of trade. They directly and immediately affect the transport or the movement of goods. Neither the Act nor the rules afford any guarantee that clearance at one check-post will afford a sufficient passport at another, at least in respect of the matters checked and verified. Therefore, the provisions are unconstitutional under Article 304 (b). (1965) 16 STC 659 (Ker), Overruled; AIR 1967 SC 1189 Rel. on. (Paras 9, 11)

(C) Constitution of India, Articles 246 and 301 — Doctrine of pith and substance — There is no scope for applying this doctrine while testing validity of law under Article 301 — AIR 1961 SC 232 & 1950 App Cas 235, Rel. on. (Para 12)

(D) Constitution of India, Article 246 and Sch. 7 List 2, Entry 54 — Interpretation of legislative lists — Doctrine of incidental and ancillary powers — How far applies to entry relating to taxation — Power of confiscation whether incidental to power of taxation under Entry 54 (Quaere).

Legislative entries have to be considered in their widest amplitude and a power authorising the imposition of a tax also includes a power to prevent the tax imposed being evaded, and to check such evasion. There are however certain obvious limitations to stretch the entries, and to extend the scope of the incidental and ancillary powers. (Para 14)

(Quaere) Whether the power of confiscation is beyond Entry 54 of List II of Sch. 7 relating to tax on sales and purchase of goods and to the powers incidental and ancillary thereto? Conflicting case law ref. (Para 14)

(E) Sales Tax — Kerala General Sales Tax Act (15 of 1963), Section 29 and Rule 35 — Do not offend Article 14 of the Constitution — Power of seizure and confiscation is not arbitrary — Sufficient safeguards are provided in Act — Mere possibility of abuse

of power is no ground for striking it down. (Constitution of India Article 14) — (1965) 16 STC 894 (Mys) & (1967) 19 STC 506 (Andh Pra) & (1968) 22 STC 540 (Andh Pra), Rel. on. (Para 15)

(F) Sales Tax — Kerala General Sales Tax Act (15 of 1963), Section 29 (4) and (5) and Rule 35 (5) to (12) and (15) — Provisions operate as unreasonable restriction on rights under Article 19 (1) (f) and (g) and are unconstitutional — (Constitution of India, Article 19 (1) (f) and (g)).

The provisions of Section 29 (4) and (5) and of Rule 35 (5) to (12) and (15) violate the rights guaranteed by Article 19 (1) (f) and (g) of the Constitution and cannot be saved as reasonable restrictions on the exercise of the said rights. Some of the provisions of Rule 35 may, by themselves, be innocuous, but they are so integrally connected with the process of confiscation provided therein, that portions of them alone cannot be allowed to stand. The whole of cls. (5) to (12) of Rule 35 must be struck down. AIR 1962 SC 316, Dist.; (1965) 16 STC 894 (Mys); AIR 1960 SC 554, Rel. on. (Paras 16 and 16A)

(G) Sales Tax — Kerala General Sales Tax Act (15 of 1963), Section 29 and Rule 35 — Rule 35 (5) does not go beyond limits of Section 29. (Obiter). (Para 17)

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In O. P. No. 2642 of 1967: N. K. Sreedharan and M. A. T. Pai, for Petitioner; Govt. Pleader, for Respondents.

In O. P. No. 4977 of 1967: V. Rama Shenoi and R. Raya Shenoi, for Petitioner; Govt. Pleader, for Respondents.

In O. P. No. 4995 of 1967: V. Rama Shenoi and R. Raya Shenoi, for Petitioner; Govt. Pleader, for Respondents.

GOPALAN NAMBIYAR J.:— These writ petitions have been placed before a Full Bench, as they raise certain important questions regarding the vires of Section 29 of the Kerala General Sales-tax Act 1963 (hereinafter referred to as the Act), and Rule 35 framed thereunder. The question has, in a way, been pronounced upon earlier, by a Division Bench of this Court in Sree Narayana Transports v. State of Kerala (1965) 16 STC 659 (Ker). But as correctness of that ruling was itself assailed, it was felt desirable that the matter be placed before a larger bench with greater freedom of action.

2. O. P. No. 4977 of 1967 may be taken as representative of the facts relating to the other writ petitions. The petitioner herein is a firm of dealers in that part of Mahe, which was originally French territory, and now, part of the Union Territory of Pondicherry administered by the Government of India. It claims to have been engaged in sending goods to places outside the Pondicherry and Kerala States. The territory of Mahe aforesaid is land-locked on all sides by frontiers of the Kerala State. Nearly five miles to the north of it, lies Tellicherry,

and about six or seven miles to the south of it lies Muttungal, where a check-post has been established under the provisions of Section 29 of the Act. The petitioner is possessed of registration certificates issued under the Central Sales-tax Act 1956, and under the Pondicherry General Sales-tax Act, 1967 which came into force on 20-11-1967. (vide Exs. P and P (a)). In August 1967 a vehicle which was carrying certain goods of the petitioner was intercepted at the Muttungal check-post and Ext. P-1 notice dated 31-8-1967 was issued threatening confiscation of the goods as the transport was not accompanied by proper documents as required by the Act. The petitioner appeared with its accounts, and by Ext. P-2 order dated 1-9-1967, after verification of the accounts, the goods were ordered to be released. A second consignment of goods was intercepted with a similar show cause notice (vide Ext. P-1 (a)) dated 20-9-1967 and was followed by a similar release order (Ext. P-2 (a) dated 25-9-1967), again, after production of accounts and verification of records. The third consignment sent in November 1967, was also intercepted by a similar show cause notice, (Ext. P-4 dated 17-11-1967). The petitioner was asked to produce all accounts and bills relating to the business for the current year for verification, and the necessary evidence to show that he had business in pepper at Mahe and was a registered dealer in that area. The notice stated that Invoice No. 96 which accompanied transport of goods (Ext. P-3 (b)) was found to be suspicious. Ext. P-3 (b) shows at its top, the number and date of the registration certificate issued to the petitioner under the Central Sales-tax Act. The petitioner produced its accounts, and, by Ext. P-5 notice dated 21-11-1967, was informed that as Mahe is a small territory where pepper was grown only on a small scale, the names and particulars shown in the purchase bills, appeared to be fictitious, that it was suspected that the purchases were effected at Tellicherry and that there was manipulation of accounts. As the genuineness of the purchases had to be verified and further time was required for the purpose, the petitioner was informed that it might get the goods released on payment of cash security amounting to double the amount of tax on the goods under Rule 35 (15) of the Rules framed under the Act. Ext. P-4 (a) dated 18-11-1967 is copy of a notice in respect of another consignment covered by invoice Nos. 94 and 95 (Exts. P-3 and P-3 (a)). It is a close replica of Ext. P-4. After production of the petitioner's accounts, Ext. P-5 (a) dated 21-11-1967 was issued on the same terms as Ext. P-5. Ext. P-4 (b) is copy of yet another notice dated 20-11-1967 on the same terms as Exts. P-4 and P-4 (a), and in respect of Invoice No. 1 (Ext. P-3 (c)). Ext. P-5 (b) is a copy of the notice dated 21-11-1967 issued after checking accounts and on the same terms as Exts. P-5 and P-5 (a). Ext. P-6 dated 22-11-1967

is a copy of the notice on the same terms as Ext. P-4 series in respect of Invoice No. 8 (Ext. P-7). Ext. P-10 series filed with the reply-affidavit of the petitioner are the relative 'C' forms in respect of the inter-State sales evidenced by Exts. P-3 (b) and P-3 (c). The petitioner has sought to quash the notices, Ext. P-4 series, Ext. P-5 series and Ext. P-6, besides getting Section 29 of the Act and Rule 35 of the Rules framed thereunder declared unconstitutional and invalid.

3. It is unnecessary to quote Sec. 29 of the Act and Rule 35 thereof in extenso, as they are both far too long, and the Rule largely repeats the terms of the section. Clause (1) of Section 29 authorises the Government, with a view to prevent or check the evasion of tax under the Act, to set up check-posts at such place or places as they deem necessary. Clause (2) of the section reads:

"No person shall transport within the State across or beyond the notified area any consignment of goods exceeding such quantity or value as may be prescribed by any vehicle or vessel, unless he is in possession of—

(a) either a bill of sale or delivery note or way-bill or certificate of ownership containing such particulars as may be prescribed, and

(b) a declaration in such form and containing such particulars as may be prescribed when the vehicle or vessel enters or leaves the State limits.

Explanation:— The term "goods", referred to in the sub-section shall not include luggage of persons who cross the notified area."

Clause (3) requires the driver or any other person in charge of the vehicle or vessel, to stop the vehicle or vessel and keep the same stationary, on being required, and as long as may be required, by any Officer empowered by the Government to do so, within the limits of the check-posts, and to allow the officer to inspect the goods and to examine the documents which should accompany the transport under Rule 2. Till such inspection and examination the driver is to keep the vehicle or vessel stationary. Clauses (4) to (6) are as follows:

"(4) Where the goods transported exceed the quantity or value prescribed under sub-section (2), the Officer in charge of the notified area or the officer empowered in the preceding sub-section shall have power to detain or seize and confiscate the goods—

(a) which are being transported by a vehicle or vessel and not covered by a bill of sale or delivery note or way-bill or certificate of ownership and where the vehicle or vessel enters or leaves the State limits, the declaration referred to in Clause (b) of sub-section (2) also, or

(b) where the declaration is false or is reasonably suspected to be false in respect of the particulars furnished therein:

Provided that before taking action for the confiscation of goods under this section, the

officer shall give the person in charge of the goods and the owner, if ascertainable, an opportunity of being heard and make an enquiry in the manner prescribed.

(5) Whenever confiscation is authorised by this section, the Officer adjudging it shall give the owner or the person in charge of the goods an option to pay, in lieu of confiscation, a penalty not exceeding double the amount of tax calculated at the rates applicable to the goods liable to confiscation:

Provided that the officer may release the goods on cash security being furnished by the person concerned to the extent of the penalty leviable if, in the opinion of the officer, further time is required to arrive at a correct finding as to whether a penalty is to be imposed or not and that the security so furnished shall be adjusted towards the penalty in case it is payable or returned to the party, if otherwise.

(6) Nothing contained in sub-section (4) or sub-section (5) shall apply in the case of goods transported which are exempted from tax under any of the provisions of this Act without any condition or restriction."

Turning now to Rule 35, Clause (2), except for specifying the limit of the value of the goods referred in Clause (2) of Section 29 as not exceeding Rs. 5/-, practically repeats the provisions of Clause (2) of the section. Clause (3) of the Rule again, practically repeats Clause (3) of Section 29. Clause (5) of the Rule reads:

"(5) If on such examination any such officer finds that any consignment of goods (the value whereof exceeds rupees five) or the entire goods are not covered by proper documents or that the documents carried by the driver or any other person in charge of the vehicle or vessel are defective or suspects that the documents are bogus or false, the said Officer shall immediately issue a notice to the said person to show cause why further steps should not be taken against him under Section 29. If the Officer is satisfied as to the reason or reasons for the omission or the defects as the case may be, he may allow the goods to pass through the notified area after recording his findings therefor. If he is not satisfied with the reasons, he shall proceed to unload, seize and confiscate the goods after following the procedure laid down in sub-rules (6) to (8)."

Clauses (6), (7) and (8) of the Rule provide for confiscation. These clauses do not carry the matter much further than what has been provided for by the section. Clause (9) provides that the goods confiscated shall be sold in public auction. Clause (11) provides that if any order directing confiscation is reversed in appeal, the goods confiscated, if they had not been sold before the reversal comes to the knowledge of the person concerned, released, or if they have been sold, the proceeds thereof, shall be paid, to the owner of the goods. Clauses (12) and (15) of Rule read:

"(12) Where a confiscation was ordered for the reason that the owner was not ascertainable and the goods have not been disposed of in auction the owner or any person on his behalf may appear before the officer ordering the confiscation and satisfy him with relevant records regarding the bona fides of the transport of goods in question. If the Officer is satisfied that there has been no evasion of tax, he may, for reasons to be recorded in writing order, the release of the confiscated goods. The Officer shall also specify in his order the amount due, to be recorded in writing order, the release of the confiscated goods for the safe custody of the goods and other incidental charges and on payment of such charges the Officer shall release the goods. If the Officer is not so satisfied, he may after recording the reasons therefor, order that the sale under sub-rule (9) be proceeded with".

"(15). Whenever confiscation is authorised by these Rules, the Officer adjudging it shall give the owner, if ascertainable, or the person in charge of the goods, an option to pay, in lieu of confiscation, a penalty not exceeding double the amount of tax calculated at the rate or rates applicable to the goods confiscated and release the goods on payment of the said penalty.

Provided that the Officer may release the goods on cash security being furnished by the person concerned to the extent of the penalty leviable, if in his opinion further time is required to arrive at a correct finding as to whether a penalty is to be imposed or not and that the security so furnished shall be adjusted towards the penalty in case it is payable or returned to the person concerned if otherwise."

4. We have set out the relevant parts of the section and the Rule which have been attached before us. The grounds of attack against these provisions are: (1) that they violate the freedom of trade enjoined by Article 301 of the Constitution and are bad for want of Presidential sanction under Article 304 (b) of the Constitution, quite irrespective of whether they can be regarded as reasonable restrictions in the interests of the general public; (2) that the power to confiscate goods conferred by the section and the Rule is beyond the limits of Entry 54 of List II of Schedule VII of the Constitution which authorises the levy of a tax on sale or purchase of goods (except certain excepted items), and even beyond the powers incidental and ancillary thereto; (3) that the power of confiscation offends Articles 14 and 19 (1) (f) and (g) of the Constitution; and (4) that Rule 35 (5) in any event, goes beyond the limits of Section 29 of the Act. We shall proceed to deal with these objections.

5. Article 301 of the Constitution of India which occurs in Part XIII thereof, provides that, subject to the other provisions of that Part, trade and commerce throughout

the territory of India shall be free. Article 304 (b) which is relevant for our purpose enacts:

"304. Restrictions on trade, commerce and intercourse among States — Notwithstanding anything in Article 301 or Article 303 the Legislature of a State may by law—

(a) x x x x x

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

6. Notwithstanding the unqualified nature of the provisions of Article 301, it has been ruled that provisions merely regulating, as distinct from restricting the free flow of trade do not offend the Article, and that only provisions which directly and immediately affect the free flow of trade or the movement part of the trade, would come into clash with it. (vide *Atiabari Tea Co. Ltd. and Khycerbari Tea Co. Ltd. v. The State of Assam*, AIR 1961 SC 232.) The principle of the above case was affirmed, and extended so as to save both regulatory and compensatory taxes, hampering the free flow of trade, in the judgments delivered in the *Rajasthan Transport case*, AIR 1962 SC 1406. Whether both compensatory and regulatory measures of taxation are outside the purview of Article 301, or only regulatory measures stand outside its fold, is probably a matter on which a final pronouncement by a Larger Bench of the Supreme Court might well be necessary. (See *Khiverbari Tea Co. Ltd. v. State of Assam*, AIR 1964 SC 925 at p. 938). As the Act has not received any Presidential sanction, for purposes of the argument based on Article 301, we are concerned with the only question whether the impugned provisions are regulatory of the free flow of trade or whether they restrict the same. If the former, they are not hit by Article 301, and if the latter, they are. The other controversies, as to the reasonableness of the restrictions, or their being in public interest, or the Act being regulatory or compensatory, need not detain us, though the reasonableness of the restrictions, if such they are, will have to be considered with respect to the attack based on Article 19 (1) (f) and (g).

7. The distinction between a regulation and a restriction has been pointed out in numerous decisions. In the *Rajasthan Transport case*, AIR 1962 SC 1406, Das, J., speaking for the majority of the Court observed:

"that which in reality facilitates trade and commerce is not a restriction, and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to

draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade but the distinction, if it has to be drawn, is real and clear."

Subba Rao, J. who agreed with the majority in the Rajasthan Transport case, AIR 1962 SC 1406, observed:

"Restrictions obstruct the freedom whereas regulations promote it. Police regulations though they may superficially appear to restrict the freedom of movement, in fact provide the necessary conditions for the free movement. Regulations such as provision for lighting, speed, good condition of vehicles, timings, rule of the road and similar others, really facilitate the freedom of movement rather than retard it. So too, licensing system with compensatory fees would not be restrictions but regulatory provisions; for without it, the necessary lines of communication, such as roads, water-ways and air-ways, cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one. So too, regulations providing for necessary services to enable the free movement of traffic, whether charged or not, cannot also be described as restrictions impeding the freedom."

The above observations of Subba Rao, J. were approved by a Full Court in State of Mysore v. H. Sanjeeviah, AIR 1967 SC 1189, to which we shall refer in some detail, later.

8. With respect to Section 92 of the Constitution of Australia which guarantees freedom of trade and commerce in more absolute terms than its Indian counterpart, Latham, C. J. in Australian National Airways Ltd. v. Commonwealth, (1947) 71 VCLR 29, observed:

"I venture to repeat what I said in the former case: 'One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is 'directed against' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding Section 92.'

(The former case referred to herein is Milk Board (N. S. W.) v. Metropolitan Cream Pvt. Ltd. 62 C. L. R. 127).

These observations were approved by the Privy Council in Commonwealth v. Bank of New South Wales, 1950 AC 235 with the following observations:

"With this statement which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree"

Earlier, their Lordships observed:

"Through all the subsequent cases in which Section 92 has been discussed, the

problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that Sec. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States, on the one hand, and citizens and States, on the other, it is only the court that can decide the issue. It is vain to invoke the voice of Parliament." We need not encumber this judgment further, with citation of authorities under Section 92 of the Australian Constitution.

9. Proceeding to examine the impugned provisions in the light of the above principles, it appears to us that they cannot be regarded as merely regulatory of the free flow of trade. Sub-section (2) of Section 29 ordains that no person shall transport goods across a check-post unless the transport is accompanied by certain documents. The prohibition is directly against transport. Had the matter rested with the mere obligation to produce certain documents for examination at the check-post, we would have upheld it as a mere regulation, such as a provision for demanding a driving licence or fitness certificate in respect of a vehicle. But sub-section (3) further ordains that the driver or any person in charge of the vehicle is to stop the same on demand by any Officer empowered by the Government at the check-post and to keep the vehicle or vessel stationary "as long as required", and allow the Officer to inspect the goods and examine the documents. Rule 35 (4) confers the power of stopping the vehicle or vessel for a period not exceeding ten minutes, even on a Peon on duty at the check-post or barrier, where the Officer is not present, in order to enable the Officer at the check-post to come to the spot and proceed to examine the goods and the records. If the Officer is satisfied that the goods are not covered by the documents specified, or that the documents are false, he has power to confiscate the goods. These appear to us to directly and immediately affect the transport or the movement of the goods. Especially do they appear to be so as we cannot totally discount the

prospect of several vehicles turning up at a check-post either simultaneously or in rapid succession, or even the same vehicle or goods of the same owner, having to pass through the same check-post at frequent intervals. As example, we need only recall the fact we have set out in O. P. No. 4977 of 1967, where goods of the petitioner having been passed after examination of documents on 31-8-1967 and 1-9-1967, were detained on 17-11-1967, 18-11-1967, 20-11-1967 and 22-11-1967, against notices for production of accounts. Even granting that the accounts in respect of the first three notices were produced only on 21-11-1967, (vide Exts. P5 series), the petitioner is asked by Ext. P6 notice dated 22-11-1967, to bundle its accounts again to the check-post, a place mostly ill-suited and ill-equipped for such examination and for the quasi-judicial adjudication to follow thereafter. Nor can we rule out altogether —although we do not envisage or presume such conduct—the prospect that such stoppage and checking can well be repeated at successive check-post, at each of which the petitioner will have to allay the suspicion of the Officer at the spot, in regard to the documents accompanying the transport or otherwise. For, as it is, neither the Act nor the Rules afford any guarantee that clearance at one check-post will afford a sufficient passport at another, at least in respect of the matters checked and verified.

10. Counsel appearing for the Respondents drew our attention to the observations in certain decisions that sales tax laws normally and generally do not violate Art. 301 of the Constitution. No exception can be taken to the statement in that form. But where any particular provision operates as a restriction on the free flow of trade, there can be little doubt that, if enacted by a State Legislature, it should pass the test of Article 304 (b).

11. We may now refer to the decision in AIR 1967 SC 1189. The same was concerned with the validity of the Rules under the Mysore Forest Act to regulate the transit of forest produce. Section 37 (1) of the Mysore Forest Act authorised the framing of rules to regulate such transit, and Cl. (2) permitted Rules to prohibit inter alia the moving of forest produce without a pass from an Officer authorised to issue the same, otherwise than in accordance with the conditions of such pass. Rule 2 framed in exercise of the power under section 37 (2) contained two provisos which prohibited transport between the hours of sunset and sunrise in certain areas, subject to the condition that the restriction may be relaxed between the hours of sunset and 10 P. M. if the person wishing to transport deposited cash security of Rs. 1,000. It was held that the power to impose restriction of the type contemplated by the two provisos to Rule 2 could not be traced to any of the clauses

of Section 37 (2), and that Clause (1) of the said section expressly authorised only the making of rules to regulate the transit. The provisos were therefore held to be beyond the scope of Section 37. The alternative argument that they offended Article 301 was also accepted with the following observations:

"The provisos are undoubtedly restrictive of trade and commerce and on that account would prima facie be void, as derogating from the freedom declared by Article 301. It has been held by this Court in *Automobile Transport Rajasthan Ltd.'s case*, 1963-1 SCR 491 = (AIR 1962 SC 1406) that regulatory measures which do not hamper trade, commerce and intercourse, but facilitate them, are not hit by Art. 301 of the Constitution. But it cannot be said of the two provisos, that they are in any sense regulatory."

In the face of the above ruling, we are of the opinion that Clauses (3) and (4) of Section 29 of the Act, and Clauses (3) to (12) of Rule 35 framed thereunder, are violative of Article 301.

12. It was contended that there is no direct and immediate violation of the free flow of trade, and that the Kerala General Sales Tax Act, 1963 being within the powers of the State Legislature under Entry 54 of List II, of Schedule VII, any violation of Article 301, could, if at all, be only indirect, incidental, and remote. Such a contention has been effectively answered in the *Atiabari Tea Co.'s case*, AIR 1961 SC 232, Gajendragadkar, J., speaking for the majority, observed:

"In the course of arguments the learned Attorney-General invited us to apply the test of pith and substance and he contended that if the said test is applied the validity of the Act can be sustained. In support of his argument he has relied on the observations made by Das, C. J. in the case of *State of Bombay v. R. M. D. Chamarbaugwala*, 1957 SCR 874 = (AIR 1957 SC 699). In that case the Court was called upon to consider the validity of the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act 1952. The challenge to the Act proceeded on two grounds, (1) that it violated the fundamental right guaranteed under Article 19 (1) (g) and (2) that it offended against the provisions of Article 301. The challenge on the first ground was repelled because it was held that gambling cannot be treated as trade or business under Article 19 (1) (g). This conclusion was sufficient to repel also the other ground on which the validity of the Act was challenged because, if gambling was not trade or business under Article 19 (1) (g), it was also not trade or commerce under Article 301. On the conclusion reached by this Court that gambling is not a trade this position would be obvious. Even so, the learned Chief Justice incidentally applied the test of pith and substance, and observed

47) in support of his submission that a much larger amount should have been awarded to the appellant. In Gyarsilal's case, 1963 MPLJ 162= (AIR 1963 MP 164) (supra) the plaintiff, who was awarded a sum of Rs. 30,000/- damages, had suffered much more serious injuries; apart from other injuries his right hip joint was dislocated and its socket fractured and even after treatment the right leg was unable to support the weight of the body compelling continuous use of crutches. There was thus a complete permanent disablement of the right leg in Gyarsilal's case, 1963 MPLJ 162= (AIR 1963 MP 164) (supra) distinguishing the same from the instant case. Moreover, the amount of compensation awarded in that case was not challenged in appeal and the High Court had no occasion to consider whether the amount awarded was fair or excessive. In 1967 MPLJ 258= (AIR 1968 Madh Pra 47) (supra), Sudhakar who was one of the plaintiffs was awarded a sum of Rs. 10,000/- as compensation for non-pecuniary damage. He had serious burn injuries on his entire body including chest, stomach and back making his condition very serious. He had also received severe mental shock as his wife and child had died in the same accident. The High Court in that case did not find any reason to interfere with the amount awarded to Sudhakar "in view of the serious injuries suffered by him as also the mental shock suffered on account of the death of his wife and the only child;" (see p. 268 of the report). Another plaintiff in that case was one Vasudeo Vyas, who was injured in the same accident and had a simple fracture on the right humerus bone in the middle and infected burns on the left thigh, buttock and part of the abdomen. His condition was serious for two months and the period of illness lasted for about six months. He was also awarded a sum of Rs. 10,000/-. Thus in the case of 1967 MPLJ 258= (AIR 1968 Madh Pra 47) (supra) the injuries that were compensated by award of damages were essentially burn injuries and bear no resemblance to the injuries received by the appellant in the instant case. Before cases can be used as comparable cases, they must bear a reasonable measure of similarity; "it is necessary to ensure that in main essentials the facts of one case must bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made;" [Singh v. Toong Fong Omnibus Co., 1964-2 All ER 925 at p. 927 (PC)]. In our opinion, the facts of the cases 1963 MPLJ 162= (AIR 1963 MP 164) (supra) and 1967 MPLJ 258= (AIR 1968 Madh Pra 47) (supra) do not bear similarity with the facts of the instant case and these cases cannot be used as comparable cases.

Now we take up the cases which have been relied upon by the learned counsel for the respondent. These cases are Deepti

Tiwari v. Banwarilal, 1966 MPLJ 464= (AIR 1966 MP 239), Union of India v. Bhagwati Prasad, AIR 1957 Madh Pra 159 and Balkrishna v. Mahabali Prasad Tiwari, 1969 Acc. C. J. 189. In Deepti Tiwari's case, 1966 MPLJ 464= (AIR 1966 Madh Pra 239) (supra) a young girl of 15 years who was a student was involved in an accident resulting in fracture of the spine fourth lumber vertebra. She was put under a plaster jacket for three months. After recovery her gait was normal and there was no disability in walking. There was partial permanent disability as regards playing Badminton or strenuous games and riding a bicycle. She was likely to develop osteoarthritic changes and low back aches. On these facts she was awarded a sum of Rs. 4,000/- as general damages. Although this was a case of spinal injury, the facts relating to the effect of the injury bear close similarity with the facts of the instant case. In AIR 1957 Madh Pra 159 (supra) the plaintiff had suffered fracture of the leg resulting in 40 per cent permanent disability and was unable to walk without pain and support. He was then 30 years of age and was earning about Rs. 50/- per month. In these circumstances, he was awarded a sum of Rs. 4,000/- as general damages. In 1969 Acc. C. J. 189 (M. P.) (supra) the plaintiff whose right leg was fractured resulting in partial permanent disability was awarded a sum of Rs. 4,000/- as general damages.

Mention may also be made of an English case Madden v. Brown, 1956 C. A. No. 209 D/- 13-7-1956 which is noted in Kemp and Kemp, The Quantum of Damages, Second Edition Vol. I p. 602. In that case the plaintiff, a boy of 15 years, broke his right leg and cracked his left knee. His leg was in plaster for twelve weeks and left knee in plaster for six weeks. He recovered completely except that he was slightly handicapped in running and in playing some games. He was awarded a sum of £ 275 as general damages and the award was upheld by the Court of Appeal.

The injuries received by the plaintiffs in 1966 MPLJ 464= (AIR 1966 MP 239), AIR 1957 Madh Pra 159 and 1969 Acc. C. J. 189 (M. P.) (supra) were more serious in comparison to the injuries received by the appellant in the instant case. In all those cases a sum of Rs. 4,000/- was awarded as general damages. The award of Rs. 5,000/- in the instant case made by the Tribunal cannot, therefore, be held to be low.

9. Lastly it is argued for the appellant that the Tribunal should have allowed interest on the amount of compensation from the date of the application for compensation made to the Tribunal.

10. The power of a Court to allow interest prior to the date of suit is governed by the Interest Act, 1839. This Act is modelled on the language used in Section 28 of the English Civil Procedure Act, 1833. This power

to allow interest under the Interest Act can be exercised only in respect of "debts and sums certain" and interest cannot be allowed if the claim is for unliquidated damages. In England Section 28 of the Civil Procedure Act, 1833 has been repealed and replaced by Section 3 of the Law Reforms (Miscellaneous Provisions) Act, 1934 which empowers a Court to allow interest from the date of the cause of action to the date of judgment in any proceedings for recovery of "any debt or damages." The change introduced by the Law Reforms Act thus enables a Court in England to award interest for a period prior to the date of suit even when the suit is for recovery of unliquidated damages. No such change has taken place in India and interest cannot be awarded for a period prior to the date of suit when the suit is for recovery of unliquidated damages. As regards any period after the institution of suit, the power to award interest in India is governed by Section 34 of the Code of Civil Procedure, 1908. This section empowers a Court to allow interest from the date of the suit to the date of decree and/or from the date of decree to the date of payment when the decree is for "payment of money." It has been held that this provision applies even when the suit is for unliquidated damages; [Pannalal v. Radhakissen, AIR 1924 Cal 637; Ramalingam Chettiar v. Gokul Das Madavji and Company, AIR 1926 Mad 1021; Anandram Mangtaram v. Bholaram Tanul, AIR 1946 Bom 1]. In England as provided in Section 17 of the Judgments Act, 1838, every judgment debt, other than one arising on a county court judgment, carries interest at four percent from the time of entering up the judgment until it is satisfied. There is no similar provision in India and the award of interest for any period after judgment is governed by Section 34 of the Code of Civil Procedure.

11. The question to be examined in the instant case is whether a Claims Tribunal has power similar in nature to that exercised by a Court under Section 34 of the Code of Civil Procedure to allow interest on the amount of damages from the date of the application and/or from the date of the award till payment. A Claims Tribunal is constituted under Section 110 of the Motor Vehicles Act, 1939 "for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles." The final adjudication of the Tribunal, as provided in Section 110-B, takes the shape of an award which the Tribunal may make "determining the amount of compensation which appears to it to be just." The Tribunal by Section 110-C is conferred the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects; it may also have all the powers of a Civil Court for such other purposes as may be prescribed. The State

Government is authorised under Sec. 111-A to make rules and the rules may provide for "the procedure to be followed by a Claims Tribunal in holding an inquiry" and "the powers vested in a Civil Court which may be exercised by a Claims Tribunal." In exercise of this power, the State Government has framed rules known as the Madhya Pradesh Motor Accidents Claims Tribunal Rules, 1959. Rule 14 of these Rules makes applicable certain provisions of the first Schedule to the Code of Civil Procedure, 1908 to proceedings before the Tribunal. Under the scheme of these sections and the Rules the Tribunal does not exercise all the powers of a Civil Court but only those which are conferred on it by Section 110-C and the rules framed under Section 111-A. Power to order interest from the date of institution of the suit upto the date of payment exercised by a Civil Court under Section 34 of the Code of Civil Procedure has not been in terms conferred on the Tribunal either by Section 110-C or by the rules made under Section 111-A. But does it follow that the Tribunal has no power to allow interest? The central power of the Tribunal is conferred by Section 110-B to "make an award determining the amount of compensation which appears to it to be just." The amount of compensation will normally be determined with reference to the date of the application, but it must appear to the Tribunal to be just on the date of the making of the award. If the circumstances of the case are such that some interest should be allowed from the date of the application upto the date of the award or payment, to make the award "just", the Tribunal must impliedly have that power otherwise it will not be able to make a just award. Thus the power to allow interest though not expressly conferred, flows from Section 110-B itself from the power to award the amount of compensation which is just. There is yet another way of looking at the matter. The Tribunals are constituted to decide claims for compensation which prior to their constitution were decided by Civil Court. The sections pertaining to the Claims Tribunal in the Motor Vehicles Act apart from dealing with its constitution, power to make an award, and other procedural matters, do not lay down the law according to which the Tribunal is to adjudicate the claim for compensation. The Tribunal must, therefore, decide claims for compensation according to the existing law as the Courts would have done if the claims were laid in a suit. The object of Sections 110 to 110-F of the Motor Vehicles Act is the substitution of Tribunals in place of Courts; the object is not to deprive the claimant of a substantive relief which he would have obtained had the matter been litigated in courts. If in the circumstances of a case a Court would have allowed interest to a claimant from the date of suit or from the date of decree, the Tribunal must necessarily possess that power otherwise the

claimant would be deprived of a relief which he would have obtained before the constitution of the Tribunal. On similar reasoning it has been held that the power exercisable by a Court under the Law Reforms (Miscellaneous Provisions) Act, 1934 to award interest on debt or damages can be exercised by an arbitrator appointed by the parties; See — Chandris v. Isbrandtsen Moller Co., 1951-2 All ER 618 (C. A.). We are, therefore, of the view that although Section 34 of the Code of Civil Procedure does not in terms apply to a Claims Tribunal constituted under the Motor Vehicles Act, the principles of the section apply and the Tribunal in a proper case has power to allow interest from the date of the application to the date of the award and/or from the date of the award to the date of payment.

12. The next question is whether this is a fit case where interest should be allowed. The appellant in his application for compensation put forward an exaggerated claim of Rs. 20,000/-. That seems to be the main reason why the claim was entirely denied by the respondents and the proceedings in the Tribunal dragged on for nearly four years. The appellant did not suffer any special damage and the award is restricted to compensation payable on account of non-pecuniary damage. In the circumstances, we do not find that this is a fit case where interest should be allowed from the date of the application. There is, however, no reason why interest should not have been allowed by the Tribunal from the date of the award to the date of payment. In our opinion, the appellant should be allowed 4 per cent interest from the date of the award on the amount of compensation awarded to him.

13. We order that the amount of compensation awarded in favour of the appellant by the Tribunal shall carry interest at the rate of 4 per cent per annum from the date of the award upto payment. Subject to this modification, the appeal is dismissed. In the circumstances, the parties shall bear their own costs of the appeal.

Order accordingly.

AIR 1970 MADHYA PRADESH 179
(V 57 C 33)

FULL BENCH

BISHAMBHAR DAYAL, C. J., SHIV
DAYAL AND A. P. SEN, JJ.

The State of Madhya Pradesh, Appellant
v. Devlal Shivlal Palliwal and another, Res-
pondents.

First Appeal No. 109 of 1957, D/- 4-12-
1969, from decree of 1st Addl. Dist. J.,
Chhindwara, D/- 3-5-1967.

(A) C. P. Land Revenue Act (2 of 1917),
Section 202 — Seizure and confiscation of

cut wood under order of competent Revenue Officer — Suit for recovery of value of wood — Seizure order not set aside by any Revenue authority — Right of plaintiff to return of wood not established — Plaintiff not entitled to decree for value of wood.

(Para 29)

(B) Torts — Vicarious liability — Seizure of cut wood under statutory powers — Seized wood entrusted to Supratdar — Misappropriation of, by Supratdar — State not liable.

Where a tortious act is committed by a public servant in discharge of his statutory functions, which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant, an action for damages for loss caused by such tortious act will not lie. If a tortious act has been committed by a public servant in discharge of duties assigned to him, not by virtue of delegation of any sovereign power, an action for damages will lie.

(Para 21)

So, if in exercise of statutory function the cut wood, seized under order of competent authority is entrusted to Supratdar then for any misappropriation of such wood by the Supratdar the State will not be liable.

(Para 30)

Cases Referred: Chronological Paras

- (1969) Civil Appeals Nos. 761-762 of
1966, D/- 23-4-1969 = 1969 SCD
777, Post Master General Nagpur
v. Radhabai 19
(1967) AIR 1967 SC 997 (V 54) =
(1967) 2 SCR 170 = 1967 Cri LJ
950, Legal Remembrancer v. Cal-
cutta Corpn. 19
(1967) AIR 1967 SC 1885 (V 54) =
(1967) 3 SCR 938, State of Gujarat
v. Memon Mohammed 9, 17, 20
(1965) AIR 1965 SC 1039 (V 52) =
(1965) 1 SCR 375, Kasturi Lal v.
State of U. P. 9, 10, 15, 17, 18, 20
(1962) AIR 1962 SC 933 (V 49) =
(1962) Supp 2 SCR 989, State of
Rajasthan v. Mst. Vidhyawati 14, 16, 17, 18
(1961) AIR 1961 Madh Pra 316
(V 48) = 1961 MPLJ 456, State of
M. P. v. Kapoorchand 6, 11
(1959) AIR 1959 Madh Pra 77
(V 46) = 1958 MPLJ 694, Bilaspur
Central Bank v. State 9
(1958) AIR 1958 SC 274 (V 45) =
1958 SCR 781, Dhian Singh v. Union
of India 13
(1951) AIR 1951 SC 23 (V 38) =
1951 SCR 1, State of Tripura v.
Province of East Bengal 11
(1868-69) 5 Bom HCR App 1 =
Bourke A. O. C. 166, Peninsular and
Oriental Steam Navigation Co. v.
Secy. of State of India-in-Council 16, 20
K. P. Munshi Govt. Advocate, for the
State; R. S. Dabir and V. S. Dabir, for Res-
pondents.

SHIV DAYAL, J.:— This appeal arises from a suit for recovery of Rs. 2,05,000/- as value of wood which belonged to the plaintiff and was seized by Revenue Officers in exercise of powers under Section 202, of the C. P. Land Revenue Act, 1917.

2. Shivlal (whose legal representatives are respondents Devilal and Smt. Godavaribai) brought the suit against the State on the allegation that he was a Malguzar Lambardar of village Jamalpani, Settlement No. 154, Patwari Circle No. 24, Tahsil Sausar, district Chhindwara. He did cutting of trees in some portion of his malguzari jungle at Jamalpani in the year 1949-50. The cut teak wood and fire wood were lying in the jungle and outside it. The plaintiff did the cutting work in the forest from September 18, 1949 to October 19, 1950. The plaintiff completely observed the rules framed for cutting jungles, but under the impression that the provisions of Section 202 of the Land Revenue Act had not been observed, the State started proceedings against the plaintiff through its officials. (Revenue Case No. 37/V-4 of 1949-50). Shri Das Sharma, Naib Tahsildar, seized the plaintiff's cut wood through the Revenue Inspector on October 22, 1950. The property seized was entrusted to Shakharam (defendant 2), a resident of Jamalpani. Eventually, this revenue case was filed on December 22, 1952. "But the plaintiff did not get back his seized goods. The order for selling the seized goods by auction was also passed on 22-12-52".

3. It was further alleged in the amended plaint that revenue proceedings were started by the officers for complicating the plaintiff's claim as far as possible. The plaintiff filed an appeal before the Board of Revenue. The appeal was allowed and the order dated March 22, 1954, passed by Shri Konher, and the order of the Deputy Commissioner dated February 12, 1954, were set aside by the Board of Revenue, by its decision dated September 28, 1955. On these allegations, the plaintiff claimed a decree for Rupees 2,05,000/-. He estimated the value of his wood at Rs. 2,28,744/-.

4. The State (defendant No. 1) resisted the suit contending that the act of cutting the trees was illegal. It was denied that the defendant-State ever got seized the timber and wood, cut by the plaintiff. But it was admitted that, in his capacity as a Revenue Officer, the Tahsildar ordered the seizure of the cut timber and wood and that the Revenue Inspector seized the same on October 20, 1950 under a seizure memo. The value of the wood as alleged by the plaintiff was denied. It was admitted that the seized property was entrusted to the second defendant as Suprutdar.

5. The second defendant admitted the plaintiff's allegation that the seized property was entrusted to him as Suprutdar, but resisted the suit on the ground that he is a Gond by caste; that he is illiterate and a

rustie; that he was in the employ of the plaintiff and was getting three Khandis of grain from each crop plus Rs. 30/- in cash as annual remuneration; that it was at the desire of the plaintiff that he accepted entrustment of goods; that the plaintiff approached him in the month of Phagun or Chait (February or March) of the year 1951 and represented to him that the case against the plaintiff had been dismissed and the seized property had been released so that he could take the seized property to his house at Mohgaon; and that practising this deception on him, the plaintiff took away the seized property to his house at Mohgaon.

6. The Trial Court held that part of the wood had been removed by the plaintiff; that on June 8, 1954, the Additional Deputy Commissioner, Sausar, passed an order for auction of the seized property; that the seizure of the goods was not in exercise of the sovereign functions of the State; that 5779 logs of wood had been seized; and that the plaintiff was entitled to recover Rs. 55011/- from the defendant-State. The rest of the claim was dismissed. The second defendant was held not liable and the suit was dismissed as against him.

7. Aggrieved by the judgment and decree of the trial Court, the State preferred this appeal. The plaintiff also preferred a Cross-appeal (First Appeal No. 127 of 1957) claiming a further decree for Rs. 1,49,989/-. Both the appeals were heard by a Division Bench consisting of Golvalker and Kekre, JJ. Mr. Justice Kekre, relying on a Division Bench decision of this Court in the State of M. P. v. Kapoorchand, 1961 MPLJ 456= (AIR 1961 Madh Pra 316) was of the opinion that this appeal filed by the State should be allowed and the plaintiff's cross-appeal should be dismissed. Mr. Justice Golvalkar, on the other hand, took the contrary view and recorded the opinion that this appeal should be dismissed. He, however, agreed that the plaintiff's appeal No. 127 of 1957, be dismissed. Both the appeals were then placed before Mr. Justice Pandey, as the third Judge, but he submitted the case to the Hon'ble the Chief Justice to consider the desirability of constituting a larger Bench to hear and dispose of both these appeals. Both these appeals were then heard by us.

8. As narrated above, as regards First Appeal No. 127 of 1957, both the learned Judges of the Division Bench (Golvalker and Kekre, JJ.) recorded a concurrent opinion.

9. In the present appeal (No. 109 of 1957), Shri Dabir, contends that the suit was maintainable and the State was liable to compensate the plaintiff for the loss sustained by him. He relies on State of Gujarat v. Memon Mohammed, AIR 1967 SC 1885 and argues that by this decision their Lordships have overruled their earlier decision in Kasturilal's case, (1965) 1 SCR 376= (AIR 1965 SC 1039) (infra), although they merely said

that that case was distinguishable. The learned referring Judge (Mr. Justice Pandey) observed that the decisions of this Court in *Bilaspur Central Bank v. State*, 1958 MPLJ 694= (AIR 1959 Madh Pra 77) (infra) and 1961 MPLJ 456= (AIR 1961 Madh Pra 316) (supra) were in conflict. We must, therefore, see what has been held in those cases.

10. The case of 1958 MPLJ 694= (AIR 1959 Madh Pra 77), was decided on the following findings. The Inspector-General of Police granted permission to a Co-operative Bank to deposit its cash chests in the Police Station provided the chests were properly locked and sealed and on the clear understanding that the Police took no responsibility for the contents of the box as laid down in Police Regulations 697 and 698. A box containing an amount of Rs. 46946/7/- was kept in the Thana duly locked and sealed. No other property except the box was found missing the next day. The box was found at some distance from the Malkhana with its lock intact, hasp broken and contents removed. It was held that by accepting the bailment of the box, the police officers must be deemed to be responsible for the security of the box as a whole. The Inspector-General was acting within his powers in granting permission, vide regulations 697 and 698. The entrustment had the foundation in contract in which the consideration was the trust reposed in the Government. The Government was liable for the negligence of the subordinates. The principle of bailment was applied. The State preferred an appeal to the Supreme Court. Their Lordships upheld the view of the High Court that it amounted to a contract of bailment and observed as follows:—

“Having regard to the terms of the arrangement, we agree with the High Court that the reservation made by the Inspector-General of Police that the Police officers were not to be responsible for the contents of the box did not operate to limit the responsibility of the bailee under the contract of bailment and thereby the bailee was not absolved from liability to take with regard to the property that degree of care which is prescribed by Section 151 of the Contract Act But we are unable to agree with the High Court that by virtue of the arrangement between the Inspector-General of Police and the Bank the State of Madhya Pradesh was liable to compensate the Bank for the loss of the contents of the cash box. The Inspector-General of Police is invested by statute with certain authority. It is not suggested that the Inspector-General of Police was an agent of the State of Madhya Pradesh for entering into a contract of bailment.”

Their Lordships then examined the relevant regulations and came to the conclusion that the Inspector-General of Police, in granting the permission, cannot be deemed to have acted within the authority conferred upon

him by regulations 697 and 698 as the Co-operative Bank was not a Government Department. Their Lordships then observed:—

“The High Court was, in our judgment, in error in holding the State of Madhya Pradesh liable on the footing that the Inspector-General of Police acting in exercise of his statutory powers entered into a contract of bailment on behalf of the State of Madhya Pradesh.....”

11. In 1961 MPLJ 456= (AIR 1961 Madh Pra 316) it was held that the State Government could not be held liable for torts committed by their servants in exercise of powers and duties imposed upon them by law. The Division Bench relied on *State of Tripura v. Province of East Bengal*, AIR 1951 SC 23. In that case, proceedings had been started under Section 251 of the C. P. Land Revenue Act for contravention of the rules framed thereunder. It was held that the Deputy Commissioner exercising powers conferred upon him by the Act did not act as a servant of the State.

12. In our opinion there is no conflict between these two cases. The former related to a non-sovereign function, and a contract of bailment was the basis. The latter related to exercise of statutory powers or sovereign function of the State.

13. In *Dhian Singh v. Union of India*, AIR 1958 SC 274, the appellants were owners of two motor trucks, which were hired out to the Union of India for imparting tuition to the military personnel. The trucks were handed over to the Union of India. Later on, the Union of India gave notice to the appellants terminating the agreement and asking them to remove the trucks. The Union of India did not return the trucks to the appellants, nor did they pay any hire charges to them. Their Lordships held that the wrongful detention being a tort which continues all the time until the redelivery of the goods by the defendant to the plaintiff, the only verdict or judgment which the Court can give in actions for wrongful detention is that the defendant do deliver to the plaintiff the goods thus wrongfully detained by him or pay in the alternative the value thereof which can only be ascertained as on the date of the verdict or judgment in favour of the plaintiff. But in the case of wrongful conversion, the tort is complete the moment the goods are wrongfully converted by the defendant and no question can arise in those cases of any continuing wrong. In that case, a decree for money being the appreciated value of the trucks together with interest was passed against the Union of India.

14. In *State of Rajasthan v. Mst. Vidhyawati*, AIR 1962 SC 933 a jeep owned and maintained by the State of Rajasthan for the official use of a Collector, knocked down a pedestrian and fatally injured him. It was

found that the driver drove it rashly and negligently. It was held that the State was vicariously liable for the tortious act like any other employer and it made no difference that the jeep was being maintained for the use of a Collector in the discharge of his official duties. It was observed:—

“Under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, State trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such.”

The decree for damages was maintained.

15. In *Kasturilal v. State of U. P.*, (1965) 1 SCR 376 = (AIR 1965 SC 1039) the question of liability of the State arose in these circumstances. The plaintiff was arrested by police officers on suspicion of possessing stolen property and on search of his person a large quantity of gold was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released but the gold seized from him was not returned as the Head Constable in charge of the Malkhana had absconded with valuable property including the gold seized from the plaintiff. In the suit instituted against the State for return of the gold or, in the alternative its value, the evidence disclosed that the police officers had not followed the provisions of the Police Regulations in taking care of the gold seized from the plaintiff. It was held (i) that the manner in which the gold seized from the plaintiff had been dealt with at the Malkhana showed a gross negligence on the part of the police officers and that the loss suffered by the plaintiff was due to the negligence of police officers of the State, and (ii) that the act of negligence was committed by the police officers while dealing with the property of the plaintiff which they had seized in exercise of their statutory powers. The power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis they are powers which can be properly characterised as sovereign powers; and so the act which gave rise to the present claim for damages had been committed by the employee of the State during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim could not be sustained.

16. Gajendragadkar, C. J., while distinguishing AIR 1962 SC 933 (supra), referred to the classic observations made in 1861

by Peacock, C. J., of the Supreme Court at Calcutta in *Peninsular and Oriental Steam Navigation Co. v. Secy. of State for India-in-Council*, (1868-69) 5 Bom HCR App. 1.

“There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of under-takings which might be carried on by private individuals without having such powers delegated to them.”

And Peacock, C. J., then observed that in the former case no action will lie, while in the latter case an action will lie. The Supreme Court then laid down the following test in *Vidhyawati's case*, AIR 1962 SC 933 (supra):—

“The question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious act committed by public servants. That is why the clarity and precision with which this distinction was emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject.”

17. This brings us to the decision in AIR 1967 SC 1885 which, according to Shri Dabir, overrules the decision in (1965) 1 SCR 376 = (AIR 1965 SC 1039) (supra). The facts of that case were that in 1947, two trucks belonging to the plaintiff had been seized by the Customs Authorities on the ground that the plaintiff had not paid import duties on those trucks, that the plaintiff used them for smuggling goods, and that some goods were smuggled goods. The law provided for an appeal. Eventually, the appellate authority set aside the order of confiscation made by the Customs authorities and directed return of the vehicles to the plaintiff. However, in the meanwhile, on an application made by a Police officer, the trucks had been disposed of under an order of a Magistrate passed under Section 523 of the Code of Criminal Procedure and the sale proceeds were handed over to the creditor of the respondent under an attachment order passed in his favour. As the defendant State could not return the vehicles, the plaintiff

filed a suit for their return or, in the alternative, for their value. The Trial Court decreed the suit. The High Court dismissed the appeal preferred by the State of Gujarat, although reduced the decretal amount. The Supreme Court, upheld the decree passed by the High Court. In that case, the State Government, in its return, did not raise the contention that it was not liable for any tortious act committed in respect of the said goods and the vehicles, by any one of its servants. When the State Government sought to raise that contention before the High Court, it was not allowed to raise it for the first time in appeal. However, the contention was reiterated before the Supreme Court. The contention before their Lordships was that since the vehicles had been seized by a competent officer and the seizure was lawful, all that could be alleged was that one or other servant of the State Government was guilty of negligence but the State Government was not liable for any tortious acts of any of its servants. Their Lordships, after examining the relevant provisions of the enactment (Junagadh Sea Customs Act No. 2 of Samvat year 1998), held that the seizure of the vehicles was carried out with jurisdiction by a competent officer, and further that the vehicles had been sold pursuant to a judicial order. Their Lordships further observed:—

"It is also possible to contend that as the said vehicles were sold pursuant to a judicial order, no liability could be attached on the State Government for their disposal by public auction."

Having said so, their Lordships held that between the seizure of the trucks and their auction, there was a duty implicit from the provisions of the Act to take reasonable care of the property seized. "But in spite of the clear position of the law while the appeal was still pending before the Revenue Tribunal and without waiting for its disposal, it allowed its Police authorities to have it disposed of as unclaimed property." Their Lordships then held that: (1) there can be bailment and relationship - of bailor and bailee in respect of a specific property without there being an enforceable contract; (2) there being a legal obligation to preserve the property intact and also an obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final was that of a bailee; and (3) once a Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods "the owner had the right either to demand the property seized, or its value, if in the meantime the State Government had precluded itself from returning the property either by its own act or acts of its agent or servant." Their Lordships then observed as follows:—

"This was precisely the cause of action on which the respondent's suit was grounded.

The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it. The order of disposal in any event was obtained on a false representation that the property was an unclaimed property. Even if the Government cannot be said to be in the position of bailee, it was in any case bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by any act of its agents or servants. In these circumstances, it is difficult to appreciate how the contention that the State Government is not liable for any tortious act of its servants can possibly arise. The decisions in 1962 Supp 2 SCR 989 = (AIR 1962 SC 933 and (1965) 1 SCR 375 = (AIR 1965 SC 1039) to which Mr Dhebar drew our attention have no relevance in view of the pleadings of the parties and the cause of action on which the respondent's suit was based."

18. Their Lordships have made two things very clear in the penultimate paragraph. Firstly,—

"In these circumstances, it is difficult to appreciate how the contention that the State Government is not liable for any tortious act of its servants can possibly arise". This means that the question of the liability of the State for tortious acts of its servants did not arise in that case. Secondly,—

"The decision in 1962 Supp (2) SCR 989 = (AIR 1962 SC 933) and (1965) 1 SCR 375 = (AIR 1965 SC 1039) have no relevance in view of the pleadings of the parties and the cause of action on which the respondent's suit was based".

Thus, it is not correct to say that their Lordships overruled their earlier decisions, or in particular, the decision in Kasturilal's case, (1965) 1 SCR 375 = (AIR 1965 SC 1039) (supra), on the contrary that decision must be deemed to hold the ground and it was merely distinguished because it was not applicable to that case.

19. Again, the case of Legal Remembrancer v. Calcutta Corp., (1967) 2 SCR 170 = (AIR 1967 SC 997), is clearly distinguishable because in that case, the Government was running daily market without licence. The claim by the Municipal Corporation was, therefore, decreed. So also the case of Post Master General, Nagpur v. Radhabai, Civil Appeals Nos. 761-762 of 1966, D/- 23-4-1969 (SC) is distinguishable. In that case, a driver in the employ of the Government drove rashly and negligently, which caused the death of one Nathu. That case was similar to 1962 Supp (2) SCR 989 = (AIR 1962 SC 933) (supra).

20. No doubt there is a school of thought that the distinction between sovereign and non-sovereign functions of the State, in order

to determine the extent of State immunity, should not be perpetuated. A critical article by Mrs. Alice Jacob on Kasturilal's case, (1965) 1 SCR 375 = (AIR 1965 SC 1039) (supra) appeared in the Journal of India Law Institute, 1965 at page 247. This was followed by a more elaborate, yet critical, note by Mr. A. R. Blackshield in the same Journal, 1966, at page 648. It is noted that the basis of Government immunity is, what Roscoe Pound called, the public interest in the integrity, security, efficiency and dignity of the State by the juristic person, and what Julius Stone calls a social interest in political institutions. But there is an emphasis which is to be found, *inter alia*, in these words:—

"But whatever we may want to say in answer to these questions, we seem finally to be led back to one central perturbation. This has its source in intuitive feeling that it is not fair for a man to be wrongly deprived of his property without some means of restitution; that however we do it, "justice" insists that somehow or the other such a man must be compensated". The learned writer has also quoted the following remarks of Mr. Justice Peacock in the P. and O. case, (1868-69) 5 Bom HCR App 1 (supra).

"It may be difficult in some cases to determine whether an act is done in exercise of powers usually called sovereign powers, by individuals to whom such powers have been lawfully delegated".

But to us it is quite clear that the Supreme Court has succinctly laid down the law in Kasturilal's case, (1965) 1 SCR 375 = (AIR 1965 SC 1039) (supra) by posing the crucial tests which have to be applied. That ruling of the Supreme Court has not been overruled by their Lordships so far. All the decisions of the Supreme Court to which we have referred above hold the ground. In no later decision have their Lordships overruled any of their earlier decisions. Vidya-wati was not overruled in Kasturilal; nor was the latter overruled in AIR 1967 SC 1885. Therefore, by virtue of Article 141 of the Constitution, the law declared by the Supreme Court in all these decisions is binding on all Courts in this country.

21. The following dicta can be deduced from the Supreme Court decisions:— (1) Where a tortious act is committed by a public servant in discharge of his statutory functions, which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant, an action for damages for loss caused by such tortious act will not lie (2) If a tortious act has been committed by a public servant in discharge of duties assigned to him, not by virtue of delegation of any sovereign power, an action for damages will lie. (3) Where, due to negligent driving of a vehicle owned by the State, a claim for damages is made, the State is not immune because

the use of the vehicle is not in exercise of any sovereign function. (4) Where the State has engaged itself in activities like industry, public transport or State trading and exercises powers as employers in public sector, the State is not immune from the consequences of tortious acts of its employees committed in the course of their employment as such. (5) Where the relationship of bailor and bailee between the plaintiff and the State comes into being and the question of tortious liability does not arise, the first two propositions will not apply and the State will be liable, if its liability under the ordinary law of bailment is made out. (6) The relationship of bailor and bailee may come into existence, even when there is no express contract between the plaintiff on the one hand and the State or its servant in the discharge of his official function, on the other.

22. Since the present appeal itself has been referred for decision to the Full Bench, we shall now deal with it on merits.

23. The plaintiff's suit is for value of the goods seized by revenue authorities from his possession. He has not claimed the relief of return of his goods, and for the value of the goods in the alternative, which is ordinarily done. But, that apart, in either case, the plaintiff can succeed only if he has established that he is entitled to the return of his goods. If the plaintiff is not entitled to the return of the goods, which were seized by the revenue authorities, in other words, if there is no order in his favour directing return of the goods to him, he is not entitled to a decree. We have, therefore, to concentrate on this question before advertent to any other.

24. It is common ground that in connection with cutting of trees in some portion of Jamalpani, malguzari jungle and in exercise of the powers under Section 202 of the G. P. Land Revenue Act (No. II of 1917), logs of wood which had been cut by the plaintiff were seized on October 20, 1950, in Revenue Case No. 37/5-4 of 1949-50. It is averred in the plaint:—

"5. In Rev. Case No. 37/5-4 of 1949-50, defendant No. 1 through its employee, Shri Das Sharma, Naib Tahsildar, Sausar, seized the plaintiff's cut wood through the Revenue Inspector on 20-10-1950

"7. Under Section 202 of the Land Revenue Act, the orders of seizure were complied with and (but?) the plaintiff was prohibited from lifting and taking away the wood from the jungle.

8. As there was no evidence with defendant No. 1 the said revenue case was filed on D/- 22-12-1952. But the plaintiff did not get back his seized goods. The order for selling the seized goods by auction was also passed on 22-12-1952."

But the order-sheet (Ex. P.7) of the Revenue Case does not support the above allegation continued in paragraph 8 of the plaint. The relevant orders read thus:—

"3-10-52. Vide D. C's orders the case is submitted to A. D. C. for n.a.

Sd/- Tehsildar.

"22-12-52. Returned to Tehsildar. Orders for disposal of property will have to be passed. Further enquiry be made and report be submitted.

Sd/- A. D. C. Sausar."

"25-5-53. The property mentioned in seizure memo at page 7, be ordered to be put to auction and the sale proceeds credited to State Revenue. Submitted to A. D. C. through Tehsildar for order.

Sd/- Naib Tehsildar."

"2-6-53. Submitted to A. D. C. Sausar for orders,

Sd/- Tehsildar."

"8-6-53. Property be auctioned. Sale proceeds be credited in Treasury and then case be resubmitted for filing.

Sd/- A. D. C. Sausar."

Thus the allegation that the said revenue case was filed on December 22, 1952, is contrary to the record.

25. In paragraph 10-B of his amended plaint the plaintiff relied on the judgment (Ex. P. 12) dated September 28, 1955, of the Board of Revenue. On a perusal of that judgment, and the orders referred to therein, the following facts are clear.

(i) On April 3, 1950, the Extra Assistant Commissioner registered a case against Sheolal for breach of Malguzari Forest Rules. The matter dragged on. 5779 pieces of teak wood were seized and entrusted on "Supratnama" to the Mukkadam Gumashta of the village who was appointed by the plaintiff Malguzar.

(ii) On June 8, 1953, the then Additional Deputy Commissioner, Sausar, Shri W. R. Deshpande, passed the following order:—

"Property be auctioned. Sale proceeds be credited in Treasury, and the case be re-submitted for filing."

(iii) On February 10, 1954, Shri N. P. Kohner, Additional Deputy Commissioner, who succeeded Shri W. R. Deshpande, was of the opinion that it was necessary to review the abovesaid order dated June 8, 1953. This he could do only after obtaining permission under Section 40 of the C. P. Land Revenue Act. Accordingly, he moved the Deputy Commissioner. Shri V. B. Bangale, Deputy Commissioner, on February 12, 1954, granted the required permission.

(iv) Thereupon, Shri Kohner, Additional Deputy Commissioner, after recording evidence, by his order dated March 22, 1954: (A) imposed a fine of Rs. 1000/- for breach of Rules 2 (c), 5 (c) and 5 (e) of the rules made under Section 202 of the C. P. Land Revenue Act; and (B) also directed confiscation of the timber under Section 202 (3) *ibid*.

(v) It was against the last mentioned order of March 22, 1954, allowing review, that the plaintiff went in appeal before the Board of Revenue. The learned Member of the Board of Revenue came to the conclusion

that the Additional Deputy Commissioner was not subordinate to the Deputy Commissioner. Therefore, the Deputy Commissioner had no jurisdiction to grant permission to the Additional Deputy Commissioner to review an order of his predecessor-in-office under Section 40 of the Act. On that basis, he set aside the order dated March 22, 1954 passed by Shri Kohner, Additional Deputy Commissioner. While doing so, the learned Member of the Board of Revenue made very clear observations as follows:—

"I accordingly hold that the order passed by Shri Konher is illegal and direct that it be set aside."

I may make it clear that the merits of the original order passed by Shri Deshpande have not been considered because they are not relevant to the present appeal, which is concerned with subsequent order passed by Shri Konher. The appeal is allowed."

(underlined (here in ' ') by us)

Now, there cannot be a shred of doubt that what was set aside by the Board of Revenue was the order dated March 22, 1954, passed in review by Shri Konher, and it is equally clear that the order passed by Shri Deshpande on June 8, 1953, remained undisturbed and untouched.

26. The material sub-sections of Section 202 of the Act read as follows:—

"(1) The Chief Commissioner may make rules regulating the control and management of the forest-growth on the lands of any estate or mahal, and the exercise of any right of user over such forest-growth, and may attach to the breach of such rules a penalty not exceeding two hundred rupees, or, if the breach be a continuing one, a penalty not exceeding ten rupees for each day during which such breach continues.

(2) The Deputy Commissioner may direct that the whole or any part of any sum recovered under the rules made under sub-section (1) shall be paid as compensation to any person or persons to whom loss or injury has been caused, or that it shall be expended in such manner as he may deem fit for the benefit of the forest-growth.

(3) The Deputy Commissioner may confiscate and sell any timber or other forest produce cut or removed in contravention of any rule made under sub-section (1) and may apply the proceeds of sale to either or both of the purposes mentioned in sub-sec. (2)." Under the 1st sub-section a penalty could be imposed within the prescribed limits. Under sub-section (3) any timber or other forest produce cut or removed in contravention of any rule, could be confiscated and sold and the sale proceeds could be applied to either or both of the purposes mentioned in sub-section (2).

27. Shri Konher's order dated March 22, 1954, was both under sub-section (1) and sub-section (3). He imposed a fine and also

ordered confiscation of the cut wood. This order of Shri Konher was set aside. But the earlier order of Shri Deshpande, which, as pointed out above, remained undisturbed and untouched, was certainly within the purview of sub-section (3) although not under sub-section (1). It was obviously to enable him to impose a penalty under sub-section (1) that Shri Konher, Additional Deputy Commissioner obtained permission to review the order of Shri Deshpande, which he did.

28. In the present suit, the following issues, among others, were framed:—

"(1) (a) Whether the cutting by the plaintiff from 18-9-49 to 19-10-50 was without the previous permission of D. C. Chhindwara?

(b) Whether the previous permission of the D. C. Chhindwara, was necessary?

2. Whether the stumps were not cut flush with the ground?

3. Whether teak trees within 20 feet of the nala which retained water till April, were cut?"

The plaintiff got these issues deleted on the ground that they were entirely within the cognizance of the Revenue Court. Accordingly, they were deleted. Moreover, the order of Shri Deshpande was not challenged in the plaint.

29. From the above resume, it must be held that the order dated June 8, 1953, passed by Shri W. R. Deshpande, stands good and is in force even today. That order has not been set aside by any revenue authority; and, on the plaintiff's own showing, this matter is within the exclusive jurisdiction of the revenue authorities. That order was to auction the wood seized and to credit the sale proceeds in treasury. That order was clearly an order of confiscation of the wood seized within the purview of Section 202 (3) of the C. P. Land Revenue Act. No decree could, therefore, be passed in favour of the plaintiff for the value of the wood.

30. There is yet another aspect of this case on which also the suit has to be dismissed. The plaintiff's wood, which was seized by the Revenue authorities was entrusted to Sakham (defendant 2) as custodian (Supratdar). In his written statement Sakham pleaded as follows:—

"3. I was in plaintiff's service — at mouza Jamlapani itself. I was carrying on cultivation work from the plaintiff. I was getting 3 Khandis of summer and winter crops and Rs. 30/- per year in lieu of my service. Only at the instance of the plaintiff himself I had accepted the Supratnama in respect of 265 logs & 14 beams, which the plaintiff has taken away."

"4. The matter relates to year 1951. In about the month of Fagon or Chait, the plaintiff came (to me). He said "The case

is dismissed. All the seized property is released. Now let (us) take the seized property to my house at Mohgaon."

"5. The plaintiff sent for his bullock carts from mouza Mohgaon & mouza Jamlapani and took away the entire seized property to mouza Mohgaon by causing deception on me. The seized property is still at plaintiff's place at Mohgaon even till now. And 14 beams are still lying at mouza Jamlapani at present. I can adduce evidence in respect of all this."

"6. I am a Gond by caste quite illiterate and a villager. The plaintiff himself took away the seized property by causing deception on me. This suit is quite bogus, false and illegal. It has been filed by showing too much value of the wood."

After this written statement was filed, the plaintiff amended his plaint to introduce certain other averments but did not controvert the above allegations of defendant No. 2. It is an established practice in that part of this State, in which the present case was tried, that the allegations against the plaintiff requiring an answer based on facts, are controverted by amending the plaint, if the plaintiff has to deny them, or has to say something about them in answer. Even in his deposition as P. W. 5, which was recorded on April 24, 1957, the plaintiff did not controvert the aforesaid allegations made in the written statement of the second defendant. Salikram (D. W. 3) was produced to say that at the plaintiff's command, the seized wood, which was lying at Sukhuwali Khari was carried by the plaintiff's servants to the plaintiff's house in about four days. Now, there are two possibilities. Either the plaintiff took away from the Supratdar the seized wood, as alleged by the second defendant, or the seized wood had been misappropriated by the second defendant. In the former case, the plaintiff is not entitled to a decree. In the latter case, if we had held that the plaintiff is entitled to the return of the wood, then the first of the above six propositions would apply and the State would not be liable for the Supratdar's tortious act. The order to seize the wood was passed by a revenue authority in exercise of his statutory powers and the seizure of the wood was by a competent authority in exercise of his statutory functions, and the seized wood was entrusted to the Supratdar, which also was an act done in exercise of statutory functions. In this view of the matter as well, the suit must be dismissed.

31. The appeal is allowed. The judgment and decree of the Trial Court are set aside. Having regard to all the circumstances of the case, we leave the parties to bear their own costs as incurred throughout.

Appeal allowed.

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(V 57 C 34)

FULL BENCH

BISHAMBHAR DAYAL, C. J., SHIV DAYAL
AND A. P. SEN, JJ.The State of Madhya Pradesh, Appellant
v. Devial Shival Paliwal and others, Res-
pondents.First Appeal No. 66 of 1967, D/- 4-12-
1969, from decree of 1st Addl. Dist. J.,
Chhindwara, D/- 3-5-1957.C. P. Land Revenue Act (2 of 1917),
Section 202 — Revenue Officer ordering
seizure of cut wood — Suit for recovery of
value of wood — Seizure order not set aside
by any revenue authority — Competence of
authority confiscating wood not challenged
— Right of plaintiff to return of wood not
established — Plaintiff not entitled to de-
creed for value of wood. (Para 15)Cases Referred: Chronological Paras
(1970) AIR 1970 Madh Pra 179 (V 57) =F. A. No. 109 of 1957, D/-
4-12-1969 (Madh Pra), State of
Madh Pra v. Devial 7(1961) AIR 1961 Madh Pra 316
(V 48) = 1961 MPLJ 456, State
of Madh Pra v. Kapoorchand 4K. P. Munshi Govt. Advocate, for the
State; R. S. Dabir and V. S. Dabir, for Res-
pondents.SHIV DAYAL, J.:— This appeal arises
from a suit for the recovery of Rs. 55,000/-
as value of wood which belonged to the
plaintiff and was seized by the Revenue Offi-
cers in exercise of powers under Section 202
of the C. P. Land Revenue Act, 1917.2. Shival (whose legal representatives
are respondents Devial and Smt. Godavari-
bai) brought a suit against the State on the
allegation that he was a Malguzar Lambardar
of village Rohna, Settlement No. 350,
Patwari Circle No. 14, tahsil and district
Chhindwara. He did cutting of trees in
some portion of his malguzari jungle at
Rohna in the year 1949-50. The cut wood
of teak, Biwla and other trees was lying in
the jungle and outside it. The plaintiff had
started the work of cutting trees in the forest
from February 1949 to August 15, 1950.
The plaintiff completely observed the rules
framed for cutting jungle but under the im-
pression that the provisions of Section 202
of the Land Revenue Act had not been ob-
served, the State started proceedings against
the plaintiff through its officials. (Revenue
Case No. V/5-4 of 1947-48). Shri Das
Sharma, Naib Tahsildar, seized the plaintiff's
cut wood through the Revenue Inspector on
October 22, 1950. Eventually, this revenue
case was filed on September 17, 1952, but
the defendant did not return the seized goods
and an order for selling the seized goods by
public auction was passed.3. It was further alleged in the plaint
that certain "revenue proceedings" werestarted by the Officers for complicating the
plaintiff's claim as far as possible. The plain-
tiff filed an appeal before the Board of
Revenue. The appeal was allowed and the
order dated March 22, 1954, passed by Shri
Konher, and the order of the Deputy Com-
missioner dated February 12, 1954, were set
aside by the Board of Revenue in its deci-
sion dated September 28, 1955. On these
allegations, the plaintiff claimed a decree
for Rs. 55,000/-. He estimated the value
of his wood at Rs. 64,351/-. The suit was
resisted by the State. The Trial Court held
that 6891 pieces of wood were seized by the
Revenue Officers. The wood was not return-
ed to the plaintiff. Accordingly, it passed a
decree for Rs. 6054/-.4. Aggrieved by the judgment and decree
of the Trial Court, the State preferred this
appeal. The plaintiff also preferred a cross-
appeal (First Appeal No. 66 of 1957) claim-
ing a further decree for Rs. 48,945/-. Both
the appeals were heard by a Division Bench
consisting of Golwalker and Kekre, JJ. Mr.
Justice Kekre, relying on the State of M. P.
v. Kapoorchand, 1961 MPLJ 456 = (AIR
1961 Madh Pra 316), was of the opinion
that this appeal filed by the State should be
allowed and the plaintiff's cross-appeal should
be dismissed. Mr. Justice Golwalker, on the
other hand, took the contrary view and re-
corded the opinion that this appeal should
be dismissed. He, however, agreed that the
plaintiff's appeal No. 65 of 1957, be dismissed.
Both the appeals were then placed before
Mr. Justice Pandey, as the third Judge, but
he submitted the case to the Hon'ble the
Chief Justice to consider the desirability of
constituting a larger Bench to hear and dis-
pose of both these appeals. Both these ap-
peals were then heard by us.5. As narrated above, as regards First
Appeal No. 65 of 1957, both the learned
Judges of the Division Bench (Golwalker and
Kekre, JJ.) recorded a concurrent opinion.6. We shall record a separate order in
respect of First Appeal No. 65 of 1957.7. The question of liability of the State
for tortious acts of a public servant was also
referred to this Full Bench in similar cir-
cumstances. That question has been answer-
ed by us in our judgment delivered today in
State of M. P. v. Devial, F. A. No. 109 of
1957, D/- 4-12-1969 = (reported in AIR
1970 Madh Pra 179).8. Since this appeal itself has been re-
ferred to the Full Bench for decision, we
shall now deal with it on merits.9. The plaintiff's suit is for value of the
goods seized by the revenue authorities from
his possession. He has not claimed the
relief of return of his goods and for the
value of the goods in the alternative which
is ordinarily done. But, that apart, in either
case, the plaintiff can succeed only if he has
established that he is entitled to the return
of his goods. If the plaintiff is not entitled
to the return of the goods, which were
seized by the revenue authorities, in other

words, if there is no order in his favour directing return of the goods to him, he is not entitled to a decree. We have, therefore, to concentrate on this question before adverting to any other.

10. The plaintiff has relied on the judgment and order dated September 28, 1955 (Ex. P. 9) of the Board of Revenue. On a perusal of that judgment and the orders referred to therein, the following facts are clear.

(i) On October 16, 1947, the Tahsildar registered a case for breach of rules framed under Section 202 of the C. P. Land Revenue Act, 1917, against the plaintiff. The matter dragged on. Eventually, the Tahsildar passed an order in pursuance of which 6891 pieces of teak were seized by the Revenue Inspector and handed over in Supratnama to the second defendant. This was on October 22, 1950.

(ii) On September 17, 1952, the then Additional Deputy Commissioner, Shri S. N. Verma passed the following order:—

"Register a case. It will now be very difficult to establish a case against the N. A. Hence the case is filed. The wood seized be auctioned and sale proceeds be credited in the treasury. Send a separate memo to Tahsildar, Sasuar, for further action. Case is filed."

The Board of Revenue pointed out that a case had already been registered and there was no question of its being registered afresh. However, that is of no consequence.

(iii) On February 10, 1954, Shri N. P. Konher, Additional Deputy Commissioner, who succeeded Shri S. N. Verma, was of the opinion that it was necessary to review the abovesaid order dated September 17, 1952. This he could do only after obtaining permission under Section 40 of the C. P. Land Revenue Act. Accordingly, he moved the Deputy Commissioner. Shri V. B. Bangale, Deputy Commissioner on February 12, 1954, granted the required permission.

(iv) Thereupon, Shri Konher, Additional Deputy Commissioner, after recording evidence, by his order dated March 22, 1954: (a) imposed a fine of Rs. 1,000/- for breach of Rules 2 (c) and 5 (c) of the rules framed under Section 202 of the Act; and (b) also directed that under Section 202 (3) the timber seized should be confiscated.

(v) It was against the last mentioned order of March 22, 1954, allowing review, that the plaintiff went in appeal before the Board of Revenue. The learned Member of the Board of Revenue came to the conclusion that the Additional Deputy Commissioner was not subordinate to the Deputy Commissioner. Therefore, the Deputy Commissioner had no jurisdiction to grant permission to review an order of his predecessor-in-office under Section 40 of the Act. On that basis, he set aside the order dated March 22, 1954 passed by Shri Konher, Additional Deputy Commissioner. While doing so, the learned

Member of the Board of Revenue made very clear observations as follows:—

"I accordingly hold that the order passed by Shri Konher is illegal and direct that it be set aside.

I may make it clear that the merits of the original order passed by Shri Verma have not been considered because they are not relevant to the present appeal which is concerned with the subsequent order passed by Shri Konher. The appeal is allowed." (underlined (here in ' ') by us)

Now, there cannot be a shred of doubt that what was set aside by the Board of Revenue was the order dated March 22, 1954, passed in review by Shri Konher and it is equally clear that the order passed by Shri Verma on September 17, 1952 remained undisturbed and untouched.

11. The material sub-sections of Section 202 of the Act read as follows:—

"(1) The Chief Commissioner may make rules regulating the control and management of the forest-growth on the lands of any estate or mahal, and the exercise of any right of user over such forest-growth, and may attach to the breach of such rules a penalty not exceeding two hundred rupees, or, if the breach be a continuing one, a penalty not exceeding ten rupees for each day during which such breach continues.

(2) The Deputy Commissioner may direct that the whole or any part of any sum recovered under the rules made under sub-section (1) shall be paid as compensation to any person or persons to whom loss or injury has been caused, or that it shall be expended in such manner as he may deem fit for the benefit of the forest-growth.

(3) The Deputy Commissioner may confiscate and sell any timber or other forest produce cut or removed in contravention of any rule made under sub-section (1), and may apply the proceeds of sale to either or both of the purposes mentioned in sub-section (2). Under the first sub-section a penalty can be imposed within the prescribed limits. Under sub-section (3) any timber or other forest produce cut or removed in contravention of any rule, could be confiscated and sold and the sale proceeds could be applied to either or both of the purposes mentioned in sub-section (2).

12. Shri Konher's order dated March 22, 1954, was both under sub-section (1) and sub-section (3). He imposed a fine and also ordered confiscation of the cut wood. This order of Shri Konher was set aside. But the earlier order of Shri Verma, which, as pointed out above, remained undisturbed and untouched, was certainly within the purview of sub-section (3) although not under sub-section (1). It was obviously to enable him to impose a penalty under sub-section (1) that Shri Konher, Additional Deputy Commissioner obtained permission to review the order of Shri Verma, which he did.

13. In the present suit, the following issues, among others, were framed:—

"1. Whether the cutting by the plaintiff from February 1949 to 15-8-1950 was without the previous permission of D. C. Chhindwara?"

(a) Whether the previous permission of the D. C. Chhindwara, was legally necessary?

(b) If so, what is the effect?

2. Whether the stumps were not cut flush with the ground?

3. Whether teak trees within 20 feet of the nala which retained water till April were cut?

14. The plaintiff got these issues deleted on the ground that they were entirely within the cognizance of the Revenue Court. Accordingly, they were deleted.

15. From the above resume, it must be held that the order dated September 17, 1952, passed by Shri S. N. Verma, stands good and is in force even today. That order has not been set aside by any revenue authority; and, on the plaintiff's own showing this matter is within the exclusive jurisdiction of the revenue authorities. That order was to auction the wood seized and to credit the sale proceeds in treasury. That order tantamounted to an order of confiscation of the wood seized within the purview of Sec. 202 (3) of the C. P. Land Revenue Act. When Shri Verma said in his order: "It will now be very difficult to establish a case against the N. A. Hence the case is filed", it was only regarding the imposition of penalty under sub-section (1) of Section 202. If that was not so, Shri Verma would have set aside the order passed by Shri Das Sharma, Naib Tahsildar, and would have ordered return of the wood seized but would not have ordered sale of the seized wood by auction and to credit the sale proceeds in treasury. Thus, in ultimate analysis, the plaintiff's wood stands confiscated to the State by an order of an authority whose competence has not been challenged in this suit. No decree could, therefore, be passed in favour of the plaintiff for the value of the wood. Moreover, the order of Shri Verma was not challenged in the plaint.

16. This appeal is allowed. The judgment and decree passed by the Trial Court are set aside. Having regard to all the circumstances of the case, we leave the parties to bear their own costs as incurred throughout.

Appeal allowed.

AIR 1970 MADHYA PRADESH 189
(V 57 C 35)

BISHAMBHAR DAYAL, C. J. AND
K. L. PANDEY, J.

A. Laxmandas and others, Petitioners v. The State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 560 of 1966, D/- 28-11-1969.

BN/DN/A559/70/LGC/B

(A) States Reorganization Act (1956), Section 115 (5) — Integration of services — Formation of new State of Madhya Pradesh — Final gradation list prepared by Central Government relates back to 1-11-1956 — Absorption of certain persons by State Government in 1959 and promotion of persons so absorbed in 1965 and 1966 — State Government had, under Articles 162 and 246 (3) read with Entry 41 of List 2, full power to deal with its services.

(Para 4)

(B) Constitution of India, Article 309 — Conditions of service — Rule making powers — Provisions of Article are merely enabling — Neither they impose any duty to legislate or to make rules nor in absence of such legislation or rules, do they fetter power of any State Government to exercise its executive power in matter of its services. (Para 6)

(C) Constitution of India, Article 320 (3) — Consultation with Public Service Commission — Clause (3) is not mandatory — Its non-compliance does not afford any cause of action to Civil servants. (Para 7)

(D) Constitution of India, Article 226 — Executive orders — Principles of natural justice — Order of State Government absorbing some technical personnel is an executive order — Cannot be challenged on ground of principles of fair-play and natural justice — Affected Civil Servants can make representations to State Government. (Para 9)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 850 (V 55)=

1968-2 SCR 186, Union of India v.

P. K. Roy

2

(1957) AIR 1957 SC 912 (V 44)=

1958 SCJ 150, State of U. P. v.

Manbodhan Lal

7

R. S. Dabir, for Petitioners; K. K. Dubey, Govt. Advocate, for State.

PANDEY, J.:— This petition under Article 226 of the Constitution is mainly directed against the promotion of R. K. Subramaniam (respondent 2) and K. B. Shah (respondent 3) as Superintending Engineers. Accordingly, the petitioners have prayed for a writ of mandamus requiring the State Government (i) to revise the aforesaid orders of promotion of respondents 2 and 3; (ii) to deal with the appointments and promotions of those two respondents and all other members of the technical personnel of the Chambal Project so as not to assign to them in the gradation list any place above the last confirmed Assistant Engineer in the Public Works Department (Irrigation Branch) and (iii) to conduct itself in accordance with the rules and principles of justice and fair-play in the matter of promotions in that Department.

2. The material facts giving rise to this petition may be shortly stated. In the new State of Madhya Pradesh formed in accordance with the provisions of the States Reorganization Act, 1956, there was a branch of the State services called the Madhya Pradesh

State Engineering Service made up of two parts, (i) Irrigation and (ii) Building and Roads. It was constituted by integrating the corresponding services of the integrating units, namely, a part of old Madhya Pradesh, Madhya Bharat, Vindhya Pradesh and Bhopal in accordance with the provisions of Section 115 (5) of the States Reorganization Act, 1956. The provisional gradation list dated September 12, 1959 is Annexure B-1 and the final gradation list dated April 6, 1962 is Annexure B-2. Although a part of the final gradation list was quashed by the Supreme Court by its decision reported in Union of India v. P. K. Roy, AIR 1968 SC 850, that has no bearing on the present controversy and it would not hereafter be necessary to refer to it.

3. In one of the integrating units, namely, Madhya Bharat, there was a project called Chambal Project, for executing which the State of Madhya Bharat had set up a temporary organization. The engineering personnel required and recruited for the purpose formed a part of that temporary organization. They did not belong to the cadres of the regularly constituted engineering service of that State. For that reason, they were not included in the two gradation lists prepared under Section 115 (5) of the States Reorganization Act, 1956. However, by an order dated January 6, 1959, the new State of Madhya Pradesh, which had come into existence on November 1, 1956, decided to absorb the technical personnel of the Chambal Project on certain terms and conditions contained in Annexure C. Thereafter, by orders dated July 16, 1965 and September 3, 1966 (Annexures D and E), the respondents 2 and 3, who had been so absorbed, were promoted as Superintending Engineers. The petitioners, who are executive Engineers of the regularly constituted cadres of the State Engineering Service, have called in question not only the promotions of the respondents 2 and 3 as Superintending Engineers but also the action of the State Government in absorbing the technical personnel of the Chambal Project in so far as it was prejudicial to the members of the regularly constituted cadres of the State Engineering Service.

4. One of the grounds urged in support of this petition is that the absorption of the technical personnel of the Chambal Project in the manner effected in this case amounted to disturbing the seniority in the various cadres of the Madhya Pradesh Engineering Service, as fixed by the final gradation list dated April 6, 1962. We are unable to accept this contention. The final gradation list prepared by the Central Government under Section 115 (5) of the States Reorganization Act, 1956, related back to November 1, 1956 when the new State of Madhya Pradesh came into existence. Subject to the integration of services thus effected by the Central Government, the State Government has,

under Articles 162 and 246 (3) read with Entry 41 of List II of the Constitution, full power to deal with its services. The exercise of this power is, however, subject to the provisions of the Constitution, any statute bearing on the point and rules framed either under such statute or under Article 309 of the Constitution.

5. Another ground is that the absorption of the technical personnel of the Chambal Project, who were persons employed outside the regular cadres of the Madhya Pradesh Engineering Service, constituted an infraction of the provisions of Article 309 of the Constitution and the rules framed thereunder. In our opinion, even this contention is not well founded. On January 6, 1959 when those persons were absorbed by the order Annexure C, there were no rules under Article 309 of the Constitution which governed the new State of Madhya Pradesh. No doubt there were such rules that were formerly in force in the integrating units, but they continued to operate only in those units as provided by Section 119 of the States Reorganization Act, 1956, which reads:

"The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to an existing State shall, until otherwise provided by a competent legislation or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

The Madhya Pradesh Civil Services (General Conditions of Services) Rules, 1961, framed under Article 309 of the Constitution came into force on August 4, 1961. Further, the Madhya Pradesh Irrigation Engineering Service (Gazetted) Recruitment Rules came into force on June 8, 1968. It follows that, at the material time, there were no rules which fettered the power of the State Government to act in the matter in the manner it did.

6. The further contention based on the same ground to the effect that rules should have been framed under Article 309 of the Constitution before absorbing the technical personnel of the Chambal Project is also unsound. The provisions of Article 309 are merely enabling provisions and they do not impose any duty to legislate or make rules nor, in the absence of such legislation or rules, do they fetter the power of any State Government to exercise its executive power in the matter of its services.

7. In the course of arguments, a reference was made to Article 320 of the Constitution, but it is now well settled that cl. (3) thereof is not mandatory and any non-compliance with the provisions thereof does not afford to the civil servants any cause of action; State of U. P. v. Manbodhan Lal, AIR 1957 SC 912.

8. It is next urged that, even under the impugned order dated January 6, 1959 contained in Annexure C, the entire technical

personnel of the Chambal Project was directed, upon absorption, to be placed below the last confirmed Assistant Engineer of the Public Works Department. In this connection, our attention is drawn to condition (iii) of the conditions therein specified on which they were absorbed which is reproduced;

“(iii) Fixation of Seniority — For the purpose of absorption and of filling up permanent posts in the Public Works Department, preferably the Irrigation Branch (the B & R Branch not totally excluded) relative claims to confirmation of Chambal employees and temporary Public Works Department employees of corresponding categories be adjusted in a manner just and fair to both categories of employees, Chambal employees on their absorption, being placed below the last confirmed employee of the Public Works Department for the purpose of seniority.”

In our opinion, the language employed there does not support the contention raised before us, for it is obvious that it provides for a just and fair treatment to both classes of employees of “corresponding categories”. We think that this condition envisaged absorption of the Chambal Project employees in the appropriate corresponding categories with the rider that, for future claims for confirmation in a particular category, all those employees, who were absorbed in that category, would be treated as taking place below the last confirmed employee of the regular cadre in the category. It would thus appear that there is no substance in the contention that the actual absorption of these employees was made in disregard of the order contained in Annexure C.

9. The last ground urged before us is that even if there be no specific rules governing the matter, the State Government should have acted in the matter of promotions in conformity with principles of fair play and natural justice and not arbitrarily. The order dated January 6, 1959 is an executive order which cannot be challenged in these proceedings on that ground. However, it is open to the affected civil servants to make representations to the State Government. As a matter of fact, some representations were made in the past and we now understand that some of the petitioners have obtained some relief. We hope that the State Government would not allow the civil servants of this department any ground for thinking that they have been treated unfairly.

10. In the result, this petition fails and is dismissed but, in the circumstances of the case, we leave the parties to bear their own costs. The outstanding amount of security shall be refunded.

Petition dismissed.

AIR 1970 MADHYA PRADESH 191

(V 57 C 36)

BISHAMBHAR DAYAL, C. J. AND
K. L. PANDEY, J.

Beni Prasad Tandan and others, Petitioners v. Jabalpur Improvement Trust and others, Respondents.

Misc. Petn. No. 316 of 1966, D/- 16-1-1970.

(A) M. P. Town Improvement Trusts Act (1960) (14 of 1961), Section 52 (2) — Procedural irregularities in framing and sanctioning scheme — They are cured under Section 52 (2). Case law discussed. (Para 7)

(B) M. P. Town Improvement Trusts Act (1960) (14 of 1961), Section 68 (1) — Acquisition of lands under Act — Notice of intention of Improvement Trust to acquire lands — Notice to individual owners is not necessary. (Para 8)

(C) M. P. Town Improvement Trusts Act (1960) (14 of 1961), S. 70 — Inquiry under — Not obligatory.

Under S. 70 it is open to the State Government, if it so thinks fit, to make an enquiry, but it is not obliged to do so. The reason is that under S. 68 the Improvement Trust gives a public notice of its intention to acquire land for purpose of any scheme, invites objections, gives an opportunity of being heard and then takes decisions on the objections, if any. Thereafter, when applying to the State Government under S. 69 for sanction of the proposed acquisition, it is required to send the record of the aforesaid proceedings, a report containing a summary of the objections and its decisions thereon and other information. (Para 9)

(D) Constitution of India, Article 31 (3) — M. P. Town Improvement Trusts Act 1960 (14 of 1961), Section 34 — Public purpose — Scheme framed under Act — Whether for public purpose.

The expression “public purpose” occurring in Article 31 (2) of the Constitution has no inflexible or rigid connotation enuring for all times. It is elastic in concept, taking colour from the statute in which it occurs and varying in meaning with the time and state of society in which it is required to be considered. (Para 12)

The scheme framed under the M. P. Town Improvement Trusts Act, 1960 which provides for rehabilitation of persons required to be displaced from a thickly populated area in Jabalpur City for the reason that it is necessary to remove therefrom congestion and the resulting nuisance, insanitary conditions and health hazards, is in the general interest of the community. That being so, acquisition of the land needed for the purpose is for a public purpose. It is not necessary that the entire community or even a considerable portion thereof should directly enjoy, or participate in the enjoyment of,

the improvement. It is enough if the object advances the general interest of the community. It may be that, in execution of the scheme, certain individuals incidentally derive benefit but so long as they do so not as individuals but in furtherance of the object of public utility, the scheme is not assailable as unsupported by public purpose, that is general interest of the community.

(Para 12)

(E) M. P. Town Improvement Trusts Act, 1960 (14 of 1961), Sections 34 and 38 — Scheme framed under Act — Scheme combining two types mentioned in sections — Scheme is not unauthorised.

Where a scheme under the Act is framed for shifting the existing wholesale grain market and Dal and Oil Mills and other like industries situated in crowded localities in the city of Jabalpur to a new site outside the thickly inhabited area for establishing there other wholesale and retail markets and also for development there of residential plots suitable for workers in those markets and industries, the scheme is a combination of two types described in Sections 34 and 38 and is not unauthorised and illegal. AIR 1966 SC 207, Disting.

(Para 13)

(F) M. P. Town Improvement Trusts Act (1960) (14 of 1961), Section 34 — Scheme framed under Act for shifting wholesale market from crowded localities to site outside city and establishing retail markets there — It is not usurpation of function of market committee under M. P. Agricultural Produce Markets Act, 1960 and of Municipal Corporation under M. P. Municipal Corporation Act, 1956.

(Para 10)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 207 (V 53) = 1966-1 SCJ 566, Municipal Corporation of the City of Jabalpur v. Kishan Lal 13
 (1966) AIR 1966 SC 693 (V 53) = 1966-1 SCR 934, Municipal Board, Hapur v. Raghuvendra Kripal 7
 (1965) AIR 1965 SC 895 (V 52) = 1965-1 SCR 970, Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur 7
 (1964) AIR 1964 SC 264 (V 51) = 1964 (1) Cri LJ 156, Afzal Ullah v. State of U. P. 13
 (1963) AIR 1963 SC 976 (V 50) = 1963-1 SCR 242, Trust Mai Lachmi Bradari v. Chairman, Amritsar Improvement Trust 7
 (1962) AIR 1962 SC 420 (V 49) = 1962-1 SCR 596, Berar Swadeshi Vanaspathi v. Municipal Committee, Shegaon 6, 7
 (1958) AIR 1958 SC 232 (V 45) = 1958 SCR 1052, P. Balakotiah v. Union of India 13
 (1940) AIR 1940 Nag 293 (V 27) = ILR (1940) Nag 446, Onkarsa Tukaram v. Municipal Committee Nandura 6

(1930) AIR 1930 Nag 157 (V 17) = 127 Ind Cas 337, Municipal Committee, Khandwa v. Radhakisan Jaikisan

Y. S. Dharmadhikari, for Petitioners; H. Khaskalami, for Respondents.

PANDEY, J.:— This order shall dispose of Miscellaneous Petition No. 357 of 1965 also. Both these petitions are directed against—

(i) Development Scheme No. 5 framed by the Jabalpur Improvement Trust (respondent 1) and sanctioned and announced by the State Government (respondent 3) under the provisions of the M. P. Town Improvement Trusts Act, 1960 (hereinafter called the Act);

(ii) sanction accorded to that Scheme by the State Government and announced by notification dated January 18, 1965, issued under Section 52 (1) of the Act and further sanction given by an order dated September 14, 1965, passed under Section 70 of the Act to acquisition of the land needed for the Scheme; and

(iii) all orders passed and notices issued thereafter in regard to the Scheme, acquisition of land therefor and delivery of possession of such land.

The petitioners have further asked for a writ of mandamus to restrain the respondents from giving effect to the aforesaid Scheme.

2. The broad facts that gave rise to these petitions may be shortly stated. The respondent 1 framed Development Scheme No. 5 for shifting the existing wholesale grain market and Dal and Oil Mills and other like industries situated in crowded localities in the city of Jabalpur to a new site outside the thickly inhabited area, for establishing there other whole-sale and retail markets and also for development there of residential plots suitable for workers in the aforesaid markets and industries. The Scheme provides for acquisition of 59.59 acres of land out of Khasra No. 204, area 88 acres of Madhotal belonging to the petitioner, which, it is not now disputed, is situated within the limits of Municipal Corporation Jabalpur. Similarly, the Scheme provides for acquisition of 131.29 acres of land out of 161.08 acres belonging to the petitioner in the other petition, as detailed in Annexure A thereto. All this land too is situated within the limits of the Municipal Corporation Jabalpur. The notification relating to the Scheme was duly published in the M. P. Rajpatra and also in a local paper as required by Section 46 (2) of the Act. The petitioners in the two cases raised several objections which were, however, rejected and then the State Government issued the aforesaid notification under Section 52 (1) of the Act and passed the impugned order under Section 70 of the Act. Thereafter, notices were issued under Section 71 (3) of the Act requiring the petitioners to deliver possession of the lands. They raised objections

the sum of Rs. one lakh as money but an actionable claim of that value, it follows that the donor was completely excluded from it.

5. The two questions in the first of these references are therefore answered against the Revenue with costs. Counsel's fee Rs. 250.

6. The other reference raises this question: "Whether on the facts and in the circumstances of the case, the inclusion of Rs. 81,356 in the estate of the deceased was justified?" The Tribunal proceeded on the basis that to start with the assessee was treated, for purposes of income-tax, as the owner, notwithstanding the fact that the amount stood in the name of his wife in the books of the firm of which he was a partner, and that subsequently from 1946 to 1950 he himself included the sum in his wealth tax statements. In 1953 the sum of Rs. 81,356 was withdrawn from the firm and was invested in certain banks and a different firm, but in the names of his wife and son under 'either or survivor' accounts. The Tribunal on these facts was not satisfied that there was any gift at all of the sum by the deceased to his wife.

7. It is argued before us that the Tribunal's conclusion is not supported by any material. In our view, that is not correct. We start with the fact that the amount initially belonged to the deceased. Unless, therefore, facts are established which would show that there was a subsequent gift of the money to the wife, the inference must follow that the property passed on the death of the deceased. No doubt it would appear to have been taken as a ground in the appeals before the Revenue and perhaps before the Tribunal that the control and use of the money were with the deceased's wife and son. But this remains to be an assertion without any material to support it. We do not think that the fact that the money was withdrawn from the firm of which the deceased was a partner, and it was subsequently invested in the name of the wife and her son in 'either or survivor' accounts established any such control or use of the property by them or either of them. The wife's name was there before and after the withdrawal of the money from the firm and the 'either or survivor' account in her name and that of her son does not, in our opinion, advance the matter further in favour of the accountable person.

8. We, therefore, answer the question against the accountable person with costs. Counsel's fee Rs. 250.

Answer accordingly.

AIR 1970 MADRAS 337 (V 57 C 97)

SADASIVAM AND
K. N. MUDALIYAR, JJ.

T. Radhakrishna Chettiar and another, Appellants v. K. V. Muthukrishnan Chettiar and others, Respondents.

Appeal No. 585 of 1963, D/- 22-8-1969, against decree of Sub-J., Devakottai, D/- 13-11-1962.

(A) Limitation Act (1908), Sch. I, Art. 115 — Suit to recover money on personal covenant — Equitable mortgage — Mortgage deed not registered — Suit for personal decree filed after more than three years after creation of mortgage — Absence of acknowledgement or renewal of liability — Suit is barred. AIR 1929 Mad 53 (FB), Rel. on. (Para 5)

(B) Civil P. C. (1908), O. 2, R. 2 — Identity of parties necessary for application of rule under — Suit for personal decree to recover balance against one mortgagor — Dismissal of application to implead the other mortgagor — Application for personal decree against the latter mortgagor not barred by reason of dismissal of application so long as their liability remains undischarged. Case law discussed. (Para 5)

(C) Contract Act (1872), S. 43 — Enforcement of joint contracts — Decree against some only of the joint promisors — Decree remaining unsatisfied — Second suit against other joint contractors not barred. (Para 8)

Cases Referred: Chronological Paras

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|---|---|
| (1953) AIR 1953 Cal 208 (V 40) = | |
| 90 Cal LJ 123, Nityananda v. R. C. B. Cinema Ltd. | 3 |
| (1947) AIR 1947 Cal 11 (V 34) = | |
| 51 Cal WN 261, Phani Bhusan v. Rajendra Nandan | 7 |
| (1936) AIR 1936 Mad 34 (V 23) = | |
| ILR 59 Mad 188 (FB), Palaniappa Chettiar v. Narayanan Chettiar | 6 |
| (1930) AIR 1930 Rang 257 (V 17) = | |
| ILR 8 Rang 316, A. K. R. P. L. A. Chettiyar Firm v. Meher Singh | 6 |
| (1929) AIR 1929 Mad 53 (V 16) = | |
| 56 Mad LJ 10 (FB), Ratnasabapathy Chettiar v. Devasigamony Pillai | 5 |
| (1927) AIR 1927 Mad 779 (V 14) = | |
| 53 Mad LJ 489, Govindaswami Koundan v. Kandaswami Koundan | 6 |
| (1916) AIR 1916 PC 119 (V 3) = | |
| ILR 44 Cal 388, Ram Narayan Singh v. Adhindra Nath | 3 |
| (1915) AIR 1915 Mad 934 (V 2) = | |
| ILR. 39 Mad 548, Mool Chand v. Alwar Chetty | 8 |
| (1910) ILR 33 Mad 317 = | |
| 7 Mad LT 373, Ramanjulu Naidu v. Aramudu Aravamudhu Aiyangar | 8 |
| (1900) ILR 22 All 307 = | |
| 1900 All | |

DN/EN/B733/70/YPB/C

WN 73, Muhammad Askar v.
Radhe Ram Singh 7
(1844) 13 M & W 494 = 153 ER 206,
King v. Hoare 7, 8

K. S. Naidu and A. Venkatachalam, for
Appellants; K. Yamunan, for Respon-
dents.

SADASIVAM, J.:— Appeal by the plaintiffs in O.S. No. 12 of 1956 on the file of the Subordinate Judge's Court, Devakottai, against the decree and order of the Principal Subordinate Judge dismissing their I.A. No. 673 of 1960 for a personal decree against the second defendant-respondent. The suit was filed, on an equitable mortgage evidenced by a promissory note Ex. A-7 dated 7-2-1950 executed by the first defendant E. N. G. Muthukrishnan Chettiar and renewed by another promissory note Ex. A-8 dated 3-2-1953 three years later by the first defendant and deposit of title deeds of properties belonging to the second respondent K. M. Muthukrishnan Chettiar. There was a usual preliminary decree on 26-2-1957 and a final decree on 11-3-1958. The appellants filed I.A. No. 778 of 1959, on the file of the lower Court, for a personal decree against the first defendant alone to recover the balance of Rs. 10,339-08 with interest from 30-3-1959, the date of the sale of the hypotheca. They pleaded that by inadvertence they failed to implead the second defendant-respondent and sought to implead him as respondent in the said application. But it was dismissed as they subsequently filed the present I.A. No. 673 of 1960, on the file of the Sub-Court, Devakottai. The said Court found that the second defendant-respondent was not personally liable for the debt advanced by the appellants to the first defendant and that the present application was barred by reason of the prior application for personal decree made against the first defendant alone.

2. The basis of the claim against the defendants in the plaint is that they were doing business as dealers and brokers in stocks and shares under the name and style of "Central Brokers" at Madras and that they took loan for the said business, though the promissory note was executed by the first defendant alone. But the second defendant retired from the said partnership business on 1-11-1947 and thereafter his son and son-in-law continued as partners of the said firm "Central Brokers" with the first defendant. Though the second defendant has pleaded the above fact in his written statement, the appellants did not dispute the same in their reply statement, but merely pleaded that with some ulterior motives and to suit his purpose, the second defendant-respondent purported to remove his name and introduced his son-in-law as partners, but continued to have control and

management as a partner. It should be noted that the suit is not against the partnership firm of Central Brokers and the defendants have not been sued as partners of the firm, "Central Brokers".

3. The promissory note Ex. A-7 dated 7-2-1950 was executed by the first defendant E. N. G. Muthukrishnan Chettiar alone and it was renewed by him alone under Ex. A-8 dated 3-2-1953. It is, however, urged that the second defendant-respondent made himself jointly and severally liable by reason of the letters Exs. A-1 to 3 sent prior to the promissory note Ex. A-7. But a reading of the letters clearly negatives the contention of the appellants. In fact, these letters really form the basis on which the first defendant executed the promissory note Ex. A-7. In the letter Ex. A-1 dated 2-2-1950, the second defendant-respondent has stated that a sum of Rs. 10,000 to Rs. 12,000 was urgently required for the firm of Central Brokers and that the first defendant would execute a promissory note for the loan and that he would arrange for a collateral security. Thus it is significant to note that the second defendant-respondent has not undertaken any liability for the loan which he arranged for the first defendant for the business of the firm of Central Brokers. The two subsequent letters, Exs. A-2 and A-31, merely reiterate the request made in Ex. A-1. Thus the second defendant-respondent has not undertaken any personal liability for the loan advanced by the appellants to the first defendant who was running the firm of Central Brokers along with the son and son-in-law of the second defendant.

4. Mr. K. S. Naidu, the learned Advocate for the appellants, relied on Sec. 96 of the Transfer of Property Act in support of his contention that the Act recognises such mortgages as equivalent to simple mortgages. Section 96 of the Act is as follows:—

"The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds."

He referred to Mr. Bahin v. Ma. E Sain, AIR 1936 Rang 400 where it was held that a mortgage by deposit of title deeds has all the incidents of a simple mortgage. He also relied on the decision in Nityananda v. R. C. B. Cinema Ltd., AIR 1953 Cal 208 where it was held that by the combined operation of Section 96 and Section 58(b) of the Transfer of Property Act, an equitable mortgage must be held to be a mortgage where the mortgagor binds himself personally to pay the mortgage-money. The suit in that case was laid on a promissory note executed by the defendant company and the plea put forward by the defendant company was that as it had deposited the documents of title

and created an equitable mortgage, the suit should be stayed under Section 68(2) of the Transfer of Property Act and the plaintiff directed to proceed against the security in the first instance. It has been observed in that decision that even a momentary reflection will show that this submission is pointless because the Court cannot determine the validity of the mortgage in the suit in which the mortgage is not in issue. It has been pointed out in the decision that the plaintiff in the suit was suing only as the payee of the promissory note which created a personal liability, independent of that implied in the equitable mortgage. There can be no difficulty in implying personal liability if a person takes a loan and deposits title deeds to secure the loan as the said facts will satisfy the requisites of a mortgage by deposit of title deeds. It is needless to point out that the requisites of an equitable mortgage are: (1) a debt; (2) deposit of title deeds and (3) an intention that the deed shall be security for the debt. It is true the second defendant has given the documents of title of his properties as security. In the case of a simple mortgage, the personal liability to pay may be either express, or implied, for a promise to pay arises out of the acceptance of the loan. In *Ram Narayan Singh v. Adhindra Nath*, ILR 44 Cal 388 = (AIR 1914 PC 119), Lord Parker gave the following brief, but adequate summary of the law:

"1. The Loan *prima facie* involves a personal liability;

2. Such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest;

3. The nature and terms of the security may negative any personal liability on the part of the borrower."

Mulla has referred to this decision in his "Transfer of Property Act," Fifth Edition, at page 382, and observed that it is a matter of construction whether the security is a simple mortgage and that for a simple mortgage there must be a personal covenant either express or implied and in the absence of such a covenant this security is generally but not necessarily a charge. The debt in this case was taken by the first defendant and the deposit of title deeds was made by the defendants. It is clear from Ex. A-1 that the second defendant-respondent did not undertake any liability for the suit loan and in fact, the contents of the letter, Ex. A-1 taken along with the promissory notes executed by the first defendant, clearly negative any personal liability on the part of the second defendant-respondent. It is true that in view of the conduct of the second defendant-respondent in sending the letters Exs. A-1 to 3 and joining in making the deposit of title deeds, he is estopped

from questioning the sale of the properties and he cannot dispute the security created by the deposit of title deeds. But there is nothing express or implied either in the terms of the letters Exs. A-1 to 3, or the conduct of the second defendant-respondent, to imply personal liability on his part for the suit loan. The first defendant alone executed the promissory note and even apart from the promissory note, he had taken a loan for his business and the deposit of title deeds would imply a promise on his part to pay the debt. But no such contention can be put forward as regards the second defendant-respondent.

5. We shall, however, proceed to consider the case on the footing that by reason of the second defendant-respondent joining with the first defendant in creating an equitable mortgage, he impliedly undertook liability for the debt. The first defendant renewed his liability under the promissory note Ex. A-7 by executing another promissory note Ex. A-8 within a period of three years and the suit was filed within three years thereafter. But there is no such acknowledgment of liability by the second defendant-respondent and the suit has been filed more than three years after the execution of the letters Exs. A-1 to 3 and the creation of the equitable mortgage by deposit of title deeds. The suit claim is governed by the Limitation Act 9 of 1908. In the Full Bench decision in *Ratnasabapathy Chettiar v. Devasigamony Pillai*, 56 Mad LJ 10 = (AIR 1929 Mad 53) it has been held that where, upon a sale of the mortgaged property under a mortgage decree obtained in a suit on a registered mortgage deed, there is a deficiency, the period of limitation to recover the same under a personal covenant in the said deed is six years under Art. 116 of the Limitation Act of 1908. It is clear from the decision that all the High Courts have held that Art. 116 of the Limitation Act governs suits to recover money on a personal covenant in a registered deed of mortgage. Article 115 of the Limitation Act of 1908 will apply to a similar suit where the instrument evidencing the covenant is not registered. We need not concern ourselves in this appeal with the corresponding Art. 55 of the Limitation Act, 36 of 1963, which does not recognise any such distinction between contracts in writing registered and other contracts, and provides a uniform period of limitation in all cases. The equitable mortgage in the present suit is not evidenced by any registered document and an action on the personal covenant will be governed by Art. 115 of the Limitation Act of 1908. This is clearly stated in the following passage at p. 1129 of *Upendra Nath Mitra's Law of Limitation and Prescription*, Seventh Edition, Volume II:—

"The question whether the applicant is entitled to a personal decree, the applica-

tion itself being within time would depend upon among other things whether the claim for the personal remedy was barred at the date of the institution of the suit. If the suit is brought within six years (where the mortgage bond is registered) or within three years where the mortgage of less than one hundred rupees is effected by delivery of the property or otherwise, or where the mortgage is by deposit of title deeds alone, a personal decree may be passed for the balance on the basis of the covenant to pay, if it exists, though the application itself is made more than six years after the due date of payment."

Thus even assuming that by the very act of the second defendant-respondent entering into the equitable mortgage along with the first defendant, there is an implied covenant to pay the debt, the claim against the second defendant-respondent is clearly barred as the suit was filed more than three years after the creation of the equitable mortgage and there was no acknowledgement or renewal of liability by the second defendant-respondent, unlike in the case of the first defendant. The learned Principal Subordinate Judge has erred in stating that "there is no question of any bar of limitation so far as the personal remedy is concerned as the suit was filed within six years from the date of the transaction." But his conclusion that the second defendant-respondent is not personally liable to pay the balance of the decree amount is correct.

6. The learned Principal Subordinate Judge has also dismissed the application of the appellants on the ground that the petitioners (appellants) cannot file a separate application one against the first defendant for a personal decree in I. A. No. 778 of 1959, and another application against the second defendant-respondent, after an unsuccessful attempt to implead the second defendant-respondent in the earlier application against the first defendant, by restoring it to file. It is true the plaint in the suit contains a prayer for a personal decree. But, as held in *Govindaswami Koundan v. Kandaswami Koundan*, 53 Mad LJ 489 = (AIR 1927 Mad 779) the Court could not on account of the said circumstance be deemed to have adjudicated upon the question of the personal decree. It is pointed out in the decision that on principle it would ordinarily be impossible for a Court to make any adjudication about personal liability in the preliminary decree and the preliminary judgment on the matter and that it would depend upon whether the mortgagor paid the amount within the time allowed; if he did not, whether when the property was brought to sale, the proceeds were or were not sufficient to discharge the mortgage debt.

In the Full Bench decision in *Palaniappa Chettiar v. Narayanan Chettiar*, ILR 59

Mad 188 = (AIR 1936 Mad 34) it is pointed out that it is after ascertainment of the deficiency arising on the sale of the mortgaged properties, the Court under O. 34, R. 6, Civil P. C. takes up this portion of the plaint claim, tries the question whether the balance is legally recoverable "otherwise than out of the property sold" and passes a personal decree and that whether it is called a 'supplemental' decree or by any other name, this is the only decree on this part of the claim in the plaint. The actual decision in that case is that so long as a decree has not been passed under O. 34, R. 6, of the Code of Civil Procedure, it is open to the Court under O. 23, R. 3 of the Code to deal with any arrangement alleged to have been entered into between the parties in respect of the claim of the mortgagee to recover the balance due to him from the defendant otherwise than out of the property sold or to be sold under the decree for sale.

It is clear from a (this) decision that it makes no difference for this purpose whether or not liberty is reserved to the mortgagee in the preliminary or final decree for sale to make an application under O. 34, R. 6, Civil P. C. It was urged in that case that the application under O. 34, R. 6, Civil P. C. must be deemed to be one in execution in so far as it is made in pursuance of liberty reserved in the preliminary decree. But it has been pointed out in the decision that this contention rests on a misapprehension as to the effect of the liberty clause in the preliminary decree. In *A. K. R. P. L. A. Chettiyar Firm v. Meher Singh*, AIR 1930 Rang 257 it has been held that an application for a personal decree against a mortgagor where the sale proceeds of the mortgaged properties are insufficient to satisfy the decree is not an application in execution proceedings, but is an application for a decree and that where such application is dismissed for default, a fresh application is barred under O. 9, R. 9, Civil P. C. and that the proper remedy of the decree-holder is to set aside the order dismissing the application for default.

7. Mr. Kesava Iyengar tried to support the finding of the lower Court that the present application against the second defendant-respondent for the passing of a personal decree is barred by reason of the earlier application against the first defendant, both on principles of *res judicata*, and the provisions contained in O. 2, R. 2, Civil P. C. Order 2, Rule 2, Civil P. C. is hardly relevant to the present case as it relates to splitting up of the cause of action. In *Phani Bhusan v. Rajendra Nandan*, AIR 1947 Cal 11, it is pointed out that the object of O. 2, R. 2, Civil P. C. is to prevent the splitting up of the same cause of action and to prevent the same person or persons being vexed twice and

that to make the rule applicable two things are essential; first that the previous and the subsequent suits must arise out of the same cause of action and secondly they must be between the same parties. The decision in that case elucidates principles which are applicable to the present case. The plaintiff's predecessor in that case had brought a suit against the first defendant claiming rent due for one year, although at the date of the suit the rent for the two subsequent years had already become due.

Subsequently, he filed another suit for the recovery of rent for the two subsequent years not only against the first defendant, but also against the second defendant, who was also jointly liable for that payment of the rent. It was held in the decision that so far as the first defendant was concerned, O. 2, R. 2, Civil P. C. operated as a complete bar to the subsequent suit, but so far as the second defendant was concerned, Order 2, Rule 2 was not directly applicable. It was held that, assuming that the liability of the two defendants was a joint and not a joint and several liability, the principle in *King v. Hoare*, (1844) 13 M & W 494 could not be invoked having regard to the provisions of Section 43 of the Contract Act. The conflicting decisions of the several High Courts have been discussed in this decision.

A reference is made to the leading decision in *Muhammad Askar v. Radhe Ram Singh*, (1900) ILR 22 All 307 where *Strachey, C. J.*, has held that the effect of Section 43 of the Indian Contract Act, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in (1844) 13 M & W 494 is no longer applicable to cases arising in India. *Pollock and Mulla* in their commentary on the Indian Contract Act, Eighth Edition, at page 310, have referred to the conflicting views and observed that they think it the better opinion "that the enactment (Section 43 of the Contract Act) should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in India, to be held a bar to a subsequent action against the other promisor or promisors." It has been observed in the decision in *Phani Bhusan v. Rajendra Nandan*, AIR 1947 Cal 11, at p. 13 that in view of the conflict of decisions the matter can be solved so far as the Calcutta High Court is concerned only by the pronouncement of a larger Bench.

Even in *Pollock and Mulla Indian Contract*, Eighth Edition, at page 311, it is stated that the reasoning of *Strachey C. J.*, seems to be conclusive; but until it has been adopted generally by the other High Courts, or confirmed by the Supreme

Court, the point must be regarded as open. But it is pointed out in the same context that the Madras High Court, in later cases, seems inclined to adopt the opinion expressed in the first paragraph of the commentary of the section, namely, that notwithstanding the English authorities, founded on a different substantive rule, the judgment obtained against some or one of the joint promisors remaining unsatisfied, ought not, in India, to be held a bar to a subsequent action against the other promisor or promisors.

8. It is sufficient to refer to some of the latter decisions of our own High Court, as to whether the rule laid down in (1844) 13 M & W 494 could be invoked in India having regard to the provisions of S. 43 of the Contract Act. In *Ramanjulu Naidu v. Aravamudhu Aiyangar*, (1910) ILR 33 Mad 317, it has been held that the omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under Section 43 of the Indian Contract Act [Civil Procedure Code Ed. 2] to a subsequent suit against another joint promisor for the portion so omitted, and that the subsequent suit will not be barred by the rule laid down in (1844) 13 M & W 494, as that rule is based on the merger of the cause of action in the judgment and there can be no such merger when the cause of action has not been sued upon. The earlier decisions of this Court relied on by the learned Advocate for the respondent have all been referred to and considered in this decision. In *Mool Chand v. Alwar Chetty*, ILR 39 Mad 548 = (AIR 1915 Mad 934) it has been held that the rule of English law should not be applied in India, as it is based on the substantive rule applicable to contractual joint-debtors, which is different under Section 44 of the Indian Contract Act, and is not in consonance with justice, equity and good conscience. Section 43 of the Indian Contract Act makes the liability on all contracts joint and several, and enables the promisee to sue one or more of the several joint promisors as he chooses, and excludes the right of any of them to be sued along with his co-promisors.

A decree obtained against some only of the joint promisors and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors. It follows that the present application I. A. No. 673 of 1960 for a personal decree against the second defendant-respondent cannot be said to be barred by reason of the prior application, I. A. No. 778 of 1959, against the first defendant for the passing of personal decree, so long as the liability of the defendants remains undischarged.

9. For the foregoing reasons, we confirm the decree and order of the lower Court, though on different grounds, and

having regard to the fact that both the parties failed in some of their contentions we direct the parties to bear their respective costs.

Appeal dismissed.

AIR 1970 MADRAS 342 (V 57 C 98)

K. VEERASWAMI, C. J. AND
GOKULAKRISHNAN, J.

Union of India, Represented by the Secretary to Govt., Ministry of Food and Agriculture, Central Secretariat, New Delhi, Appellant v. M/s. Vijaya Agencies (Cuddapah) Madras, Respondent.

O. S. Appeal No. 16 of 1969, D/- 30-7-1969, against judgment and decree of High Court in Appln. No. 405 of 1966, D/- 11-7-1966.

Arbitration Act (1940), S. 2 (a) — Arbitration agreement — Construction — Agreement with arbitration clause between Union and contractors — Failure of contractors causing Union to incur demurrage — Arbitration clause is comprehensive enough to include such dispute — Decision of arbitrator will prevail as final — Finality would be subject to clause of arbitration. (Para 3)

Standing Counsel, for Appellant; C. Rangaswami Iyengar and V. V. Raghava, for Respondent.

VEERASWAMI, C. J.:— The dispute has arisen between the appellant, which is the Union Government, and the respondent whether there was failure to carry out the work with a view to avoiding incurring of demurrage on the part of the former. The parties differed on the question whether the dispute is covered by the arbitration clause in the agreement which was for providing transport for goods of the Union from the Madras Port to Avadi. While on the one hand the Union relied on Cl. 5(h) of the agreement to contend that it intended to prevent any difference arising under that clause from being referred to arbitration, the respondent maintained that even a difference within the ambit of Cl. 5(h) would be within the purview of Cl. 17, which provides for arbitration. Kunhamed Kutti, J. held that the arbitration clause applied and directed the Union Government to make a reference of the dispute for arbitration. The appeal arises from that order.

2. We are of opinion that the order of the learned Judge is correct. Clause 17, in so far as it is relevant for the present purpose, reads:

"17. Arbitration: All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever shall be referred to the sole arbitration of any person appointed by the"

Clause 5(h) taking only the relevant words, reads:—

"Liability of contractors for losses etc. suffered by Government: The contractors shall be liable for all costs, charges, and expenses suffered or incurred by the Government due to their failure to carry out the work with a view to avoiding incurrence of demurrage..... The decision of the Regional Director (Food) regarding such failure of the contractors and their liability for the losses, etc., suffered by Government will be final and binding on the contractors."

For the Union it is said that the effect of Cl. 5(h) is to make the decision of the Regional Director (food) final and binding as between the parties and that this meant that there could be no question of further arbitration of the dispute. Otherwise, according to the Union, the word 'final' in Cl. 5(h) will have no meaning attached to it whatsoever. We are told that the two Cls. 5(h) and 17 should be read together and each given effect to in the light of each other, and, if that were done, finality to the decision of the Regional Director (Food) being the intention of the parties, it should be kept in view in delimiting the scope of arbitration under Cl. 17.

3. We are unable to accept this interpretation of the arbitration clause. But for Cl. 5(h) there can be no doubt whatever that the arbitration clause is so comprehensive that it could include the dispute relating to the alleged failure on the part of the respondent leading to the Union incurring demurrage. The words "arising out of or in any way touching or concerning this agreement" are wide enough to comprehend such a dispute. Equally, it is clear that the dispute is squarely within the ambit of Cl. 5(h), which means, it is open to the Regional Director (Food) to decide the difference between the two parties. But the point is whether such a decision should prevail as final and prevent the operation of the arbitration clause over the dispute. It seems to us that this very question will in itself be within the ambit of the arbitration clause. For, it arises out of, touches and is concerned with the agreement. Apart from that, Cl. 17 is so comprehensive, and any dispute arising out of, touching or concerning the agreement would be referable to arbitration and does not except within its scope any dispute which would be comprehended by Cl. 5(h).

Notwithstanding the finality attaching to the decision of the Regional Director (Food), as between the parties, under Cl. 5(h), that finality, when the two clauses are read together, would be subject to the clause of arbitration. This is because Cl. 17 mentions the whole agreement and Cl. 5(h) has not been excluded from it. It would, therefore, come to this, that, the two clauses read together, the

finality in Cl. 5(h) would have effect only in the absence of an arbitration and will not have the force of preventing the operation of the arbitration clause over the dispute. If it is intended that any dispute, which is within the purview of Cl. 5(h), is to be excluded from the operation of Cl. 17 of the agreement, specific exclusion of such dispute should have been made in Cl. 17.

4. For the Union Government our attention has been invited to the following observations from Russell on Arbitration, 17th Edn:—

"It might seem, therefore, that if the agreement between the parties is in effect an agreement to prevent disputes from arising and not an agreement as to how they are to be settled, then it is neither an agreement to refer to arbitration nor a submission to arbitration, and it is not within the Act."

We fail to see how this observation is of any assistance to the Union. If Cl. 5(h) has remained alone without Cl. 17, phrased as it is, the observation from Russell would be apposite. But here Cl. 17 does not save or except the dispute within Cl. 5(h) and the result is the arbitration clause will have full force in respect of the dispute.

5. The appeal is dismissed with costs. The appellant will have two months' time from to date to appoint an arbitrator and make the reference of the dispute in question.

Appeal dismissed.

AIR 1970 MADRAS 343 (V 57 C 99)

KRISHNASWAMY REDDY, J.

Palaniswami Gounder and others, Petitioners v. State of Madras Represented by Taluk Supply Officer, Karur, Respondent.

Criminal Revn. Cases Nos. 373 etc. of 1967, D/- 30-12-1969, against judgment of S. Court, Tiruchirapalli in C. A. No. 14 of 1967.

(A) Madras Paddy and Rice (Movement Control) Order (1966) — Validity — Order is invalid because before passing it the State Government had not formed an opinion that it was necessary and expedient for purposes mentioned in S. 3(1), Essential Commodities Act. W. P. Nos. 1274 of 1968 and 2869 of 1967 (Mad), Foll. (Para 8)

(B) Madras Paddy and Rice Dealers (Licensing and Regulation) Order (1966) — Validity — Order is invalid since State Government had not formed opinion that it was necessary and expedient for purposes mentioned in S. 3(1), Essential Commodities Act. W. P. Nos. 1274 of 1968 and 2869 of 1967 (Mad), Foll. (Para 9)

Cases Referred: Chronological Paras
(1969) 1969-2 Mad LJ 324 = ILR
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v. Vanamamalai Mutt 5, 7
(1967) W. P. Nos. 1274 of 1968 and
2869 of 1967 (Mad) 7, 9

S. Sethuratnam, T. Somasundaram, B. Soundarapandian, Fyzee Mohmood, V. C. Palaniswami, G. Gopalaswami, A. Nagara-jan, T. S. Arunachalam, S. R. Srinivasan, V. P. Raman, K. A. Panchapakesan, N. Chandrasekaran, M. Srinivasagopalan, S. Ramasubramaniam, B. Sriramulu, T. N. Anandanayaki, R. Santanam, K. N. Bala-subramaniam, N. Sivashanmugham, K. Santhanam, C. K. Venkatanarasimhan, C. Chinnaswami, V. Narayanaswami, R. S. Venkatachari, S. Ramalingam, K. Raman, C. K. Vijayaraghavan, E. S. Govindan and M. Srinivasan, for Petitioners; Asst. Public Prosecutor, for State.

ORDER:— Batch I:— In all these petitions, a common point has been raised that the prosecution under Cl. 3 of the Madras Paddy and Rice (Movement Control) Order 1966 (hereinafter called 'the Order') is unsustainable for the reason that the said order is invalid as the condition requisite for passing such an order has not been conformed.

2. The Madras Paddy and Rice (Movement Control) Order 1966 the Madras Paddy and Rice Dealers (Licensing and Regulation) Order, 1966 and the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order, 1966, were all passed by the State of Madras on 28th June 1966. These orders were made in exercise of the powers conferred by Section 3 of the Essential Commodities Act 1955 (Central Act 10 of 1955) read with the Government of India, Ministry of Food, Agriculture, Community Development and Co-operation (Department of Food) Notification G. S. R. 906 dated 9th June 1966.

3. Section 3(1) of the Essential Commodities Act (hereinafter called the 'Act') reads thus:—

"If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein."
Section 5 of the same Act runs thus:

"The Central Government may, by notified order direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by—

(a) such officer or authority subordinate to the Central Government or (b) such State Government or such officer or autho-

rity subordinate to the State Government, as may be specified in the direction."

By virtue of Section 5 of the Act, the Central Government in Notification G. S. R. 906 dated 9-6-1966, published in the Extraordinary issue of the Gazette of India, delegated its power to the State Government exercisable under Section 3 of the Act.

3-A. It is contended by the learned counsel for the petitioners in these cases that the impugned order is not valid as it is not proved that before the order was passed, the State Government as required under Section 3 of the Act had formed the opinion that it was necessary or expedient to pass such an order for the purposes mentioned therein. The preamble of the order does not show that such opinion was formed by the State Government before passing the order. Nor was any material placed before this Court that such opinion was formed by the State Government. But the Secretary to Government, Food Department, Government of Madras, filed an affidavit on the 12th December 1969, stating that he consulted the Food Minister, had a discussion over the matter and on his specific instructions, the order in question came to be passed and issued. It is not the case of the State before me that it was not necessary to form an opinion provided under Section 3(1) of the Act. - But it is stated that such opinion was formed in consultation with the Minister concerned.

4. The question now is, in the absence of a recital in the preamble itself that the State Government had formed an opinion that it was necessary and expedient for the purposes mentioned therein and in the absence of placing any material before the Court that such opinion was formed, whether the affidavit filed by the Secretary at this late stage without any other material to corroborate the averments made in the affidavit, specially when controverted by the counsel for the petitioners, can be accepted.

5. We have already noted that besides the impugned order, the other two orders, namely, the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1966 and the Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1966, were passed on 28th June 1966. On an earlier occasion, the validity of the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1966 was challenged on several grounds, one of the grounds being that the State Government before passing that order did not form an opinion that it was necessary or expedient to pass the said order. Kailasam, J. who heard the petition, held that the State Government had not complied with the provisions of Section 3(1) of the Act before issuing the said order. On an appeal filed against that order, the

Division Bench consisting of Anantaramayan, C. J. and Natesan, J. agreed with Kailasam, J. on this point and held that there was no material to show that the State Government complied with the requirements of Section 3 (1) of the Act. It may be relevant to note the following observations made by the Division Bench in State of Madras v. Vanamamalai Mutt, (1969) 2 Mad LJ 324 at p. 351:

"The objection taken for the respondent is not a mere technical one. Drastic powers could be taken by the State and its enforcement entrusted to a whole hierarchy of officials. The Government has to exercise its mind and consider whether the situation demanded the assumption of such powers, and the expediency of the course. These are matters to be determined at the highest level of the Government to its subjective satisfaction. Matters of policy and expediency are executive functions, and if the opinion had not been formed at the relevant time the fact that later on the State Government stands by the order is neither here nor there. The State Government is here acting as delegate of the Central Government and of the Parliament which permitted the delegation, the pre-condition for its exercise of the delegated power being the formation of opinion as to the necessity or expediency for the order. In the absence of such an opinion, the Government has no power to issue the order.

Having regard to the importance of the matter and the fact that the order is for regulating and providing for equitable distribution of paddy and rice, despite objection by counsel for the respondents, we invited the learned Advocate General to satisfy us even though it was the appellants' case that the Government had formed an opinion before the issue of the order in question. To facilitate the production of the relevant material, we also adjourned the hearing. But the Advocate General could not satisfy us that the Government was at the relevant point of time satisfied about the necessity or expediency of the order. The Advocate General placed before us certain files relating to the passing of the order in question and frankly stated that it does not appear that the matter went up to the stage of consultation at the ministerial level before passing of the impugned order. We regret to notice that a matter of such considerable importance affecting the rights and liberties of the people does not appear to have been considered by any Minister. As we have stated earlier, there was current then, the Madras Paddy and Rice (Declaration and Requisitioning of Stock) Order 1964, issued under Rule 125 of the Defence of India Rules. As a routine matter in supersession of that order, the present order under the Essential Commodities

Act has been issued. From the notings on the files, produced, it appears to have been thought sufficient if orders under the Defence of India Rules were re-issued under the Essential Commodities Act, utilising the occasion for incorporating whatever changes were considered necessary."

6. It is significant to note that either before Kailasam, J. or before the Division Bench, no affidavit has been filed similar to the one filed before me stating that only after oral consultation with the Minister concerned the order was passed. I emphasise this fact for the reason that, as already noted, the impugned order in these petitions has been passed along with two other orders, one of which was the subject-matter of the decision of the Division Bench. If oral consultation was a fact, there is absolutely no reason for the Secretary concerned for not having filed an affidavit about the alleged consultation. On the other hand, we observed in the observation made by the Division Bench that the Advocate General placed before them certain files relating to the passing of the order in question and frankly stated that it did not appear that the matter went up to the stage of consultation at the ministerial level before passing of the impugned order. It is not the case of the prosecution that there were different files in respect of passing of the three orders. No such material was placed before me.

7. Later, the validity of Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1966 was questioned in W. P. Nos. 1274 of 1968 and 2869 of 1967 (Mad) subsequent to the decision in 1969-2 Mad LJ 324 of the Division Bench, D/- 23-10-1967. In those petitions the Secretary to Government, Food Department, filed an affidavit stating that the impugned order was passed after carefully going through all the formalities, prescribed therefor and before issue of such order, he (the Secretary) contacted the then Food Minister, had a discussion over the matter and on his specific oral instructions, the order in question came to be passed and issued. The same secretary filed the present affidavit which is the exact reproduction of the averments made in the earlier affidavit. Kailasam, J. held that in the absence of any corroborative material in the file and the fact that an affidavit was not filed on an earlier occasion when another order was the subject-matter before himself and later before the Division Bench, he was not persuaded to accept the statement made by the Secretary, and rejected it. The learned Judge ultimately held that that order was invalid. I respectfully agree with the observation of Kailasam, J. in respect of the affidavit filed by the Secretary to Government, Food Department.

8. In the affidavit filed before me, we do not have even the minimum details of the alleged oral discussion between the Secretary and the Food Minister, such as, the date and the time of discussion. The date of discussion may be relevant especially when it is not supported by any document, for the opposite side to know whether such a discussion could have taken place on the alleged date. It may be open to the opposite side, if certain date is given, to contend that the concerned Minister was on camp or that he would not have been available on the alleged date and time. I, therefore, hold that it is not established that before passing the impugned order, the State Government formed an opinion that it was necessary and expedient to pass such an order for the purposes mentioned in Section 3(1) of the Act. The impugned order is invalid. The convictions and sentences of the petitioners in all these cases are set aside. The pending proceedings in certain cases are set quashed. The fines, if paid, will be returned to the respective petitioners. The orders of confiscation in these cases are set aside. The lorries concerned in CrI. R. C. 1234 and 1441 of 1967 and 110, 116 and 392 of 1968 will be returned to the respective petitioners. The sale proceeds of the paddy or rice as the case may be, would be returned to those persons who are entitled to them. On the applications filed by the parties, the lower Court will go into the question of ownership of the paddy or rice as the case may be and after due enquiry shall return the same to the persons entitled to them. The properties concerned in CrI. R. C. 666 and 667 of 1968 will be disposed of by the lower Court after enquiry. The revision petitions are allowed.

9. Batch II. In all these petitions the petitioners were convicted under Cl. 3 of the Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1966 read with Section 7(1) (a) (ii) of the Essential Commodities Act, 1955. For the reasons given by me in the order relating to the previous batch, I hold that this order is also invalid. No affidavit has been filed by the Secretary to Government, Food Department, similar to the one filed in the previous batch. Kailasam, J. in W. P. Nos. 1274 of 1968 & 2869 of 1967 (Mad) held that the impugned order is invalid. I respectfully agree with him. The convictions and sentences of the petitioners in these cases are set aside the fines, if paid, will be refunded to the respective petitioners. The orders of confiscation in these cases are set aside. The sale proceeds of the paddy or rice as the case may be would be returned to those persons who are entitled to them. On the applications filed by the parties, the lower Court will go into the question of ownership of the paddy or rice as the case may

be and after due enquiry, shall return the same to the persons entitled to them.

10. The revision petitions are allowed.
Revision allowed.

AIR 1970 MADRAS 346 (V 57 C 100)
RAMAPRASADA RAO AND
RAMANUJAM, JJ.

M/s. N. Muthiah Achary and Sons, Petitioner v. State of Madras, Respondent.

Tax Case No. 95 of 1966, D/- 12-11-1969.

Sales Tax — Tamil Nadu General Sales Tax Act (1 of 1959), S. 2 (n) — Sale — Contract for providing and fixing doors and window frames in accordance with specification — Contractor undertaking to supply materials and to provide the labour required for execution of the totality of work — Contractor further agreeing to receive a consolidated sum as consideration therefor — Contract is one and indivisible — Contract is not one for sale of materials but essentially a contract for work and labour — Amount of consideration cannot be assessed to tax. AIR 1965 Raj 234 & AIR 1969 SC 1245 & AIR 1967 Raj 50, Rel. on. (Paras 3, 4, 6)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 1245 (V 56) =

(1969) 24 STC 349, State of Rajasthan v. Man Industrial Corporation

(1967) AIR 1967 Raj 50 (V 54) =

(1967) 20 STC 551, Nenuram v. State of Rajasthan

(1965) AIR 1965 Raj 234 (V 52) =

(1965) 17 STC 152, Man Industrial Corporation Ltd. v. State

(1945) Appeal No. 38 of 1945 (Mad)

1, 6

N. Srinivasan, for Petitioner; K. Venkataswami, First Asst. Govt. Pleader, for Respondent.

RAMAPRASADA RAO, J.: This tax case is directed against the order of the Madras Sales Tax Appellate Tribunal in T. A. 103 of 1963. The assessment relates to the year 1960-61. The petitioners who are contractors and dealers, submitted a quotation to Messrs. Gannon Dunkerley and Co. Madras, Pvt. Ltd., to provide and fix doors and window frames for certain quarters to be constructed by the aforesaid company. There is no written contract evidencing the bargain between the parties. While quoting for the works, the assessee sent up to the company a memo which reads as follows—

"Providing and fixing best Indian teak wood frames only for doors, windows, ventilators, etc., including the cost of timber, labour charges, delivery charges

etc., complete, but inclusive of the cost of clamps."

This quotation was accepted by M/s. Gannon Dunkerley & Co. which directed the assessee to take details from their site representative and put the work on hand. The assessee having undertaken the work, completed the same by providing doors and windows and fixing the same in the quarters pointed out by the company, and also submitted a bill which is noted by the Tribunal in their order. The bill which is obviously a simple one, whilst reiterating the bargain between the parties as one for providing and fixing doors and windows in the quarters, mentioned the specification of the work done, and also the composite cost of the materials, work done and labour charges. The turnover in question is admitted as relating to the said transaction between the assessee and the company. The Tribunal, after noting the essential facts as cited by us, came to the conclusion in the beginning that that was a works contract. We may state that the assessing authority was of the view that the disputed turnover was relateable to sale of materials and even so the Appellate Assistant Commissioner was of the view that the essence of the contract was only for the sale of goods and not for carrying out any work alone.

We have already noticed that, the Tribunal in the initial stages was of the view that the transaction between the assessee and the company was a works contract. However, they felt bound, though they were not inclined to do so, by a decision of this Court in App. 38 of 1945 (Mad) which was rendered in 1947. The Tribunal says that the above decision of this Court cannot be a basis for the assessment in this case. The evidence let in before the Tribunal is to the effect that the work involved in the instant case was over after the filling of the gaps and after the doors and windows were placed in the places with the cement and brick etc. Following this evidence, the Tribunal observes—

"This statement conclusively shows that even during the assessment year no fixing was done by the appellants."

How the Tribunal has arrived at this conclusion is not clear. But, basing their decision on the ratio of this Court in App. No. 38 of 1945 (Mad) the Tribunal came to the conclusion that the contract entered into between the petitioners and their customers is one for the supply of the wooden article at site and not a works contract involving any elaborate work in connection with the fixing of the frames. There were other aspects also noted by the Tribunal; but they were not predominantly in respect of the contract between the petitioners and the company. As against the decision of the Tribunal,

the present tax revision case has been filed.

2. Mr. Srinivasan, learned counsel for the petitioners urges that the contract in question has to be viewed as a whole and should not be dissected to suit the purpose of the Revenue and, if this is understood, the contract is for work and labour, though the contract also involves the supply of materials by the petitioners to the company. The learned counsel has taken us through the contract and stated that the decision, hesitantly relied upon by the Tribunal, is no longer good law in view of the subsequent pronouncements made by this Court and the Supreme Court in similar circumstances and whilst considering other allied matters.

3. It is now well settled that, when a contract is for fabricating goods of a specification and also for the purpose of affixing the same in immoveable property and the contractor simultaneously obliges himself to supply the material for such fabrication and provides the labour required for the execution of the totality of the work and further agrees to receive a consolidated sum as consideration therefor, the contract is one and indivisible. In the instant case, from the nature of things, it cannot be predicated that the assessee intended to sell the material used in the bargain. The term 'sale' has a juristic concept inhered in it. The three essential elements constituting a sale, as is understood both in fiscal enactments and common law, are (1) that there should be an agreement express or implied between the parties to transfer title in goods; (2) that such a transfer should be for valuable consideration, and (3) that as a result of the bargain the title in the goods should pass.

4. When in a composite contract as the one in the instant case, title in the material does not pass no sooner they are fabricated but only after they are fixed to immoveable property, then one of the essential ingredients of sale is absent. Again, in the light of the facts noticed by us, the contract in question is an undissectable contract. The oneness of the contract is maintained throughout and severability of the same in any form was never intended or possible. The assessee had to fabricate the materials in accordance with the specifications. They had to fix them at the places where they were directed to affix. They had no option whatsoever to fabricate and affix the materials at their choice and volition. This contiguous process and also the test deployed for effectuating the bargain between the parties indicate that the contract is an indivisible one and it is essentially a contract for work and labour and not a contract for sale of the materials. Again, the invoice relied on by the

assessee provides ample justification for our above conclusion. The cost of both the materials and also labour involved therein has been charged on a consolidated basis and such composite inclusion of the consideration for the work is indicative of the fact that the contract is one and the consideration is for the totality of the undertaking.

5. The literature on the subject has flowed ever since 1947. But it is unnecessary for us to note the catena of decisions on the subject excepting to refer to a few of them. In *Man Industrial Corporation Ltd. v. The State*, (1966) 17 STC 152 = (AIR 1965 Raj 234) the Court was interpreting a contract, whereunder the assessee undertook to fabricate steel doors, windows, sashes and works of allied nature and fix them according to the directions of the Government of India which was the contractee in that case. The question was whether the assessee was liable to pay sales tax on the amount received by the company under the contract. We may incidentally state that the amount paid under the contract was a consolidated price. The learned Judges, after noticing the various authorities on the subject, came to the conclusion that, as there was no transfer of immoveable property from one person to another for consideration and as the contract in question was incapable of being broken up and dealt with in component parts, the contract was an indivisible contract of work and not of sale, and that the assessee was, therefore, not liable to sales-tax. This was approved by the Supreme Court in *State of Rajasthan v. Man Industrial Corporation*, (1969) 24 STC 349 = (AIR 1969 SC 1245). In that case, Shah, J. speaking for the court observed—

"The contract undertaken by the respondent was to prepare the window-leaves according to the specifications and to fix them to the building. There were not two contracts one of sale and another of service. 'Fixing' the windows to the building was also not incidental or subsidiary to the sale, but was an essential term of the contract. The window-leaves did not pass to the Union of India under the terms of the contract as window-leaves. Only on the fixing of the windows as stipulated, the contract would be fully executed and the property in the windows passed on the completion of the work and not before."

In that view the Supreme Court held that the contract was for execution of the work not involving sale of goods. In the instant case also, it cannot be said that the assessee entered into two contracts, one for sale and another for service. The two aspects are inextricably mixed up in the undertaking of the assessee and one cannot be torn out from the other. Such a nexus between the two is obviously a

condition precedent to find out whether a contract is one of sale or for execution of work. In *Nenuram v. State of Rajasthan*, (1967) 20 STC 551 = (AIR 1967 Raj 50), the contract was for fabrication and affixture of wooden doors and windows. There also the court held that the contract was an indivisible works contract and the amount received by the petitioner under the contract could not be assessed to sales tax.

6. The Tribunal, in fact, found in this case that the transaction in question was a works contract. They also agreed that the decision of this court in App. No. 38 of 1945 (Mad) would not apply to the facts of this case. What ultimately prompted them to negative the relief to the assessee, we are not able to comprehend. As already stated, the contract in question being indivisible and composite should be characterised as a contract for work and labour and not a contract for sale of materials. The disputed turnover included in the assessable turnover of the assessee has, therefore, to be excluded. The tax case is allowed with costs. Counsel's fee Rs. 100.

Case allowed.

**AIR 1970 MADRAS 348 (V 57 C 101)
FULL BENCH**

**K. VEERASWAMI, C. J., NATESAN
AND GOKULAKRISHNAN, JJ.**

The Chief Controlling Revenue Authority, Board of Revenue, Madras, Petitioner v. Rm. L. Rm. L. Lakshmanan Chettiar, Respondent.

R. C. No. 2 of 1967, D/- 5-1-1970.

(A) Stamp Duty — Stamp Act (1899), Sch. I, Art. 55 — Release — Mother by deed giving up her life interest in property in favour of her son and grandson — Mother to be paid certain amount monthly — Amount to be charged on some other property

— Held, deed operated only as release and not as conveyance — That release was for consideration did not make any difference — (1895) ILR 18 Mad 233 (FB), Rel. on. (Para 2)

(B) Stamp Duty — Stamp Act (1899), Sch. I, Art. 23 — Conveyance — Mother by deed giving up her life interest in property in favour of her son and grandson — Mother to be paid monthly amount to be charged on some other property of mother — Held, deed did not operate as conveyance and hence not chargeable under Article. (Para 2)

(C) Stamp Duty — Stamp Act (1899), Sch. I, Art. 55 — Release — Characteristics — No transfer of interest or right to another who had no pre-existing right — Release in favour of person having such

right — His right or claim is enlarged or is made fuller in its content — Case law considered. (Para 3)

Cases Referred: Chronological Paras
(1968) AIR 1968 Mad 159 (V 55) =
ILR (1968) 1 Mad 651, Chief Controlling Authority v. Patel 4

(1967) AIR 1967 SC 1395 (V 54) =
1967-1 SCR 275, Kuppaswami v. Arumugha 3

(1960) AIR 1960 Mad 33 (V 47) =
ILR (1959) Mad 552, Hutchi Gowder v. Bheema Gowder 3

(1955) AIR 1955 Mad 641 (V 42) =
(1955) 2 Mad LJ 166 (FB), Board of Revenue v. Murugesu Mudaliar 3, 4

(1954) AIR 1954 Mad 5 (V 41) =
(1953) 2 Mad LJ 387, S. P. Chinnathambiar v. Rama Pandia 3

(1895) ILR 18 Mad 233 (FB), Ref. under Stamp Act, S. 46 2

G. Ramaswami, Addl. Govt. Pleader and K. Kumaraswami Pillai, Asstt. Govt. Pleader, for Petitioner; A. Sundaram Iyer, for K. Hariharan and P. Viswanathan, for Respondent.

VEERASWAMI, C. J.:— This is a reference under the Stamp Act, the question being whether a document styled as partition and release dated 15th June, 1959, should be termed as a conveyance, which should attract duty under Art. 23 in the schedule to the Stamp Act. By a deed dated 17th January, 1957, the respondent's mother to whom the property belonged absolutely settled a life interest in favour of the respondent and his minor son, reserving at the same time a similar interest in herself, and further providing that after her death and of her son, the remainder should vest absolutely in the respondent's son and his brothers. The document dated 15th June, 1959, which followed an arbitration relating to the family properties of the respondent, his father and his son and to which the respondent's mother was party, purported to divide the family properties in accordance with the terms of the award. The document also dealt with the property that was the subject-matter of the earlier document.

The operative part of it stated that the mother gave up her life interest in the property in favour of her son and grandson and instead it was agreed that she should be paid a sum of Rs. 100 per month and the payment of this sum was charged on some other property specified in the document. The document described itself as a partition and was stamped as such. But the revenue considered that it was a composite document partly serving as a partition and partly as a conveyance in so far as it related to the mother giving up her life interest in the property.

2. There is no dispute before us that as a partition the document has been cor-

rectly stamped. The only question is whether the document, in so far as it operated for the mother giving up her life interest in the property, is a conveyance. We are clearly of opinion that it is not and that part of it operated only as a release within the meaning of Art. 55 of the Schedule to the Stamp Act. That such a release is for consideration does not make any difference to its character as such. That much is clear from the Reference under the Stamp Act, S. 46, (1895) ILR 18 Mad 233(FB).

3. The essential difference between a conveyance and a release lies in the fact that, in the latter, there is no transfer of an interest or right to another, who had no pre-existing right in it to any extent. A release of a right or of a claim can only be in favour of a person who had a pre-existing right or claim and by reason of the release the latter's right or claim is enlarged or is made fuller in its content. *Kuppuswami v. Arumugha*, AIR 1967 SC 1395 quoting from *Hutchi Gowder v. Bheema Gowder*, AIR 1960 Mad 33 and *S. P. Chinnathambiar v. Chinnathambiar*, 1953-2 Mad LJ 387 = (AIR 1954 Mad 5) accepted the proposition as correct that a release can only feed title but cannot transfer title or that "renunciation must be in favour of a person, who had already title to estate, the effect of which is only to enlarge the right; renunciation does not vest in a person a title where it did not exist."

4. *Board of Revenue v. Murugesu Mudaliar*, 1955-2 Mad LJ 166 = (AIR 1955 Mad 641) (FB) was a case of one of the co-owners releasing his right in favour of the rest of the co-owners. This court held that the document relating to it was a release and not a conveyance. In expressing that view, *Rajamannar, C. J.*, who spoke for the court, observed:

"In such a case there need be no conveyance as such by one of the co-owners in favour of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part and in whole. It is not therefore necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he releases his interest. The result of such release would be the enlargement of the share of the other co-owner. There can be no release by one person in favour of another, who is not already entitled to the property as a co-owner."

5. *Chief Controlling Authority v. Patel*, AIR 1968 Mad 159 which, like *Board of Revenue v. Murugesu Mudaliar*, 1955-2 Mad LJ 166 = (AIR 1955 Mad 641 FB), was under the Stamp Act, took a similar view. Both these cases related to release of a co-owner's right in favour of the rest of the co-owners. We are here concerned with joint possession and

one of the persons entitled to joint possession giving up her right to such possession. The release, as in the case of a release in co-ownership, goes to enhance the interest of the rest of the persons entitled to joint possession.

6. The question referred to us is amply covered by authority with which we find ourselves in entire agreement. The question is, therefore, answered against the Revenue, as we hold that the document was rightly stamped and that the material part under consideration operated as a release and not as a conveyance. Costs Rs. 250.

Reference answered.

AIR 1970 MADRAS 349 (V. 57 C 102) FULL BENCH

K. VEERASWAMI, C. J., NATESAN
AND GOKULAKRISHNAN, JJ.

Chief Controlling Revenue Authority,
Board of Revenue, Madras, Petitioner v.
B. P. Eswaran (Died) and others, Respondents.

R. C. No. 2 of 1968, D/- 5-1-1970.

(A) Stamp Duty — Stamp Act (1899), S. 49(d) — Allowance for spoiled stamps — Section does not contemplate allowance where a composite instrument embodying rights and liabilities fails only in part and is good for the remaining part.

In the case of an instrument which is a composite document creating not merely a right by way of conveyance which fails for want of title but also stipulating for compensation or indemnity for loss resulting from that cause, the instrument as a whole is not absolutely void from the beginning within the meaning of S. 49(d). AIR 1922 PC 403, Dist. (Para 4)

(B) Contract Act (1872), S. 65 — Obligation to refund benefit — Conveyance with covenants for indemnity — Instrument providing liquidated damages or mode of recovery or indicating the source from which loss could be recovered — These stipulations (notwithstanding the failure of the conveyance for want of title) would continue to be valid and actionable even apart from the basis of S. 65. (Para 4)

Cases Referred: Chronological Paras
(1922) AIR 1922 PC 403 (V 9) =
50 Ind App 69, Har Nath Kuar
v. Indar Bahadur 3

Addl. Govt. Pleader, for Petitioner; K. Raju K. Lukose, for Respondents.

K. VEERASWAMI, C. J.:— This is a reference under S. 57 of the Indian Stamp Act. The question is—

"Whether on the facts and circumstances of this case the sale deed dated 7-4-1965 executed by Thirumathi Pattammal and Pushpavathi Ammal in favour of the

DN/EN/C214/70/YPB/C

respondent herein is absolutely void in law from the beginning and the refund of the value of stamps affixed on the instrument in question can be allowed?" The facts stated by the Chief Controlling Revenue Authority are that after the conveyance, it was found that the vendor had no title to the property covered by the document and, for that reason, the vendor executed another document conveying a different property. The first sale deed was valued as a conveyance. The point is whether because the vendor had no title, it could be regarded as one found to be absolutely void in law from the beginning within the meaning of Section 49(d) of the Stamp Act.

2. The sale deed contained, besides the operative part of the conveyance, covenants as to title and indemnity. It provides that if right in respect of the property conveyed is found vested in a third party, the vendor would, at his own expense, make good the consequent loss to the vendee. Sec. 3 is the charging section and it says that the instruments specified therein shall be chargeable with duty of the amount indicated in the schedule to the Act. The schedule gives the description of each instrument and the relative amount of duty payable in respect thereof. An instrument is defined by Sec. 2(14) to include every document by which any right or liability is proposed to be created, transferred, limited, extended, extinguished or recorded. Where the instrument is a conveyance, it is charged accordingly, but where it is a composite document, as for instance containing a conveyance by way of sale, mortgage, charge, or exchange or release, the instrument will be liable to duty on each one of those transactions. In other words, by the definition of instruments it may be a document which creates rights or liabilities and it is with reference to such rights and liabilities created by the document that the chargeability to duty will have to be decided, as to whether duty is payable as a conveyance and also as on any other basis. Sec. 49 contemplates allowance for spoiled stamps and clause (d) provides for allowance if an instrument executed by a party has been afterwards found to be absolutely void in law from the beginning. Instrument has been defined in the Act in the sense of a document which creates rights and liabilities with reference to which charge to stamp duty is determined.

3. Where an instrument is a document which is a conveyance simpliciter without anything more and the title to the property conveyed is found to be wanting, it will, in our opinion, fall clearly within the meaning of Sec. 49(d). In that case, as held by the Privy Council in *Harnath Kuar v. Indar Bahadur*, AIR 1922 PC 403, the agreement would

be manifestly void from its inception because its subject-matter was incapable of being bound in the manner stipulated. In that case the courts in India had held that the transfer was inoperative, as the vendor at the date of the execution of the document had no interest capable of transfer but merely an expectancy. The suit by the purchaser was for possession of the villages covered by the conveyance with an alternative prayer for payment of money. The Privy Council held that the plaintiff was entitled to recover under S. 65 of the Contract Act.

4. We are, however, of the view that while the principle of the decision of the Privy Council would doubtless be applicable to a case of conveyance simpliciter in which title in the vendor was found to be totally wanting, it cannot be extended to the case of an instrument which is a composite document creating not merely a right by way of conveyance which fails for want of title, but also stipulating for compensation or indemnity for loss resulting from that cause. The sale deed in question while asserting that the title was with the vendor clearly set out that if any right in respect of the property was found to inhere in a third party, the vendor would make himself liable for the loss ensuing therefrom and such a loss the purchaser could recover also from the other properties of the vendor. In the case of such an instrument, notwithstanding the fact that the conveyance, which is of course the main purpose of the document, has failed, the instrument as a whole is not absolutely void from the beginning. If it is a case of a mere conveyance without covenants for indemnity and the conveyance fails, Section 65 of the Contract Act may well be the basis, as was the case in the Privy Council decision. But where the instrument provided for liquidated damages or the mode of recovery or indicated the source from which the loss could be reimbursed, those stipulations notwithstanding the failure of the conveyance for want of title would still be valid and would be actionable apart from the basis of Sec. 65 of the Contract Act. On that view, it is not possible for us to say that the instrument in this case as a whole is void absolutely from the beginning. Sec. 49(d) does not contemplate allowance for spoilation of stamps, where a composite instrument embodying rights and liabilities fails only in part and is good for the remaining part.

5. We are, therefore, of opinion that Section 49(d) of the Stamp Act cannot be invoked. We answer the question in favour of the Revenue. Costs Rs. 250/-.

Reference answered in negative.

AIR 1970 MADRAS 351 (V 57 C 103)

KRISHNASWAMY REDDY, J.

Public Prosecutor, Appellant v. Perumal Naidu and others, Respondents.

Criminal App. Nos. 413 and 494 of 1966 etc., CrI. R. C. No. 258 of 1966, etc., D/- 16-12-1969.

(A) Madras Paddy and Rice (Movement Control) Order (1965) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 3)

(B) Madras Paddy and Rice (Movement Control) Order (1964) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 5)

(C) Madras Paddy and Rice Dealers (Licensing and Regulation) Order (1965) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A) Defence of India Rules (1962) came into force on 25-5-1965. (Para 6)

(D) Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1964) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125 (3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 6)

(E) Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order (1964) — Validity — Order has expired on 20-6-1965 because the concurrence of the Central Government was not obtained within a month after R. 125(3-A), Defence of India Rules (1962) came into force on 25-5-1965. (Para 7)

The Assistant Public Prosecutor, for the Appellant; C. K. Venkatanarasimhan, N. Dhinakaran and P. C. Kurian, for the Respondents in CrI. Appeals; C. K. Venkatanarasimham, M. Narayanamurthi, G. Gopalaswami, C. F. Louis, S. S. Bharadwaj, M. Suganthan, K. Ramachandran, R. Sundaralingam, R. Santhanam, P. R. Vasudeva Iyer, T. S. Arunachalam, B. Soundarapandian, R. Shanmugham, Fyzwe Mohammed, S. M. Subramaniam, S. R. Srinivasan, V. P. Raman, K. A. Panchanakesan, L. J. A. Menezes, M. S. Sethu and K. Gopalachari, for the Petitioners (in CrI. R. Cs.).

JUDGMENT:— First Batch:— These cases relate to offences under the Madras Paddy and Rice (Movement Control) Order, 1965. The only point raised in

these cases is that the Madras Paddy and Rice (Movement Control) Order, 1965 is not valid on the ground that the concurrence of the Central Government was not obtained within thirty days after sub-rule (3-A) of Rule 125 of the Defence of India Rules, 1962 came into force. Sub-rule (3-A) of Rule 125 of the Defence of India Rules came into force on 20-5-1965. The Madras Paddy and Rice (Movement Control) Order, 1965 was passed in exercise of the powers conferred by sub-rule (2) of Rule 125 of the Defence of India Rules, 1962 read with sub-rule (3) and clause (b) of sub-rule (9) of that rule, by the Governor of Madras, which came into force on 1-1-1965. At the time when the Madras Paddy and Rice (Movement Control) Order 1965 was passed, sub-rule (3-A) to Rule 125 of the Defence of India Rules was not in force. Therefore, it may be necessary to examine the scope of sub-rule (3-A) of Rule 125, which runs thus:

"Notwithstanding anything contained in sub-rules (2) and (3), an order under these sub-rules for regulating by licences, permits or otherwise the movement of transport of any foodstuffs including edible oil-seeds and oils, or for controlling the prices or rates at which any such foodstuffs may be bought or sold, shall not be made by the State Government after the commencement of the Defence of India (Third Amendment) Rules, 1965, except with the prior concurrence of the Central Government, and any order made before such commencement under these sub-rules for any of the purposes aforesaid by a State Government or any officer or authority authorised by it in that behalf shall cease to have effect on the expiry of a period of thirty days from such commencement except as respects things done or omitted to be done before such expiry, unless such order is confirmed by Central Government before such expiry." The latter portion of sub-rule (3-A) is relevant in respect of these cases. It is clear that in respect of the order in question, unless the confirmation of the Central Government is obtained on or before 20-6-1965, it would expire. The prosecutions in all these cases were in relation to matters done or omitted to have been done after 20-6-1965. These things done or omitted to have been done before 20-6-1965 would be valid for the simple reason that this order was in force till that time.

2. The question that arises in respect of these cases where the prosecution was launched in respect of certain things done or omitted to be done after 20-6-1965 is whether the confirmation as required under sub-rule (3-A) was obtained by the State Government from the Central Government. The learned Public Prosecutor

admits that there is no notification published in the Gazette of India in respect of confirmation of this order. But, however, he drew my attention to a letter purported to have been sent by the Ministry of Food and Agriculture, Government of India, under the signature of the Under Secretary, dated 11-6-1965, addressed to the Secretary to the Department of Food and Agriculture, Government of Madras, stating that with reference to their letter dated 31st May 1965, he was directed to state that the Government have confirmed the following orders which includes (1) The Madras Paddy and Rice (Movement Control) Order, 1965; (2) The Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1964, and (3) The Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1965.

3. It is contended for by the learned counsel, appearing for the accused in all these cases, that the letter sent by the Under Secretary, Ministry of Food and Agriculture to the Secretary to Government, Department of Food and Agriculture, Government of Madras, stating that the Government of India had confirmed the order in question is not sufficient compliance under sub-rule (3-A) of rule 125. It is further contended that such confirmation must not only be made by the Central Government but also it must be made by a notification published in the Official Gazette of the Government of India. There is force in their contention. A mere letter passed between the two Governments would not be sufficient to validate the order unless the confirmation, which is the condition precedent, to validate the order is officially notified, so that the citizens who are affected by such order will know whether the order had come into force for them to obey. In the absence of such notification in the Official Gazette, and much less in the absence of evidence that such confirmation was made by the Central Government, excepting the letter that has been produced before me, I am of the view that sub-rule (3-A) was not complied with and eventually, I hold that this order had expired on the 20th June 1965 for the reason that no valid confirmation was obtained within a month after sub-rule (3-A) came into force.

4. All the prosecutions in respect of offences committed after 20-6-1966 under this order are quashed. All the convictions and sentences passed under this order are set aside. The appeals filed by the Public Prosecutor are dismissed. The revisions filed by the accused are allowed. The order of confiscation made in all these cases on a conviction or irrespective of the conviction are all set aside. The sale proceeds in respect of the properties seized in all these cases are directed to

be returned to those persons who claim them on their filing applications before the lower courts. The fines, if paid, will be refunded to the petitioners.

5. Second Batch:— These appeals were filed by the Public Prosecutor against the order of acquittal of the accused in these cases, by the Judicial Sub-Magistrate, Madurai in respect of offences under S. 3 of the Madras Paddy and Rice (Movement Control) Order 1964. The offences in these cases were said to have been committed on 23-10-1965, 23-9-1965 and 22-11-1965 respectively after sub-rule (3-A) or Rule 125 of the Defence of India Rules came into force, which was on 20-5-1965. For the reasons given by me in the earlier batch just now disposed of, I hold that the order under which the respondents were prosecuted, expired on or after 20-6-1965. These appeals are dismissed.

6. Third Batch:— In this batch, CrI. R. C. 315 of 1966 and 91 of 1967 relate to offences under the Madras Paddy and Rice Dealers (Licensing and Regulation) Order 1965 and CrI. R. C. 316 of 1966 relates to the offence under the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1964. In these cases, the offences were committed subsequent to 20-6-1965. For the reasons, given by me in the first batch of cases, I hold that the orders were not valid at the time the offences were committed. The proceedings concerned in CrI. R. C. Nos. 315 and 316 of 1966 are quashed. The conviction of the petitioners in CrI. R. C. 91 of 1967 are set aside and the fine, if paid, will be refunded to the petitioners. The confiscation in these cases are set aside. The sale proceeds of the properties seized would be returned to the claimants by the lower court after due enquiry.

7. Fourth Batch:— These two cases relate to offences under the Madras Paddy and Rice (Declaration and Requisitioning of Stocks) Order 1964. The offences in these cases were committed subsequent to 20-6-1965. For the reasons given by me in the first batch of cases, I hold that the order in question was not valid at the time the offences were committed. The convictions and sentences are set aside. The fine, if paid, will be refunded to the petitioners. The confiscation in these cases are set aside. The sale proceeds of properties seized would be returned to the claimants by the lower Court after due enquiry.

Order accordingly.

AIR 1970 MADRAS 353 (V. 57 C 104)

FULL BENCH

K. VEERASWAMI, C. J., NATESAN
AND SOMASUNDARAM, JJ.

State of Madras represented by Spl. Tahsildar Regional Engineering College Scheme, Tiruchirapalli, Petitioner v. Muthurethinam and others, Respondents.

C. M. P. Nos. 13533 to 13535, 13539, 13540, 13542 and 13543 of 1967 in Appeal S. R. Nos. 30109, 30097, 30105, 30125, 30113, 30089 and 30085 of 1966 respectively, D/- 17-11-1969, decided by FB on Order of Ref. made by Venkataraman and Ramamurthi, JJ., D/- 19-12-1968.

(A) Limitation Act (1908), S. 12(2) — Exclusion of time — Common judgment of Court — Appeals filed by common appellant — Copy of judgment filed along with one appeal only — Exclusion of time would also enure to connected appeals filed by him. AIR 1967 Mad 122 & AIR 1915 Mad 493(2), Overruled.

Where a Court passed a common judgment disposing of together certain connected land acquisition references and the common appellant filed a copy of the judgment in one of the connected appeals and filed copies of decrees in each of all the appeals, the benefit of exclusion of time under S. 12(2) on the basis of endorsements of the time taken in furnishing the certified copy of the judgment would be available for all the appeals against the common judgment. AIR 1920 Pat 535, Applied; AIR 1967 Mad 122 & AIR 1915 Mad 493 (2), Overruled.

(Para 21)

(B) Limitation Act (1908), S. 12(2) — Whether once a certified copy of the judgment and decree furnished the basis for exclusion under S. 12(2) and (3), it would enure to the benefit of not merely the appellant who had secured them but also to other parties to the judgment appealed against, whether or not they filed appeals together or separately on the same day or different dates. (Quaere).

(Para 20)

(C) Civil P. C. (1908), O. 41, R. 1 — Dispensing with production of copy of judgment — Power of High Court. AIR 1945 Mad 353, Diss.

(Per Venkataraman and Ramamurthi, JJ. in order of reference): In case of appeals to the High Court it has power to dispense with the production of the copies of judgment along with the memorandum of appeals. AIR 1945 Mad 353, Diss.; AIR 1946 Mad 163, Foll.

(Para 3)

Cases Referred: Chronological Paras
(1967) AIR 1967 Mad 122 (V 54) =
1966-2 Mad LJ 380, State of Madras v. Md. Sirajudeen 13, 14, 19
(1966) AIR 1966 SC 1713 (V 53) =
1966 SCR (Supp) 46, Addl. Collector of Customs v. Best and Co. 18

(1946) AIR 1946 Mad 163 (V 33) =

1945-2 Mad LJ 563, Rayalla

Ramappa, In re 3

(1945) AIR 1945 Mad 353 (V 32) =

1945-1 Mad LJ 268, Jami Kurmanus, In re 3

(1928) AIR 1928 PC 103 (V 15) =

55 Ind App 161, Jijibhoy Surty v. T. S. Chettiar 17, 19

(1920) AIR 1920 Mad 159 (2) (V 7) =

ILR 43 Mad 633, Aminuddin Sahib v. Pyari Bi 20

(1920) AIR 1920 Pat 535 (V 7) =

1 Pat LT 562, Bibi Umtul Rasul v. Ramcharan 19

(1915) AIR 1915 Mad 493 (2) (V 2) =

25 Ind Cas 28, Avudiammal v. Ganapathi 19

(1907) ILR 29 All 265 = 4 All LJ

152, Ramkishan Shastari v. Kashibai 20

G. Ramaswami, Addl. Govt. Pleader, for Petitioner; N. Sivamani, P. S. Srisailam, N. K. Ramaswami, for Respondents.

ORDER OF REFERENCE.

RAMAMURTI, J.:— In a batch of Land Acquisition cases, a common judgment was delivered by the trial Court. The State of Madras obtained 12 printed copies of judgment and filed an appeal which (for the sake of convenience) may be referred to as the main appeal. In the other appeals, the memorandum of appeal was accompanied only by a copy of the relevant decree along with a petition to dispense with the production of printed copies of judgment on the ground that in the main appeal, 12 printed copies had been filed. Along with this, a petition has also been filed, in each of these appeals, to excuse the delay, if any, in filing the appeals as they would be barred by limitation if the time taken for obtaining certified copies of the relevant decrees alone is taken into account under S. 12 of the Limitation Act, hereinafter referred to as the Act.

2. In all cases, where a common judgment is delivered disposing of a batch of cases, the practice of this court has been to dispense with the production of the printed copies of the judgment in the rest of the appeals provided in one appeal the requisite number of printed copies of the common judgment are filed. Following this practice, (we?) dispense with the production of the copies of the printed judgment in the present batch of appeals.

3. Mr. Sivamani, learned counsel for the respondent drew our attention to the decision of Byers J. in Jami Kurmanus In re, 1945-1 Mad LJ 268 = (AIR 1945 Mad 353) in which the learned Judge after comparing the language of O. XLI, Rule 1, C.P.C. and O. XLI-A, Rule 2, sub-rule (i), C.P.C., held that in the case of appeals to the High Court, it has no power to dispense with the production of

the copies of the judgment. Our attention was also drawn to the decision of Chandrasekhara Aiyar J. in *Rayalla Ramappa* in re, 1945-2 Mad LJ 563 = (AIR 1946 Mad 163) in which the learned Judge differing from Byers J. held that the High Court has such a power. With respect we agree with the decision of Chandrasekhara Aiyar J. A reading of all the provisions of O. XLI-A dealing with appeals to the High Court from the subordinate courts shows that the provisions of O. XLI would undoubtedly apply to appeals in the High Court subject only to the modifications contained in O. XLI-A. The provisions of O. XLI-A have to be necessarily read into and applied along with the provisions of O. XLI and the provisions of O. XLI-A would prevail only to the limited extent to which there is a special provision. In other words, the procedural law governing appeals to the High Court is the combined operation of O. XLI and O. XLI-A the latter Order prevailing only to the limited extent of a different specific provision. The provisions of O. XLI-A cannot be applied in isolation. So far as the requirement of production of the copy of the judgment is concerned, in the case of an appeal to the High Court, a memorandum should be accompanied by printed copies and they should be twelve in number. It is only to this extent that there is a variation and in other respects, the provision in O. XLI would apply and this court will have undoubted jurisdiction to dispense with the production of the copies of judgment in a proper case.

4. If a Sub-Court or a District Court has jurisdiction and power to dispense with the production of a copy of the judgment in an appeal preferred to it, we do not find any reason why the High Court should be denied such a power, in the case of an appeal preferred to the High Court. The provision for dispensing with is specially provided in O. XLI, Rule 1 only because of the clear necessity felt for such a provision, as otherwise, serious hardship and injustice would arise. In innumerable cases, the appellant may not be in a position to file the copy of the judgment and unless such a power is reserved to Subordinate Courts, the right of appeal itself would become illusory and futile. It is obvious that the position must be the same with regard to appeals preferred to the High Court and there is no basis to make any distinction between the two sets of appeals. That, this is the only correct view, also follows from the provisions of O. XLII governing procedure in the case of second appeals. Order XLII contains only one rule to the effect that the rules of O. XLI and O. XLI-A shall apply, so far as may be, to appeals to the High Court from appellate decrees. There cannot be any doubt that in the case of a

second appeal, the High Court will have power to dispense with the production of judgment. The Madras Amendment consists of three rules, Order XLII, Rules 1, 2 and 3. Order XLII, Rule 1 states that Orders XLI and XLI-A shall apply to second appeals to the High Court. We are not prepared to accept any interpretation which will involve this anomaly, that the High Court will have power in the case of second appeals, to dispense with production of copies of judgment and no such power in the case of first appeals. We do not find anything either in the scheme or the language of the provisions of O. XLI-A to deny the High Court such a power which is so vital and necessary. For all these reasons and following the uniform practice of this court, the production of the copies of judgment is dispensed with in this batch of appeals.

5. The question next arises whether there is any delay in filing these appeals; this point is linked up with the question whether the appellants are entitled to the exclusion of time taken for obtaining the printed copies of the judgment which have been filed in the main appeal. (After referring to the relevant case law, His Lordship put up the papers before his Lordship the Chief Justice for making reference to a Full Bench.)

ORDER OF FULL BENCH

12. K. VEERASWAMI C. J.:— The question we are called upon to answer is whether the benefit of exclusion of time under S. 12(2) of the Indian Limitation Act, 1908 is available to each of the appeals, which are all directed by the same appellant against a common judgment disposing of together certain connected land acquisition references, or, to only one of the appeals in which alone certified copies of the judgment and decree were filed along with the related memorandum of appeal. The common judgment of the court below was dated 2-12-1965 and an application for a copy thereof and of the decree was made on 6-12-1965. The copies of the judgment and decree were delivered to the appellant on 15-4-1966 and the appeals were filed on 4-7-1966.

13. There is no dispute that so far as the appeal in which the copies of the judgment and decree were filed is concerned, it was in time, having regard to the time to be excluded in furnishing the copies. We may mention that certified copies of the decree were filed in each of the appeals, but, applications were filed to dispense with production of copies of the judgment in the appeals except in the main one in which, as we said, they had been produced. These applications have since been allowed. On the assumption that these appeals, except the main one, were out of time, applications also were taken out for excusing the delay in

filing them. Evidently this procedure was followed because of State of Madras v. Md. Sirajudeen, 1966-2 Mad LJ 380 = (AIR 1967 Mad 122) which was decided by two of us constituting a Division Bench. Venkataraman and Ramamurti JJ. before whom the applications went up for disposal, being of the view that 1966-2 Mad LJ 380 = (AIR 1967 Mad 122) required reconsideration they have referred the matter to a Full Bench for an authoritative decision on the point, to wit, whether in the appeals arising from a common judgment disposing of a batch of suits a party will be entitled to exclusion of time under S. 12 of the Limitation Act in respect of all the appeals, though he had obtained only one set of copies of judgment.

14. 1966-2 Mad LJ 380 = (AIR 1967 Mad 122) expressed the view that the time for preferring an appeal should be calculated on the endorsements on the copies of judgment produced in each of the appeals, even if they were filed in a batch and in one of them such copies were produced and in the rest their production was dispensed with. At the same time it was felt in that case that delay, in such cases might, however, be excused in the circumstances. The correctness of this view has been examined by us and we are of opinion that, on a proper construction of S. 12(2) and (3) and of the principles evolved by some of the decided cases relevant to the question, the view in 1966-2 Mad LJ 380 = (AIR 1967 Mad 122) does require modification.

15. S. 3 of the Limitation Act directs that any appeal preferred after expiry of the period of limitation prescribed therefor by the First Schedule should be dismissed. Part III contains the procedure for computation of the period of limitation, and S. 12 allows exclusion of time in the computation. In computing time the day from which the period is to be reckoned has to be excluded. Sub-sec. (2), which is in point here, is:

"In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application of a review of judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded".

The next sub-section says that where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment, on which it is founded, shall also be excluded. On a careful reading of these provisions it is evident that they are not in any way qualified or limited in their application by anything outside these provisions. The

direction by those provisions is that in computing time for purposes of exclusion the day on which the judgment appealed against was pronounced and the time required for obtaining a copy of the decree as well as of the judgment should be taken into account for exclusion. The provisions are silent as to who should apply for such copies or whether they should at all be filed along with the appeals. But Order XLI, Rule 1 C.P.C., as in force in this State, requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and also a copy of the judgment. This requisite, except as to the decree, is not an inflexible rule, as the court has the power to dispense with the production of copies of the judgment. This provision of the Code, however, is obviously unrelated to S. 12 of the Limitation Act, and cannot be understood, in our view, as enjoining that exclusion for computation of time for limitation for an appeal should only be based on the endorsements in the certified copies of the judgment necessarily to be filed therewith. O. XLI, Rule 1 C. P. Code is limited to the procedure in filing an appeal and is concerned with the form of the memorandum of appeal and the enclosures thereto. That rule has nothing to do with the exclusion of time which is entirely dependent on S. 12 of the Limitation Act. The result of this view of the scope of S. 12 of the Limitation Act and O. XLI, Rule 1 is that there is no interdependence or connection between them so that whether or not an appellant is entitled to exclusion of time will not depend upon any requisition for filing of copies of judgment and decree in an appeal, though of course, exclusion of time has to be determined in the light of the endorsements on the certified copy of the judgment or the decree, or both, as the case may be, as to the time taken in supplying them.

16. Where, therefore, several appeals arise from a common judgment and they have been filed by the same party, there is nothing to prevent him from relying on a copy of the judgment or decree, or both, filed in only one of them, for exclusion of time in computing limitation for each of such appeals. For that purpose the party concerned is not required by S. 12(2) to file copies of the judgment and decree along with the memoranda of any of the appeals. That requisite, as we said, flows not from the provisions of the Limitation Act but from the procedure prescribed by O. XLI, Rule 1 C.P.C. The idea in allowing exclusion of time for computation of limitation is to allow the party concerned time to consider whether he is called upon to file an appeal. If that is borne in mind, we do not see why a copy of the judgment and decree filed in one of the appeals cannot

be made use of for purposes of getting exclusion of time in the other connected appeals filed along with it simultaneously by the same party. If in such appeals it is shown with reference to the endorsements on the copies of the judgments and decrees that by the exclusion of time warranted by them the appeals are in time, the requirement of the Limitation Act is satisfied. On that view no question of limitation will, therefore, arise in the appeals. Dispensation of production of copies of the judgments is called for only because of O. XLI, Rule 1 C.P.C.

17. The view we have just expressed, which is based on a reading of S. 12, is also, as it seems to us, in consonance with the decided cases. *Jijibhoy Surty v. T. S. Chettiar*, AIR 1928 PC 103 though not concerned with appeals from a common judgment, laid down, on a construction of S. 12(2) of the Limitation Act, that this section was not qualified by the Civil Procedure Code or any other Act, but contained an independent direction for exclusion of time. The Privy Council there rejected a contention that because no enclosure was required by the procedural rules to be filed of copies of the judgment and decree along with a memorandum of appeal, it followed that limitation should be computed without exclusion of time taken for obtaining those copies. Dealing with that question, the Board observed:—

“Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation. S. 12 makes no reference to the Civil Procedure Code or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction.”

The object of the exclusion, said the Privy Council, was that counsel or the party should have time to decide with reference to a copy of the decree and judgment whether it was necessary to file an appeal.

18. The view of the Privy Council that S. 12(2) of the Limitation Act operates irrespective of the Code of Civil Procedure has been approved by the Supreme Court in *Additional Collector of Customs v. Best and Co.*, AIR 1966 SC 1713. This is what the Supreme Court stated:

“As the Privy Council has laid down the provisions of S. 12(2) and (3) are a positive direction excluding the time taken for obtaining a copy of the judgment and decree or order as the case may be and those provisions are irrespective of the Civil Procedure Code or the rules made by a court under S. 122 of the Code.”

We are aware that neither of these two cases related to appeals from a common judgment, but, all the same, the principle is well established by them that exclusion of time under S. 12(2) of the Limitation Act has no relevance and is not in any way related to the requirement of filing copies of judgments and decrees along with the memoranda of appeals.

19. *Bibi Umtul Rasul v. Ramcharan*, AIR 1920 Pat 535 is directly in point here as it was concerned with the case of several appeals filed by the same party against a common judgment. The Patna High Court held that where more appeals than one were presented by the same appellant from the same judgment but with only one certified copy of the judgment enclosed with one of the appeals, they should all be held to be in time if the one with the enclosures was found to be in time. In support of this view, the court relied on its own practice, but, obviously, this practice is certainly in consonance with the law. The Patna High Court pointed out:

“In such a case the time requisite for obtaining a copy of the judgment would be excluded under S. 12(3) in computing the period of limitation in respect of all the appeals filed by the appellant, although only one copy of the judgment is filed for all the appeals.”

1966-2 Mad LJ 380 = (AIR 1967 Mad 122) had but followed an earlier Bench decision in *Avudaiammal v. Ganapathi*, AIR 1915 Mad 493 (2). *Sadasiva Aiyar* and *Tyabji JJ.* in AIR 1915 Mad 493 (2), were of the view that an appellant was not entitled to a deduction of the time taken in obtaining copies of judgments filed in another connected appeal. The basis for this view was the consideration that the requirement of O. XLI, Rule 1 was related to the application of S. 12(2) and (3) of the Limitation Act. *Sadasiva Aiyar J.* expressed his opinion thus:

“Order XLI, Rule 1 C.P.C. requires the appeal memorandum to be accompanied by a copy of the judgment unless the appellate Court dispenses therewith. No such dispensation was given and hence there was an irregular presentment of the appeal on 27-7-1910 to the District Court. Assuming however that the presentation of the copy of the judgment was dispensed with by the appellate Court the appeal was presented long out of time. The appellant could not claim the deduction of any period as required for obtaining copy of the judgment, as no time could be required or could have been spent in obtaining copy of the judgment when such copy was dispensed with.”

The time spent in obtaining a copy of the same judgment for purposes of filing a different appeal in another suit (though it was a connected suit disposed of with the present suit by a single judgment)

cannot legally be excluded in computing the period of limitation for filing this appeal."

Tyabji J. concurred in that view. But, with respect, we may point out that no attempt was made in that case to determine the true scope and effect of S. 12(2) and (3); in fact, no reference was even made in the judgment to the section. As the Privy Council pointed out in AIR 1928 PC 103, the learned judges lost sight of the true position that exclusion of time for purposes of limitation was not in any way controlled or affected by the requirements in the Civil Procedure Code of filing of certified copies of judgment and or decree with the memoranda of connected appeals from a common judgment.

20. In the course of the argument before us the discussion was widened to the proposition that once a certified copy of the judgment and decree furnished the basis for exclusion under S. 12(2) and (3), it would enure to the benefit of not merely the appellant who had secured them but also to other parties to the judgment appealed against, whether or not they filed appeals together or separately on the same day or different dates. Having regard to the limited scope of the reference before us, in the light of the facts, we do not think it necessary to cover that area and express our view. It will suffice to say that *Aminuddin Sahib v. Pyari Bi*, ILR 43 Mad 633 = (AIR 1920 Mad 159 (2)) and *Ramkishan Shastari v. Kashibai*, (1907) ILR 29 All 265 do not, as we are inclined to think, contribute to such a proposition. In the first of these cases all that was held was that an appellant who was required to file with his memorandum of appeal a copy of the decree appealed from, might file a copy obtained by another party and that under S. 12(2) of the Limitation Act, he was entitled to a deduction of the time taken to obtain that copy. In (1907) ILR 29 All 264 it was held that the words 'the time requisite for obtaining a copy' in S. 12(2) and (3) were not confined to cases where the person appealing had in person or by a properly authorised agent applied for a copy of the judgment or decree. But that is not the question under our consideration.

21. We are of the view, in these cases, that the common appellant having filed a copy of the judgment in one of the connected appeals and filed copies of decrees in each of all the appeals, the benefit of exclusion, on the basis of the endorsements, of the time taken in furnishing the certified copy of the judgment would not merely be available to the appeal in which the certified copy of the judgment was filed but would enure also to the other connected appeals filed by the same party against the common judgment.

Accordingly, we hold that the appeals were all within time and that on that view, the petitions for excusing the delay are unnecessary. They are, therefore, dismissed. No costs.

Order accordingly.

AIR 1970 MADRAS 357 (V 57 C 105)

ISMAIL, J.

B. Susila and another, Appellants v. Saraswathi Ammal and others, Respondents.

A. A. O. No. 174 of 1965, D/- 6-11-1968.

Civil P. C. (1908), O. 21, Rr. 66 and 90 — Notice of alteration in upset price contained in sale proclamation — Court can fix upset price but is under no obligation under statute to fix it — Fixation of upset price by Court does not also affect rights of any of parties — Judgment-debtor, therefore, is not entitled to notice of fixation of upset price or of alteration therein — Failure to give notice does not constitute material irregularity or fraud within meaning of O. 21, R. 90

(Paras 4, 5 & 6)

Cases Referred: Chronological Paras (1958) AIR 1958 Mad 423 (V 45) =

70 Mad LW 815, Yellappa Naidu v. Venugopal Naidu 6

(1957) 70 Mad LW 493 (1) = 1957-2 Mad LJ 134, Kuppammal v. Devendra Iyer 6

P. Balasubramaniam, for Appellants; C. S. Swaminathan, for Respondents.

JUDGMENT:— This is an appeal against an order of the learned Second Additional Subordinate Judge, Tiruchirappalli, dated 21-4-1965, dismissing E. A. No. 297 of 1964 in O. S. 107 of 1953. The said E. A. itself was filed by supplemental defendants 3 and 4 in O. S. 107 of 1953, under O. 21, R. 90, Civil P. C., for setting aside a sale of the house property sold in execution of the decree passed against them in O. S. No. 107 of 1953 on 19-6-1963. The sale was knocked down in favour of the first respondent for a sum of Rs. 2,05,000, on 19-6-1963 and the application was filed on 17-7-1963. In the said application, the appellants herein had taken the following three grounds for the purpose of setting aside the sale: (1) due notice of the execution or of the application to reduce the upset price has not been served on the petitioners; (2) the property has been sold for a grossly inadequate price inasmuch as the decree-holder has been able to knock off the property for a price which will be a third of its real value; and (3) that by reason of the fraud committed by the decree-holders in getting the upset price reduced, i.e., without notice to the petitioners, the property did not fetch a proper price at the sale, with the result that

the sale held on 19-6-1963 resulted in substantial prejudice to the appellants.

2. The learned Second Additional Subordinate Judge came to the conclusion that, with regard to the application filed by the decree-holder for reduction of the upset price previously fixed, the appellants herein were not entitled to any notice, and therefore, there was no irregularity or illegality in the conduct of the sale. With regard to the second point, the learned Judge came to the conclusion that the property was not sold for an inadequate price and consequently the appellants herein had not suffered substantial injury on account of any irregularity in the matter of the publication of sale as contended for on their behalf.

3. Before I deal with the point urged before me, it is better to refer to the facts that had taken place anterior to the sale of the property, as stated by the learned Subordinate Judge himself, in the judgment, the correctness of which was not disputed before me:

"The execution application for attachment and sale of the property of the judgment-debtor, the late Thiagaraja Bhagavathar, was filed as early as 5-12-1959 against the heirs of the late M. K. Thiagaraja Bhagavathar of whom the petitioners are the daughters. Notice was ordered under O. 21, R. 66, Civil P. C. in the said application on 17-3-1960. As the petitioners herein were not served, fresh notice was ordered on 22-4-1960 for 29-6-1960. The said notices were returned with endorsement absent affixed and hence on 29-6-1960 the Court was pleased to order fresh notice by substituted service for 22-7-1960. The substituted service ordered was effected on the petitioners and since they were absent they were declared ex parte on 1-8-1960 after accepting the service as sufficient. In those circumstances it will be idle now to contend that no notice was issued to them under O. 21, R. 66, Civil P. C. As regards the other complaint that they were not served with notices for the subsequent applications for the reduction of upset prices it is found that originally upset price was fixed at 5 lakhs. As the property was not sold the decree-holders filed an application under E. A. 807 of 1960 for the reduction of upset price from five lakhs to two lakhs. In that petition also notice was ordered on 14-12-1960 for 9-1-1961. As the petitioners were not served for that hearing date a fresh notice was also ordered and since these petitioners were absent on the date of hearing they were set ex parte. Then the upset price was reduced to Rs. 4,05,000. There were no bidders for that sale. The decree-holders filed E. A. 810 of 1962 to reduce the upset price from Rs. 4,05,000 to Rs. 1,50,000. Again notice was ordered in this application to the peti-

tioners for 18-12-1962. Fresh notice was also ordered on 18-12-1962, for the hearing dated 19-1-1963. As the petitioners' brother Ravindran alone appeared in that application and the petitioners were absent they were set ex parte and after hearing the arguments advanced on behalf of the brother of the petitioners upset price was reduced to Rs. 3,50,000 even though the decree-holder wanted the upset price to be reduced to Rs. 1,50,000. No doubt at this stage the decree-holders filed an application in E. A. 156 of 1963 for permitting the first respondent herein to bid and set off in the sale to be held on 3-4-1963. Since that sale also could not take place for want of bidders the decree-holders respondents filed E. A. 222 of 1963 on 8-4-1963 to reduce the upset price from Rs. 3,50,000 to Rs. 1,50,000, and notice was ordered for 11-4-1963. As the decree-holders' pleader wanted to have the sale proclamation issued during the summer recess and was anxious to bring the property to sale at least after the reopening of the Court the petition was heard without notice being taken to the petitioners herein and was ordered. Under that application the upset price was reduced to Rs. 2,00,000, after hearing the counsel for the petitioner's brother Ravindran."

Thus it will be seen that the original sale proclamation was settled after notice to the appellants herein as required under O. 21, R. 66, Civil P. C. and after setting them ex parte. Three attempts were made to sell the property and since no bidders came forward, applications were filed to reduce the upset price originally fixed by Court and, except with regard to the last application, E. A. No. 222 of 1963, in all other applications notices were taken to the appellants but they remained ex parte. Consequently, the question that arises for consideration is whether the failure to give notice to the appellants in E. A. No. 222 of 1963 which was an application for reducing the upset price constitutes material irregularity or illegality, so as to come within the scope of O. 21, R. 90, Civil P. C. entitling the appellants to have the sale set aside.

4. Learned counsel for the appellants contended that, since the upset price was fixed as part of the sale proclamation settled under O. 21, R. 66, Civil P. C., the appellants are entitled to notice, whenever any change or alteration or modification is contemplated in anything that is contained in the said sale proclamation. I may straightway point out that, under O. 21, R. 66, Civil P. C. as amended by this Court, there is absolutely no provision for the Court to fix any upset price and all that the rule requires the Court to do is to mention the valuations of the property as given by the decree-holder as well as by the judgment-debtor. It is open to the Court, if the circumstances of

the case justify, to arrive at its own valuation and fix the upset price; but the Court is under no obligation under the statute to fix the upset price. Therefore, when the Court fixes the upset price or modifies either by way of enhancement or reduction of the upset price originally fixed, it cannot be said that the Court is acting pursuant to the obligation imposed upon it under O. 21, R. 66, Civil P. C. Therefore, from the point of view of the provision contained in O. 21, R. 66, Civil P. C. it cannot be said that, whenever the Court fixes the upset price or alters the upset price, it is under an obligation to give notice to the judgment debtors.

5. Then the question arises whether, independent of O. 21, R. 66, Civil P. C. the judgment debtor is entitled to notice, whenever the Court, as required by the decree-holder, alters the upset price. In my opinion, a judgment debtor is not entitled to any such notice. The reason is this. When the Court fixes the upset price in a sale proclamation, the Court is not determining the rights of any of the parties before it and the fixation of upset price may be an indication of the probable price which the property may fetch from the point of view of the intending bidders; but it is not binding either on the decree-holder or the judgment-debtor or even on the Court. Notwithstanding the fixation of the upset price and notwithstanding the fact that a bidder has offered an amount higher than the upset price, it is still open to the judgment debtor to go before the Court and allege that the property has not fetched the proper price; and, he can have the sale set aside, if he can establish that the inadequacy of the price is the result of material irregularity or fraud in the publication or the conduct of the sale. Consequently, the fixation of the upset price by the Court, does not affect the rights of any of the parties, and it is not, therefore, open to the judgment debtors to contend that independent of O. 21, R. 66, Civil P. C., they are entitled to notice of an application filed by the decree-holder for reducing the upset price. As a matter of fact, there had been a view in this Court that fixation of upset price is not a judicial act but merely an administrative act, because of the reason that it does not affect the rights of any parties.

6. Mr. P. Balasubramaniam, learned counsel for the appellants, drew my attention to the decisions of this Court in *Yellappa Naidu v. Venugopal Naidu*, 70 Mad LW 815 = (AIR 1958 Mad 423) and *Kuppammal v. Devendra Iyer*, (1957) 70 Mad LW 493(1). In my opinion, none of these decisions supports the case of the appellants in this case. These decisions merely lay down that under O. 21, R. 66, Civil P. C., the Court has an obligation to mention the valuations given by the decree-holder as well as by the judgment-

debtor, but it cannot designate both these valuations as upset price. On the other hand, Mr. Balasubramaniam was not able to bring to my notice any decision of this Court holding that failure to give notice of an application to reduce the upset price will constitute material irregularity or fraud either in the publication or conduct of the sale, so as to enable the judgment-debtor to have the sale set aside under O. 21, R. 90, Civil P. C. Under these circumstances, I am of opinion that the conclusion of the lower Court on this point is correct and does not call for any interference.

7. No other point was urged before me and hence the appeal is dismissed. But there will be no order as to costs.

Appeal dismissed.

AIR 1970 MADRAS 359 (V 57 C 106)

K. N. MUDALIAR, J.

In re, L. N. Srinivasa Chetty, Petitioner; Accused.

Criminal Revn. Case No. 758 of 1967 and Criminal Revn. Petn. No. 748 of 1967, D/-1-8-1969, against Order of Addl. First Class Magistrate Vellore, D/- 31-3-1967.

Penal Code (1860), Ss. 332 and 323 — Applicability — Seizure of cycle by Inspector for want of licence — Accused slapping inspector on his cheek and forcibly taking away cycle — Evidence showing that cycle had licence — It was also found that inspector was acting in his capacity as public servant and in discharge of his official duties — Held, accused was guilty of offence under S. 332 and not under S. 323 — He being first offender, interest of justice would be served by admonishing him under S. 3(1) of Act 20 of 1958. AIR 1948 Mad 356 & 1962 (1) Cri LJ 45 (Mad), Dist.— (Probation of Offenders Act (20 of 1958), S. 3 (1)) — (Criminal P. C. (1898), S. 562 (1-A)). (Para 3)

[Ed.:— Section 332, I. P. C. prescribes 3 years' sentence and/or fine. Fine was substituted by admonition (?)]

Cases Referred Chronological Paras
(1962) 1962 (1) Cri LJ 45 = 1961

Mad WN (Cri) 117, Public Prosecutor v. Syed Rowther 3

(1948) AIR 1948 Mad 356 (V 35) = 1948 Mad WN (Cri) 68, Pedda

Muni v. Emperor 3

K. Ramaswamy, for Petitioner; S. Jagadesan, for Public Prosecutor, for State.

ORDER:— On 11-1-1967 the cycle of the son of Srinivasa Chetty was detained by the Municipal Inspector, P. W. 1 for want of a license. The boy went and brought his father who slapped P. W. 1 on his cheek and took away the cycle from him by force. The evidence of P. W. 1 who proves these facts is corroborated by

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P. W. 2. P. W. 3 received the complaint from P. W. 1 and sent P. W. 1 and the complaint to the police station. P. W. 4, the doctor, speaks to the injury sustained by P. W. 1.

2. Accepting this evidence, the Additional First Class Magistrate found the petitioner guilty of an offence under Section 332, I. P. C.

3. P. W. 1 admits in the course of his cross-examination that if the cycle had village licence he would not demand licence and states that the boy Chelapathi, son of the accused, did not tell him that he had village licence. Exhibit D-2 is the village licence for 1966-67 for the second half year. It has been issued in the name of the accused. M. O. 2 is the disc in respect of that licence. It emerges from the evidence that the cycle did not carry this disc. The argument of Mr. Ramaswami is that inasmuch as the cycle in question had the licence from the village panchayat and regardless of the fact that the disc was not displayed on the cycle, although P. W. 1 had acted in his capacity as a public servant in the discharge of his duties, the seizure is illegal and therefore, the petitioner had a right to take back his cycle and his act of slapping P. W. 1 amounts to an offence under Section 323, I. P. C. This argument, if accepted, would result in an anomalous reasoning whether P. W. 1 acted as a public servant in the discharge of his official duties and this illogical finding regarding his act of seizure is not in consonance with law. I am not prepared to countenance this argument in the face of the evidence which certainly supports the finding that P. W. 1 was acting in his capacity as a public servant and in the discharge of his official duties he seized the cycle. The seizure of the cycle is correct and legal. Apart from that, I have no doubt in my mind that P. W. 1 was doing an act in his capacity as a public servant, acting in good faith under the colour of his office. The act of P. W. 1 is also strictly justifiable by law.

In support of the proposition of law contended for by Mr. Ramaswami, he attempted to draw support from the ruling in *Pedda Muni v. Emperor*, 1948 Mad WN (Cr) 68 = (AIR 1948 Mad 356). That was a case where the constable P. W. 1 had no authority to effect the arrest since there was no order in writing under Section 56(1) of the Code of Criminal Procedure and the constable did not purport to act on his own accord, because there was nothing to show that the elements necessary to justify the action under Section 54, Criminal P. C. were present, the Act of P. W. 1 was not that of a public servant but of an ordinary individual. Another authority was also cited before me. In *Public Prosecutor v. Syed Rowther*, 1961 Mad WN (Cr) 117 =

(1962 (1) Cri LJ 45). Anantanarayan, J., (as he then was) found that the officers had forcibly entered into the private house of the first respondent and attempted to seize some note books merely on the allegation that they were accounts of the business. The learned Judge found that the records did not even show that the respondent had really carried on any business as dealer. It is seen from these two decisions that initially there is a total lack of jurisdiction on the part of these officers to act as they did in their official capacities. These two decisions are not helpful to the proposition of law submitted by Mr. Ramaswami. In my view, the conviction of the petitioner for an offence under Section 332, I. P. C. is correct and proper. There are no grounds for me to interfere with the conviction of the petitioner.

Mr. Ramaswami made an eloquent plea that in view of the status of the petitioner, the sentence of fine may be substituted for by admonition. Although one is disposed to take the stern view that a Municipal Councillor must exercise a greater sense of responsibility in his dealings with public servants who discharge their official duties in the interest of public service, I am inclined to think that the interests of justice would be served by admonishing the petitioner under Section 3(1) (sic) of the Probation of Offenders Act in view of the fact that the accused is a first offender. The fine amount may be directed to be returned to the petitioner. With this modification, this revision petition is dismissed.

Revision dismissed.

AIR 1970 MADRAS 360 (V 57 C 107)
KRISHNASWAMI REDDY, J.

A. Gnanasikhamony, Petitioner Accused;
v. Palukal Panchayat, Respondent.

Criminal Revn. Case No. 1190 of 1967 and Cri. R. P. No. 1176 of 1967, D/- 11-9-1969 against order of Spl. First Class Magistrate, Kazhithurai, D/- 20-9-1967.

Panchayats — Madras Panchayats Act (35 of 1958), S. 178(2) (xxii), R. 32 of the Rules and the Rule under Madras Notification No. 52 of G. O. Ms. No. 1248 dated 26-4-1961 — Money due under contract is not recoverable by distraint or prosecution.

Arrears of kist amount payable under contract by which contractor was given the right to collect fees from public market. Panchayat cannot recover the amount by distraint or prosecution — Expression "other sums" in Rule does not include money due under contract — Panchayat has power to enter into con-

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tracts under Section 8(3), but sums due under them are not recoverable as sums due under the Act or Rules — Provisions of Section 387 of the Madras City Municipal Corporation Act and Section 344 of the Madras District Municipalities Act giving such power indicates that omission of such power from the Panchayat Act was deliberate. ILR 26 Mad 475 & AIR 1924 Mad 669 & AIR 1924 Mad 898 (2) & AIR 1951 Trav-Co 82, Foll.

(Paras 5, 6, 7 and 13)

Cases Referred: Chronological Paras

(1951) AIR 1951 Trav-Co. 82 (V 38)

= 52 Cri LJ 271, Ahemad Hydros

12

v. Always Municipality

(1924) AIR 1924 Mad 669 (V 11) =

10

ILR 47 Mad 381, Punia Syamalo

In re

(1924) AIR 1924 Mad 898 (2) (V 11) =

84 Ind. Cas. 325 = 26 Cri LJ 261,

Mahabab Alli Khan v. President

Taluk Board Kurnool

11

(1901) ILR 26 Mad 475 = 1 Weir

752, Abdul Azees Sahib v.

Cuddapah Municipality

9

T. R. Ramachandran and T. R. Raja-

gopalan. for Petitioner; S. Padmanabhan,

for Respondent; Addl. P. P., for State;

C. F. Louis (Amicus Curiae).

ORDER:— This petition has been filed by the accused in C. C. No. 15 of 1967 on the file of the Special First Class Magistrate, Kuzhithurai, against the order of the said Magistrate in overruling the preliminary objection raised by him on the ground that the complaint against him was incompetent as there was no procedure laid down in Madras Panchayat Act for the recovery of the amount due from him under the contract by way of distraint or prosecution.

2. It is necessary to note the facts very briefly for the purpose of appreciating the point raised by the petitioners: The right of collecting fees from Kannumamood public market in Palukal Panchayat was leased out to the petitioner by the Executive Officer, Palukal Panchayat, and a written agreement was entered into between the Executive officer of the Panchayat on one part and the petitioner on the other on 7th April 1966 by which the petitioner had to pay to the panchayat the kist amount in ten monthly instalments at Rs. 1,370.50 and the first instalment was to be paid on 31-1-1967.

The petitioner defaulted to pay the instalments and had fallen in arrears to the tune of Rs. 6,320/-. The Executive Officer therefore, filed a complaint before the Special First Class Magistrate, Kuzhithurai alleging that the petitioner had wilfully omitted to remit the market lease amount of Rs. 6,320/- due to Palukal Panchayat for the year 1966-67 in respect of lease contract of the Kannumamood Market. It was alleged in the complaint that the peti-

tioner wilfully prevented distraint. The complaint was instituted under Cl. 22 of Sub-section (2) of S. 178 of the Madras Panchayats Act and violation of condition as per para 3 of the agreement executed by the petitioner on 7-4-1966 and also under Notification No. 52 of G. O. Ms. No. 1248 dated 26-4-1961.

3. The petitioner raised an objection in the lower Court that the amount due under the contract cannot be recovered in the manner provided in Notification No. 52 of G. O. Ms. No. 1248 dated 25-4-1961 and that, therefore, the prosecution was not maintainable. The learned Magistrate by his Order dated 20-9-1967 overruled his objection by stating that the Panchayat Rules did not mention about any contracting party, but it simply says that any sum due to the Panchayat under the Panchayat Act should be recovered by a suit and ultimately held that he can take cognizance of the offence and proceed with the trial.

4. I sought the assistance of Mr. C. F. Louis, Advocate, to assist the Court as the point involved in this case may in the larger interest affect the rights of parties. The question which has to be considered is whether the Panchayat has got any right to prosecute a person for his failure to pay the Panchayat any amount which he agreed to pay as per the agreement entered into between him and the Panchayat. It therefore, becomes necessary to note the relevant provisions of the Madras Panchayats Act, 1958 (hereinafter called 'the Act'). The power to enter into contract is provided under Section 8 sub-section (3) of the Act which is as follows:

"Every Panchayat shall be a body corporate by the name of the village or town specified in the notification issued under Section 3, shall have perpetual succession and a common seal, and, subject to any restriction or qualification imposed by or under this Act or any other law, shall be vested with the capacity of suing or being sued in its corporate name, of acquiring, holding and transferring property, movable or immovable, of entering into contracts and of doing all things necessary, proper or expedient for the purpose for which it is constituted."

Sub-section (2) of Section 99 of the Act relates to levy of fees in a public market. Sub-section (2) of S. 99 runs thus:

"Subject to such rules as may be prescribed, the Panchayat.....may after obtaining the previous written permission of the Inspector, levy any one or more of the following fees in any public market at such rates, not exceeding the maximum rates if any "prescribed in that behalf as the panchayat may think fit"

Section 176 of the Act confers power on the Panchayat to farm out collection of fees. It runs thus:—

"No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any tax or other sum due to a panchayat or panchayat union council under this Act or any rule, by-law, regulation or order made under it after the expiration of a period of "three years from the date on which distraint might first have been made, a suit might first have been instituted, or prosecution might first have been commenced as the case may be, in respect of such tax or sum."

Under Section 178(2) (xxii) it is provided as follows:

"The Government shall, in addition to the rule-making powers, conferred on them by any other provisions contained in this Act, have power to make rules generally to carry out the purposes of the Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Government may make rules—

... ..
(xxii) as to the realisation of any tax or other sum due to a panchayat or panchayat union council under this Act or any other law or any rules or by-laws, whether by distraint and sale of movable property, by prosecution before a Magistrate, by a suit, or otherwise."

Under this rule-making power, the Governor of Madras by Notification No. 4 framed rules in respect of assessments and collection of taxes. Rule 24 relates to mode of collection of taxes. Rule 25 relates to distraint and sale of movable property and Rule 25(2) provides for prosecution, if for any reason the distraint or a sufficient distraint of the defaulter's property is impracticable and Rule 32 provides for imposition of fine.

The relevant Rule 32 with which we are now concerned is the Rule relating to the recovery of sums due to the Panchayat other than the taxes, as we are now concerned with the amount due under the contract. In Notification No. 52, the Rule provides as follows:—

"Recovery of sums due to the panchayat. All costs, damages, compensation, penalties, charges, fees (other than school fees), expenses, rents (not being rents for land and buildings demised by the Panchayat) contributions and other sums which under the Madras Panchayats Act, 1958, or any other law or rules or by-laws made thereunder are due by any person to the Panchayat may, if there is no special provision in the Act or the rules made thereunder for their recovery, be demanded by bills which shall be served on the persons concerned and recovered in the manner provided in the rules for the collection of taxes under the Madras Panchayats Act, 1958."

This Rule provides that the amounts due under the various heads specified therein

could be recovered in the manner provided under the rules for the collection of taxes, namely, by distraint and if distraint becomes impracticable, by prosecution.

5. Now, the question is whether this rule includes the amount due to the Panchayat under a contract between the Panchayat and the third party under any of the heads mentioned therein. It is clear that the specific heads provided therein, namely, costs, damages, compensation, penalties, charges, fees, expenses, rents and contributions would not cover the amounts due under the contract. But the Rule includes "other sums" also. Can it be said that the amount due under the contract would come within the item of 'other sums'? It is very significant to note that the Rule does not take in whatever amount due to the Panchayat but limits to the amount due to the Panchayat under law or rules or by-laws made thereunder. The amount due under the contract may be an amount due to the Panchayat but it cannot be said that the said amount is due under the Panchayats Act, or any of the Rules framed thereunder. The Rule does not include specifically the amount due under the contract. In the absence of such a specific provision and with a limitation to the sums due under the Act or any other law or rules or by laws made thereunder, it is clear that the amount due under a contract to the Panchayat is excluded within the purview of this Rule. Otherwise, when a power was conferred on the Panchayat to enter into contract by virtue of sub-section (3) to Section 8 of the Act, the Notification could have included specifically the amount due under the contract also under this Rule. It is, therefore, evident that the intention was to exclude it within the purview of this rule.

6. In this context, it is worthwhile to note the similar provisions contained in other Acts. Section 387 of the Madras City Municipal Corporation Act, 1919 runs thus:

"Recovery of sums due as taxes—

All costs, damages, penalties, compensations, charges, fees, rents, expenses, contributions, and other sums which under this Act or any rule, by-law or regulation made thereunder or any other law or under any contract including contract in respect of water-supply or drainage made in accordance with this Act, and the rules, by-laws and regulations are due by any person to the Corporation shall, if there is no special provision in this Act for their recovery, be demanded by bill containing particulars, of the demand and notice of the liability incurred in default of payment and may be recovered in the manner provided by rules 21 and 28 of the rules contained under Part VI of Schedule IV....."

Rules 21, 28 and 29 of Schedule IV to the said Act contain similar rules as in Notification 52 of the Panchayat Act providing for distraint and prosecution. This section specifically includes in spite of other sums due under the Act or any rule, by-law or regulation made thereunder, the amount due under any contract including a contract in respect of water-supply or drainage made in accordance with this Act and the amount due to the Corporation. The amounts due under the contract are significantly omitted in Notification No. 52 which is under consideration.

Similarly, Section 344 of the Madras District Municipalities Act, 1920 are in pari materia with S. 387 of the Madras City Municipal Corporation Act, 1919, with the exception that this Section does not include all contracts as provided under Section 387 of the former but includes only the amount due under a contract in respect of water-supply or drainage made in accordance with the Act, rules or by-laws made thereunder. This section also includes the sums due under the contract mentioned therein besides the other sums due. In this Act, also, there are provisions which are similar to the provisions in the Madras Panchayats Act in respect of the mode of recovery by distraint and by prosecution. It is therefore, clear from the provisions of these Acts that whenever the Legislature intended to include the amount due under the contract also to be recovered by the mode of distraint and prosecution, it specifically said so. When there is an omission in the Panchayat Act, the omission must be taken to be a deliberate one and that the Legislature did not intend to include the amount due on the contract.

7. It is significant to note that the Rules framed under the Madras District Boards Act, 1920 and the Madras Village Panchayats Act 1950 are in pari materia with the rules under consideration. The sums due under the contract were not included in these rules. It, therefore, appears that though the Legislature has given power to the Corporation and the District Municipalities to recover the amount due under the contract by following the modes of distraint and prosecution for recovery, yet, in its wisdom, it did not want to confer such power to the District Board, Village Panchayat, Town Panchayat or Panchayat Union to collect any amount due to the Panchayat under a contract. The Legislature then passed the Madras Panchayats Act, 1958 and the Government framed the Rules thereunder, and followed the pattern provided under the Madras District Boards Act and the Madras Village Panchayats Act though they would have been aware of the provisions of the Madras City Municipal Corporation Act and the Madras District Municipalities

Act. It is not necessary to go into the motives of the Legislature of the Government for not following the pattern provided under the Municipal Corporation Act, 1919 and the District Municipalities Act, 1920. The absence of the words "Sums due under any contract to the Panchayat" in the Rules is very significant. It shows that a Panchayat cannot prosecute a person who committed default in respect of payments due under the contract to the Panchayat.

8. In the following decisions in respect of the provisions of the District Municipalities Act, 1920, and the Local Boards Act, 1920, it has been held that the words "other sums" used in the provisions of the said Acts will not include the amount due under the contract.

9. In Abdul Azees Sahib v. Cuddapah Municipality, (1901) ILR 26 Mad 475 Sir Arnold White, C. J. held that "money due under a contract entered into with a Municipality for the right to collect tolls in consideration of a money payment does not fall within any of the provisions of Section 269 of the District Municipalities Act, 1884 and a contractor who fails to pay what is due under such a contract cannot be convicted and fined under that Section 269 of the District Municipalities Act, 1884 is in pari materia with Section 344 of the District Municipalities Act, 1920.

10. In Punia Syamalo In re, ILR 47 Mad 381 = (AIR 1924 Mad 669) referring to the words used under Sec. 221 of the Madras Local Boards Act, 1920, the Court held that the words "other sums" in that section should be read ejusdem generis with the words preceding therein. The Division Bench found that the amount due under a contract of lease though of the toll cannot be treated as falling within the words of Section 221 of the Local Boards Act and that the sum in question was not payable "under or by virtue of this Act", but is payable under the contract between the parties.

11. In Mahabab Alli Khan v. President, Taluk Board Kurnool, 84 Ind Cas 325 = (AIR 1924 Mad 898(2)) the Division Bench held that money due to a Municipality under a contract cannot be summarily recovered by the Municipality under Section 221 of the Madras Local Boards Act of 1920.

12. In Ahemad Hydros v. Alwaye Municipality, 52 Cri LJ 271 = (AIR 1951 Trav-Co 82) the Travancore-Cochin High Court, in dealing with Section 365 of the Travancore District Municipalities Act which is in pari materia with Section 269 of the Madras District Municipalities Act held that the amount due under a contract for the collection of market cess will not come under any of the Municipal dues and the prosecution of the Contractor was unsustainable.

13. Thus, it is seen that the Courts have uniformly taken the view that the words "other sums" due under the Act could not be equated with the amount due under the contract. In the result I find that the Special First Class Magistrate had no jurisdiction to entertain the complaint and the proceedings before him are quashed. The petition is allowed.

14. Before taking leave of this case, I am bound to express my gratitude to Mr. C. F. Louis, Advocate, who rendered valuable assistance to the Court by making submissions after having carefully made a research of all the relevant Acts and provisions and the case law on the subject. Petition allowed.

AIR 1970 MADRAS 364 (V 57 C 108)

**VEERASWAMI AND
RAMAPRASADA RAO, JJ.**

Elumalai Panchayat Board by its President and another, Appellants v. Guruswami Nadar and others, Respondents.

Letters Patent App. No. 41 of 1967, D/- 6-12-1968 against decree of Alagiriswami, J. in S. A. No. 1594 of 1963, D/- 1-8-1967 reported in AIR 1968 Mad 271.

Panchayats — Madras Village Panchayats Act (12 of 1950), Section 58 — Vesting of income in Panchayat — Income — Meaning of — Mahimai collections are not income — (Civil P. C. (1908), Prc. — Interpretation of Statutes) — (Words and Phrases — Income) — AIR 1968 Mad 271 Affirmed.

Mahimai or tharugu collections were not income which by sanction of custom had vested in Panchayat because they were dependent upon the contingency of a trader taking goods from the village and another bringing forbidden things into the village. They were not regular and periodical payments. There was no source from which they were received. No custom was inherited in a toll voluntarily paid by such traders for however long a period it might be. AIR 1968 Mad 271, Affirmed; AIR 1921 Mad 427 (SB) and AIR 1930 Mad 626 (2) and 1907 AC 264 (268), Rel. on; AIR 1966 SC 1807, Ref.

(Paras 6 and 7)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1807 (V 53) =
1966 SCR (Supp) 118, Tirunagar
Panchayat v. Madurai Co-operative
House Construction Society 6
(1930) AIR 1930 Mad 626 (2) (V 17):
= 58 Mad LJ 337, Vulcan Insu-
rance Co. Ltd. v. Corporation of
Madras 6
(1921) AIR 1921 Mad 427 (V 8) =
39 Mad LJ 649 (SB), Secretary,
Board of Revenue, Madras v.
Arunachalam Chettiar 6

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(1907) 1907 AC 264, Ystrady Fodwg
and Pontypridd Main Sewerage
Board v. Hensted 7

V. P. Raman and S. P. Palaniswami, for
Appellants; T. R. Mani, for Respondents.

RAMAPRASADA RAO, J.:— In this Letters Patent Appeal the question canvassed is whether the mahimai collections made by the Elumalai Panchayat in the district of Madurai would constitute "income" within the meaning of Section 58 of the Madras Village Panchayats Act, 1950. The plaintiffs who are residents and traders in the village of Elumalai, filed a suit more or less in a representative capacity in O. S. No. 66 of 1960 on the file of the Court of the District Munsif, Tirumangalam, questioning the validity of the act of first defendant, the Panchayat Board, to levy and collect such moneys by way of mahimai, and that of the other defendants as the limbs of the Panchayat to implement its action by enforcing such collection. The 2nd defendant is the person to whom such collections have been formed out, the 3rd defendant is the President of the Board and the 4th defendant is the Manager of the Panchayat. The collections were opposed on the ground that Ex. B. 11, dated 16-12-1958, which is the resolution of the Panchayat Board to collect the same, is without authority. The defendants pleaded that such collections were made on the strength of a custom prevailing in the village and such a customary right to collect is now vested in the Panchayat Board, and the resolution to implement the same is valid and enforceable. The trial Court and the appellate Court found that there was a custom in the village whereby the village community made similar collections bearing similar incidence as is reflected in Ex. B. 11, and therefore, the Panchayat Board had the requisite authority to impose and collect the Mahimai involuntarily as well, under Section 58 of the Madras Village Panchayats Act 1950. In the second appeal, filed by the plaintiffs against the said decisions, Alagiriswami, J. held—

"The levy of the kind in question can be contemplated only on the ground of its being related to the holding of some land or the holding of some office or at least some convenience or facility provided by a landholder. A mere custom, unrelated to anything else by which the village community makes collections in respect of goods brought for sale within its limits or goods taken out of its limits for sale outside cannot be said to be valid. There is no constitutional or legal basis for such a levy. Such a levy would be valid only if it is on incident of the possession of any property or holding of any office I should think that when Section 58 mentions 'income' it can only

refer to income from sources other than property belonging to the Panchayat, and particularly income from property which was not owned by the village community." and reversed the judgment of the lower appellate Court. Elumalai Panchayat, aggrieved against the decision of Alagiriswami, J. has appealed. Though several grounds were stated in the memorandum of grounds of appeal, the only question canvassed before us was that the levy was not in the nature of a tax and even if it is, it is justified. Mr. V. P. Raman, learned counsel, for the appellant, would urge that the collections are in any event income within the meaning of Section 58 of the Madras Village Panchayats Act, 1950, hereinafter referred to as the Act. He would also contend that the custom to collect the amounts having been found by the Courts below in favour of the appellant, the Panchayat had the right to pass the impugned resolution. He would also sustain the collections on the ground that it is tax or toll because the custom sanctioned such a levy even before the advent of the Constitution of India.

2. It appears to us that the collections made by the appellants are not income within the meaning of Section 58 of the Act, and it is not necessary to address ourselves to the other larger question elaborately considered by Alagiriswami, J., whether the collection is in reality a tax and as a tax whether the Panchayat had the authority to levy and collect the same. Suffice it however to say that on a fair reading of Section 58 of the Act and the prevalent practice in the village it was never contemplated or understood that what was being collected as mahimai was in the nature of tax as is understood in law and taxing statutes.

3. The sheet-anchor of the argument of Mr. V. P. Raman is that the collections made by the Panchayat by virtue of the resolution Ex. B. 11 was and continues to be income of the Panchayat. There can be no doubt that if such moneys paid by the traders in the village are to be characterised as income of the Panchayat, then such income would vest in it. But mahimai or tharagu are periodical collections made by the Panchayat not on any incidence normally available to it, but on the accidental circumstances of a trader coming in or going out of the Panchayat with certain notified goods or things. It is undoubtedly a voluntary payment and presumably to respect the custom in the village to pay the same to the members of the community.

4. Ex. B. 11 no doubt nominates the collections as toll which according to the Panchayat was derived by the custom prevalent in the village. Mere nomenclature cannot make any difference. Unless the amounts sought to be recovered

are income which by custom belongs to or has been administered for the benefit of the villagers in common, then Sec. 58 would not be attracted and such moneys cannot vest in the Panchayat.

5. What is 'income'? Funk and Wagnall in their new Standard Dictionary on the English Language explain the word 'income' as:—

"the amount of money coming to a person or corporation within a specified time or regularly whether as payment for services, interest, or profit from investment."

6. The element of regularity and the presence of a source from which such income is derived appear to be essential before any money obtained by a person or body can be described as "income." Oxford Dictionary would say: "Income" is:—

"periodical receipts from one's business, lands, work, investment etc."

This definition has found judicial approval in two decided cases of our Court. The Secretary, Board of Revenue, Madras v. Arunachalam Chettiar 39 Mad LJ 649 = (AIR 1921 Mad 427) (SB) and The Vulcan Insurance Co. Ltd. v. Corporation of Madras, 58 Mad LJ 337 = (AIR 1930 Mad 626 (2)). The contention here is that custom enabled the community to levy the toll and Ex. B. 11 authorised the Panchayat to collect it, and hence it is income. The argument overlooks the basic requirements of the word 'income' and the positive concepts imbedded therein. Here there is no source from which the collections are received; nor can it be said that they are regular and periodical payments. It depends upon the contingency of a trader taking the goods from the village and another bringing the forbidden things into the village. It is unusual to refer to an uncertain collection of the nature under consideration as "income", as it is purely money which is expected to be paid or got. There is a halo of chance around this collection depending upon a variety of circumstances. There may be no crop at all during one year and no trader may get into the village the forbidden goods. If, therefore, the 'income' stands and remains as a bare expectancy and depends on chance, it is inconceivable that such collection, even though authorised by custom, is 'income' as it popularly and legally understood. Reference was made to Tirunagar Panchayat v. Madurai Co-operative House Construction Society, AIR 1966 SC 1807. But far from gaining any assistance from the above, it appears to us that the ratio therein is against the contention urged before us by Mr. V. P. Raman. The Supreme Court observed—

"In the enactment of this section the legislature did not contemplate that parks, play grounds, schools or temple or

hospital dedicated to the public should vest in the panchayat merely by the fact of such dedication. What is required by S. 58 for the purpose of vesting is the proof of custom by which the villagers in common acquire title to any property or income. Vesting of rights takes place under S. 58 if there is proof of customary right of administration of any property or income for the benefit of the villagers in common. Unless therefore there is proof of customary right, the Panchayat cannot claim title to the property or income administered for the benefit of the villagers in common. For example, the society may have established a library or a social club or a school for the benefit of its members. Again, a private individual may have created a trust for the provision of amenities like parks, play grounds, and hospitals for the residents of the village. In a case of this description the legal ownership of the Society or of the trustees will not vest in the Panchayat because of the provisions of S. 58 of the Act. It cannot be supposed that such a startling and unjust result was contemplated by the legislature in enacting Section 58. We are accordingly of the opinion that the scope of S. 58 of the Act must be confined to communal property and income of the Panchayat which by custom belongs to the villagers in common or has been administered for their benefit as a matter of custom, and the scope of that section cannot be extended to include parks, play grounds, hospitals, libraries and schools provided by the Society for the benefit of the members of the Tirunagar colony."

7. It follows therefore that a social mandate by the villagers enabling a collection by way of a toll or otherwise from incoming and outgoing traders cannot by itself be proof of income or of a customary right of administration of income for the benefit of the villagers in common. As already stated, there may or may not be income. It is not periodical, but uncertain. For the only reason that the mandate has an impact over a section of the public in the village, it cannot make such a right, if it is a right at all, to vest in the Panchayat. Something more concrete is necessary. The word 'income' appears after the word 'property.' This specific word 'property' constitutes a class by itself. It is not exhaustive by its enumeration. The generic word 'income' which follows cannot be considered in the abstract and it cannot be deemed in the circumstances to refer to a genus which is of a wider connotation. There is no clear and manifest intention to this effect in S. 58 of the Act. As pointed out by Earl of Halsbury in *Ystrady Fodwg and Pontypridd Main Sewerage Board v. Hensted*, 1907 AC 264, at p. 268—

".....a very familiar canon of construction that, where you have a word which may have a general meaning wider than that which was intended by the legislature, when you find it associated with other words which shew the contrary within which it is to come, it is cut down and overridden — according to the general proposition which is familiarly described as the *ejusdem generis* principle".

Applying the rule of *ejusdem generis* the word "income" should mean income from any property to which the Panchayat has acquired a right by custom or otherwise. No custom is inhered in a toll voluntarily paid by the incoming and outgoing traders in a village, for, however long a period it may be. It cannot be said that it is income which by sanction of custom has vested in the Panchayat by reason of S. 58 of the Act. We also feel that there is considerable weight in the observation of Alagiriswami J. when he says—

"I should think that when Sec. 58 mentions 'income' it can only refer to income from sources other than property belonging to the Panchayat and particularly income from property which was not owned by the village community".

Viewing the subject from any perspective, we are unable to agree that the toll sought to be collected by the appellant under Ex. B-11 is income by custom belongs to or has been administered for the benefit of the villagers in common.

8. We have already observed that it is not necessary in the instant case to consider whether mahimai collections are in reality a tax and whether the legality of such a levy be upheld on the basis of a custom. We refrain from discussing this question as we have come to the same conclusion as Alagiriswami J. though on different grounds. The Letters Patent Appeal is dismissed; but in the peculiar circumstances with no order as to costs,

Appeal dismissed.

AIR 1970 MADRAS 366 (V 57 C 109)
FULL BENCH

K. VEERASWAMI, C.J., NATESAN
AND SOMASUNDARAM, JJ.

Shri Alladi Kuppaswamy, Applicant
v. The Controller of Estate Duty, Madras,
Respondent.

Tax Case No. 40 of 1965 (Reference
Case No. 13 of 1965), D/- 5-12-1969.

(A) Estate Duty Act (1953), S. 7(1) —
Interest ceasing on death — Widow's interest under Section 3(2), Hindu Women's Rights to Property Act, 1937 does not

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fall within S. 7(1) — Her interest lapses at her death and there is no cesser of interest.

The interest of a widow under S. 3(2) of the Hindu Women's Rights to Property Act, 1937 is not coparcenary interest within S. 7(1) of the Estate Duty Act. Her statutory interest is of undefined character before partition. Therefore on the widow's death there is no cesser of any interest she had in the joint family property and her interest being undefined lapses at her death resulting in no change in the coparcenary property as such and her interest cannot be regarded as an interest in property within S. 7(1). (1958) 34 ITR (ED) 20 (PC), Applied. Case law discussed. (Para 8)

(B) Estate Duty Act (1953), S. 5 — Property — Interest of a widow under S. 3(2) of Hindu Women's Rights to Property Act (1937) is property. (1968) 81 Mad LW 655, Approved. (Para 6)

(C) Estate Duty Act (1953), S. 5 — Levy of duty — Word "passes" — Widow's interest in joint family property merges on her death and not passes.

On the death of a widow who has not asked for partition, her interest merges in the coparcenary of which her sons were coparceners. Merger cannot be termed as passing of property on the death of the widow. "Passes" in Sec. 5 implies movement of the estate from one dying to another, and means changing hands. When by the death of the widow her interest under Section 3(2) of the Hindu Women's Rights to Property Act (1937) lapsed or it merged in the coparcenary automatically, not involving any mode of devolution known to the law, and her interest upto her death, unless worked out by a partition, was but a fluctuating one as in the case of her husband when alive, and is in no way different in its behaviour or character from the interest of a coparcener, it cannot possibly be said that on her death her interest passed within the meaning of Section 5. (Para 4)

Cases Referred: Chronological Paras

- (1968) 81 Mad LW 655 = ILR (1969) 2 Mad 684, Govindammal v. Ramaswami Pillai 3, 6
 (1968) 1968-70 ITR 663 = 1968 AC 553 (HL), Gartside v. Inland Revenue Commr. 8
 (1967) AIR 1967 SC 272 (V 54) = 1967-1 SCR 7, Satrugan v. Sabujpari 3, 9
 (1965) AIR 1965 SC 825 (V 52) = 1965-2 SCJ 620, Lakshmi Perumallu v. Krishnavenamma 3
 (1962) AIR 1962 Mad 36 (V 49) = 1961-43 ITR (ED) 1, Mammad Keyi v. Asstt. Controller of E. D. 9
 (1958) 1958-34 ITR (ED) 20 = 1957 AC 513 (PC), Attorney General of

Ceylon v. Arunachalam Chettiar 1, 4, 5, 8

- (1957) AIR 1957 Mad 695 (V 44) = 70 Mad LW 249, Kuppathammal v. Sakthi 8
 (1955) AIR 1955 All 625 (V 42), Sahu Jagadish Prasad v. Sridharkanta 3
 (1954) AIR 1954 SC 505 (V 41) = 1955-1 SCR 467, Kalishankar Das v. Dharendra Das 3
 (1916) AIR 1916 PC 117 (V 3) = 43 Ind App 207 = ILR 39 Mad 634, Janki Ammal v. Narayanaswami 3
 (1907) ILR 34 Cal 329 = 34 Ind App 87, Bijoy Gopal v. Krishna 3
 (1880) ILR 5 Cal 776 = 7 Ind App 115, Moniram v. Keri Kolutani 3
 K. R. Ramamani and S. V. Subramaniam for Subbaraya Iyer, Sethuraman and Padmanabhan, for Applicant; V. Balasubramanian and J. Jayaraman, for Respondent.

K. VEERASWAMI, C. J.:— This is a reference under Section 64(1) of the Estate Duty Act, 1953. Sri Alladi Krishnaswami Iyer, who died before the Estate Duty Act came into force, had, during his lifetime, settled certain properties absolutely on his wife Srimathi Alladi Venkalakshamma, and had also declared certain other properties as joint family properties. The lady having died on January 5, 1956, the principal value of her estate passing on her death was determined by the Revenue at Rs. 7,25,527/- This sum included Rs. 2,02,271/- as the value of her 1/4th share in the properties belonging to the Hindu family consisting of herself and her three sons. The Central Board of Revenue, agreeing with the Estate Duty Officer upheld the inclusion as warranted by Section 7(1) and dismissed the appeal from the assessment order. The Board held the view that the Hindu widow's estate created by Section 3(2) of the Hindu Women's Rights to Property Act, 1937 was an interest in property which ceased on the death of the widow attracting duty, and that Attorney-General of Ceylon v. Arunachalam Chettiar, (1958) 34 ITR (ED) 20 (PC) had no application to such a case.

2. The original reference to this Court was of the following three questions:—

"1. Whether on the facts and in the circumstances of the case, one-fourth share of the deceased in the joint family properties, to which she was entitled under Section 3 of the Hindu Women's Rights to Property Act, 1937, was correctly included in her estate as property deemed to pass on her death under Section 7 of the Estate Duty Act, 1953?

2. Whether the Estate Duty Act, 1953, in so far as it seeks to levy duty on agricultural lands, is ultra vires of the legislative powers of the Union Legislature?

3. Whether on the facts and in the circumstances of the case, the accrued inte-

"Property passing on the death" is property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation. Pausing here for a moment, we may observe that the interest a widow has under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, may be regarded as property. That is the view rightly taken in (1968) 81 Mad LW 655. The charging Section 5 directs levy of duty on the estate of the deceased which passes on his death. The Section also says that the levy and demand of duty be upon the principal value ascertained as provided later in the Act. What property is deemed to pass is specified in the next following Sections, including Section 7. Special provisions relating to transfers to companies then follow. Certain exceptions from the charge of duty are provided in respect of specified property of the deceased, depending on its situs or the status in which it was held by him, or other detailed considerations. Section 34 relates to aggregation of property and rates of duty. Then we have Section 36 (Part V) which deals with the manner of estimation of the principal value chargeable to tax; Section 36 states that the principal value of any property shall be estimated to be the price which, in the opinion of the Controller it would fetch if sold in the open market at the time of the deceased's death, and that in so estimating, the Controller shall fix the price of the property according to the market price at the time of the deceased's death. Section 39 contains special provisions for valuation of interest in coparcenary property ceasing on death, and as related to the inclusive part of Section 7(1).

The benefit accruing or arising from the cesser of a coparcenary interest in a joint family property governed by the Mitakshara school of Hindu law on the death of a member thereof shall be the principal value of the share in the joint family property which would have been allotted to the deceased had there been a partition immediately before his death. The principle is applied also to cesser benefit in cases governed by the Marumakkattayam or Aliyasantana rule of inheritance. But in order to arrive at the value of the deceased's share which would have been allotted to him had there been a partition before his death, the principal value of the entire property of the joint family should be estimated. The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall under Section 40, be the principal value of the property:

(a) if the interest therein is extended to the whole income of such property; and

(b) in case the interest extended to less than the whole income of the property, the value of the benefit should be the principal value of an addition to the property equal to the income to which the interest extended.

7. It would be proper, and necessary, in our opinion, to understand the words "property", "interest", and "benefit" in the context and in the light of these provisions. It follows that though property, or an interest in property may well be as included in the definition of the term "property", still it may or may not be so for purposes of a particular section in the Act. For instance, it is only property that passes in the sense of passing hands by way of inheritance, or other form of devolution, which seems to attract Section 5. Likewise, for purposes of Section 6, it must be property which the deceased at the time of his death was competent to dispose of. So also, for application of the first part of Section 7(1), it should be such interest in property, as on its cesser, the benefit that accrues or arises should be referable to the whole or less than the whole income of the property. The implication is that if this measure in terms of income of the property is not apposite to the cesser of an interest, it will not be an interest such as is contemplated by Section 7(1). The inclusive provision of the sub-section does not seem to affect this construction as the principal value of the class of interest with the coverage is value accruing to the members contained in Section 39, and not on the basis of valuation of benefits from interest ceasing on death under Sec. 40. It is clear from the language of Section 49(b) that the cesser benefit by ceasing of the corresponding interest is an addition to the property equal to the income to which the interest extended.

8. Having regard to the nature of the interest a widow has, under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, we doubt whether it is at all an interest ceasing on her death within the contemplation of the first part of sub-section (1) of Section 7. So long as the widow did not work out her interest by asking for partition and separate possession of her husband's share in the joint family properties, she is not entitled to any specified part of such properties, or the income referable to it. The entire properties are owned by the coparcenary, and so too the income therefrom wholly belongs to it. Each member of the coparcenary is entitled to be maintained out of the income, and so too the widow of a deceased coparcener: but the expenditure to be incurred, and its quantum in respect of maintenance rested on the discretion of the karta of the joint family. The result of the fluctuation of a coparcener's interest in the joint family pro-

perties is but reflected only at the partition thereof. But before then, the idea is but notional. There may be births and deaths of the coparceners in a joint Hindu family, but they have no effect in a sense on the coparcenary as such, which remains the same.

The widow's interest under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, is not that of a coparcener as we shall presently see. But even so, her statutory interest is of undefined character before partition. We are of the view, therefore, that on the widow's death there was no cesser of any interest she had in the joint family property, and that in any case, her interest being entirely undefined, it lapsed at her death, resulting in no change in the coparcenary property as such, and her interest cannot properly be regarded as an interest in property within the meaning of Section 7(1). Further, we fail to see what benefit accrues or arises, on the cesser of her interest. The income of the joint family properties is available to the coparcenary both before, and after her death. Apart from that, the scheme of the Statute, in the light of Section 40(b) is that any interest in property not capable of measurement in terms of income is not within the purview of Section 7(1). (1958) 34 ITR (ED) 20 (PC) supports this view. *Gartside v. Inland Revenue Commissioners*, (1968) 70 ITR 663 (HL) with reference to S. 7(7) (a) and (b) of the English Act which corresponds to Section 40(a) and (b) of our Act, observed at page 718:

"This shows that for the cesser of an interest to give rise to a charge for duty, it must be possible to say of the interest that it extended to the whole income, or to a definite part of the income. This notion of definite extension is, in my opinion, vital to the understanding and working of Section 2(1) (b) and consequently of Section 43 of the Act of 1940".

Section 2(1) (b) is in pari materia with the first part of Section 7(1) of the Indian Act. For the Revenue, our attention was invited to *Kuppathammal v. Sakthi*, AIR 1957 Mad 695. But we do not think that the learned Judge in that case meant to lay down the law to be that the widow of a Hindu deceased coparcener is, by reason of her interest under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, entitled without effecting partition, to any definite share of income of the joint family properties. In our opinion, it follows that the charge to Estate Duty in this case cannot be sustained as valid under the first part of Section 7(1).

9. There is even less justification, as it seems to us, for the Revenue to invoke the extended scope by the inclusive coverage of Section 7(1). It goes no farther than that a coparcenary interest in

the joint family property of a Hindu family governed by the Mitakshara ceasing on the death of the coparcener shall be deemed to pass to the extent to which a benefit accrues or arises by the cesser of such interest. We are clearly of opinion, that the interest of a widow of a deceased coparcener under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, is in no sense a coparcenary interest. It is well settled that the widow is not a coparcener, though she is a member of a Hindu joint family. AIR 1967 SC 272 says this:

"A Hindu coparcenary under the Mitakshara school consists of males alone; it includes only those members who acquire by birth or adoption interest in the coparcenary property. The essence of coparcenary property is unity of ownership which is vested in the whole body of coparceners. While it remains joint, no individual member can predicate of the undivided property that he has a definite share therein. The interest of each coparcener is fluctuating, capable of being enlarged by deaths, and liable to be diminished by the birth of sons to coparceners; it is only on partition that the coparcener can claim that he has become entitled to a definite share. The two principal incidents of coparcenary property are: that the interest of coparceners devolves by survivorship and not by inheritance; and that the male issue of a coparcener acquires an interest in the coparcenary property by birth, not as representing his father but in his own independent right acquired by birth."

The widow gets a right to the interest of her husband in the joint family properties under Section 3(2) of the Hindu Women's Rights to Property Act, 1937, not by any right by birth, but by force of the Statute. The basis of her right is not her birth, but the Statute. Nor does her interest under Section 3(2) devolve on the coparcenary on her death; but it merges with the coparcenary property in that event. In the same case which we just now noticed, the Supreme Court pointed out:

"If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate, her interest will merge into the coparcenary property."

It is clear, therefore, that the interest of a widow under Section 3(2) of the said Act is not coparcenary interest within the meaning of Section 7(1). It is true that the expression "coparcenary interest" has been used in the sub-section even in respect of joint family property of a Hindu family governed by the Marumakkattayam or Aliyasanthana Law. In the context, that expression only means, as apparently *Mammad Keyi v. Assistant Controller of Estate Duty*, (1961) 43 ITR (ED)

1 = (AIR 1962 Mad 36), a case of a Mahomedan tarwad, was inclined to think. But we see no justification why the expression "a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara" should be understood not in the light of the exposition by that school of the Hindu Law, but as mere joint interest in the joint family property of a Hindu family. The Legislature must be taken to have had in mind while enacting Section 7(1) the incidents of a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara. We find nothing in (1961) 43 ITR (ED) 1 = (AIR 1962 Mad 36) which compels us to take a different view. Section 7(2) read with Section 39(1) and (3) leaves no room for doubt that a coparcenary interest in the joint family property of a Hindu family governed by the Mitakshara law is a coparcenary interest in such family property as expounded by the Mitakshara.

10. We answer the question in favour of the accountable persons, with cost. Counsel fee Rs. 250/-.

Reference answered accordingly.

AIR 1970 MADRAS 372 (V. 57 C 110)
VEERASWAMI AND RAMAPRASADA
RAO, JJ.

Commissioner of Income-tax, Madras,
Applicant v. S. Govindan Chettiar, Res-
pondent.

Tax Case No. 110 of 1965, (Ref. No. 46
of 1965), D/- 16-12-1968.

Income-tax Act (1922), S. 34(3), Proviso
— Finding — Incidental observation is
not.

Where an assessee prefers an appeal to
the Tribunal, any incidental observation
made by it in order to dispose of the ap-
peal is not a finding within the proviso.
A finding is a conclusion which the Tri-
bunal has to reach so as to dispose of the
appeal before it. Case law discussed.

(Paras 3, 4)

Cases Referred: Chronological Paras
(1967) 66 ITR 586 (SC), N. K. Shiva-
lingam Chettiar v. Commr. of I. T. 6
(1965) AIR 1965 SC 342 (V 52) =
52 ITR 335, Income Tax Officer v.
Murlidhar Bhagwan Das 5, 6
(1963) AIR 1963 All 172 (V 50) =
48 ITR 705, Lakshman Prakash v.
Commr. of I. T. 5
(1963) 47 ITR 16 (Mad), A. S. Khader
Ismail v. I. T. Officer, Salem 5
(1960) AIR 1960 All 97 (V 47) = 39
ITR 265, Pt. Hazari Lal v. I. T.
Officer, Kanpur 5

V. Balasubramanian and J. Jayaraman,
for Applicant; K. Srinivasan, D. Meena-

EN/EN/C221/70/VRB/C

ksishundaram and K. C. Rajappa, for
Respondent.

VEERASWAMI, J.:— The question in
this reference at the instance of the Com-
missioner of Income-tax is as to the ap-
plicability to the facts of the second pro-
viso to Section 34(3) of the Income-tax
Act, 1922.

2. The assessee carried on business in
Ceylon and by an order dated January 30,
1954, he was assessed to tax on a total in-
come of Rs. 90,378/-, against the admitted
income of Rs. 40,378/-. His appeal result-
ed in enhancement of the total income to
Rs. 94,905/-. The Tribunal confirmed
that order and dismissed the assessee's
further appeal. In the course of its order
the Tribunal observed 'unexplained' cash
credits to the extent of Rs. 60,051/- and
stated that they did not represent genu-
ine liability. On that basis, according to
the Tribunal, the total income amounted
to Rs. 1,00,429/-. Its order was dated
November 27, 1959. The Income-tax
Officer on the view that there was a find-
ing by the Tribunal in respect of credits
in the anamath accounts amounting to
Rs. 60,051/- which were spurious and un-
proved, reopened the assessment under
Section 34(1) (a) and (3) and reassessed
on January 25, 1961 on a total foreign in-
come of Rs. 1,00,429/-. Differing from the
Revenue, the Tribunal in an appeal aris-
ing out of the reassessment Order held
that its observation in the order dated
November 27, 1959 as to the total income
of the assessee amounted to Rs. 1,00,429/-
was only incidental to its finding that the
total chargeable income fixed by the
Appellate Assistant Commissioner was not
excessive. The following question has
been referred to this Court:—

"Whether on the facts and in the cir-
cumstances of the case, the Appellate
Tribunal was right in holding that the re-
opening of the assessment for the year
1951-1952 under the second proviso to
Section 34(3) was not justified in law."

3. In our opinion, the Tribunal was
right. The appeal of the assessee before
it, was confined to the propriety of the
finding of the Appellate Assistant Com-
missioner that the total income charge-
able to tax should be fixed at Rs. 94,905/-.
The Tribunal was not concerned with the
question, whether the sum of Rs. 5,524/-
should be added to the chargeable total
income for the assessment year, and in-
deed we doubt its jurisdiction to do so in
the assessee's appeal. While investigat-
ing the point arising in the appeal, name-
ly, whether the fixation by the Appellate
Assistant Commissioner of the chargeable
total income was excessive, it confronted
with unexplained cash credits to the ex-
tent of Rs. 60,051/- in the light of which
the total income would amount to
Rs. 1,00,429/-, and in view of it, conclud-
ed that no interference with the order of

the Appellate Assistant Commissioner was called for. It is obvious, therefore, that, having regard to the scope of the appeal preferred by the assessee and the question the Tribunal was called upon to decide in disposing of it, its observation as to the unexplained cash credits amounting to Rs. 60,051/- was but incidental to the question which it was necessary for it to decide in order to dispose of the appeal. Such an observation is not a finding within the meaning of the second proviso to Section 34(3).

4. A 'finding' in the context is the conclusion which the Tribunal has necessarily to reach so as to dispose of the appeal before it. We are of the view that the scope of the appeal not only with reference to what the appellant has asked for by way of relief but also the Tribunal's appellate powers with reference to it; and whether the assessee and the Revenue were at issue on a particular point in dispute a decision of which is also necessary for granting or denying the relief in such an appeal would govern the determination whether a disputed observation is a finding within the meaning of the second proviso. It should follow that every step or reason or observation incidental to finding cannot be mistaken for the finding itself.

5. In *A. S. Khader Ismail v. Income Tax Officer, Salem*, (1963) 47 ITR 16 (Mad) this Court was inclined to the view that 'a finding' for purposes of the proviso should be given a wide significance so as to include not only findings necessary for the disposal of the appeal, but also findings which were incidental to it. A Full Bench of the Allahabad High Court in *Lakshman Prakash v. Commissioner of Income-tax*, 48 ITR 705 = (AIR 1963 All 172) considered that the scope of a finding was even wider. The Court observed that a finding was nothing but what one found or decided and a decision on a question even though not absolutely necessary or not called for, was a finding. The majority in *Income-tax Officer v. Murlidhar Bhagwan Das*, 52 ITR 335 = (AIR 1965 SC 342) disagreed with both the Courts and held:—

"A finding, therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question."

While so defining the scope of 'a finding' the majority in 52 ITR 335 = (AIR 1965 SC 342) accepted as correct the earlier view of the Allahabad High Court in *Pt. Hazari Lal v. Income-tax Officer, Kanpur*, 39 ITR 265 = (AIR 1960 All 97), that is to say, a finding would cover only material questions arising in a particular case for decision by the authority hearing the appeal, which, being necessary for passing the final order, or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing.

6. Mr. Balasubramanian, for the Revenue, referred to this view as extracted in 52 ITR 335 = (AIR 1965 SC 342) and appeared to rely on it as if it was wider in scope than the delimitation drawn by the majority in 52 ITR 335 = (AIR 1965 SC 342). Clearly this is not correct, for, with reference to the observation extracted from the decision of the Allahabad High Court, the majority of the Supreme Court in 52 ITR 335 = (AIR 1965 SC 342) laid down that a finding could only be that which was necessary for the disposal of the appeal, and that too in respect of an assessment of a particular year. This view has been applied by the Supreme Court in *N. K. Sivalingam Chettiar v. Commissioner of Income-tax*, (1967) 66 ITR 586 (SC). There again, it was reiterated that a finding within the second proviso to Section 34(3) must be a finding necessary for giving relief in respect of the assessment year in question.

7. Can it be said that the determination of the total income of the assessee for the assessment year 1951-1952 to be Rs. 1,00,429/- was necessary for the disposal of the appeal, that is to say, to find whether the Appellate Assistant Commissioner fixed the total income excessively at Rs. 94,905/-? We are of the view that no such finding that the total income amounted to Rs. 1,00,429/- was necessary to arrive at that conclusion, so that the Tribunal could dismiss the appeal. It is no doubt true that to determine whether Rs. 94,905/- was excessive the Tribunal had to explore into the unexplained cash credits and it had to do it in the nature of things with reference to all such unexplained cash credits which when totalled up came to a total income of Rs. 1,00,429/-. But that is only for the purpose of finding whether there was excessive fixation of the total income by the Appellate Assistant Commissioner, and that way, the observation of the Tribunal was but incidental to that main question.

8. We answer the question against the Revenue with costs. Counsel's fee Rs. 250/-.

Answer accordingly.

AIR 1970 MADRAS 374 (V 57 C 111)

RAMAPRASADA RAO AND
SOMAPRASADA RAO, JJ.

Varadarajulu Naidu, Appellant v. Revenue Divisional Officer, Tirukoilur, Respondent.

Appeal No. 334 of 1966, D/- 18-2-1970, against decree of Sub-J. Coimbatore, D/- 21-9-1965.

(A) Constitution of India, Art. 31 — Compulsory acquisition of property — Powers of eminent domain — State must compensate owner by paying market value including intelligible increase due to improvement of locality and surroundings — Long user before valuation date attaching to land reputation as market place and increase in market value — Compensation must be found on such market value and not on criteria secured from sales in vicinity of lands qualitatively not comparable. (Para 3)

(B) Land Acquisition Act (1894), S. 23 — Assessment of compensation — Matters to be considered — Loss of earning caused by acquisition must be taken into consideration — Land used by District Board as market place on payment of rent to owner — Owner having reasonable expectation to receive such rent in future for a number of years — Loss of such income cannot be ignored — Evaluation must be by capitalisation of rent and not on basis of value of land not qualitatively comparable to land acquired. Case law discussed. (Para 4)

Cases Referred: Chronological Paras (1954) AIR 1954 Andhra 12 (V 41) =

(1954) 2 Mad LJ (Andhra) 1, Raja of Vizianagaram v. Revenue Divisional Officer, Vizagapatnam 4, 7
(1939) AIR 1939 PC 98 (V 26) =
ILR (1939) Mad 532, Vyricherla Narayana Gajapathiraju v. Revenue Divisional Officer, Vizagapatnam 3

(1934) AIR 1934 Cal 97 (V 21) =
58 Cal LJ 38, Bijaya Kanta v. Secy. of State 4, 7
(1926) AIR 1926 Mad 732 (V 13) =
50 Mad LJ 566, Collector of Chingleput v. Kadir Mohideen Sahib 4

Kanakaraj, for Appellant; Addl. Govt. Pleader, for Respondent.

RAMAPRASADA RAO, J.:— One acre and twelve cents of land in T. S. No. 37-A/1B in Thokkavadi village, Villupuram Taluk, South Arcot District, was acquired compulsorily for the use as a weekly cattle market. This acquisition was at the instance of the District Board, as it then was, of the district. The District Board initially applied also for the acquisition of R. S. No. 37-B/2B of the same

village for purposes of the weekly shandy. Later, on the suggestion of the Collector, the proposal for the acquisition of R. S. No. 37-B/2B was withdrawn, for it was felt that the said land was on the other side of the Railway line and it cannot be reached from R. S. No. 37-A/1B excepting through crossing the railway line which is objectionable. It was also found that R. S. No. 37-B/2B was not used as a market place, whereas the land acquired was so being used as a shandy for the sale of cattle. It was with this initial background that the above extent of land in R. S. No. 37-A/1B belonging to the appellant was acquired under the provisions of the Land Acquisition Act for which purpose a notification under Section 4(1) thereof was issued on February 29, 1956.

The claimant, both before the Land Acquisition Officer and in the Court below, when the subject came to it on a reference under Section 18 of the Act, contended that the land was used as a shandy for a considerable length of time prior to the valuation date and that he was obtaining a rent of about Rs. 1,500/- per annum and therefore the land had to be valued with such potential in it by capitalising the annual rental yield with a reasonable multiple arrived at on the basis of the rate of interest prevailing on the valuation date for such securities. But the Land Acquisition Officer ignoring the said contention treated the land acquired as a house site, valued it as such and awarded compensation at the rate of Rs. 25/- per cent. The Land Acquisition Officer, however, rightly in our view, did not award any interest over the compensation awarded, since the State by then was in possession of the land as a result of an arrangement between the District Board and the appellant.

On a reference to Court by the interested person, the Court sustained the value at Rs. 25/- per cent, but thought that some accommodation should be made for the fact that the land had potential value to serve as a shandy. After noticing this, the Court awarded an additional compensation of Rs. 3,000/- having regard to the annual income realised by the appellant from and out of the acquired land and having also regard to certain other features of the land acquired. But it gave interest on the amount awarded at four per cent thereon from the date of taking possession to the date when the compensation amount was paid. Still aggrieved by the award of the Court below, the appellant is before us.

2. Mr. Kanakaraj, learned counsel for the appellant, contends that the Court below failed to notice his main contention and, probably the only contention, that the method of valuation of the land acquired ought to be on the capitalisation

system and not by secured criteria from the sales of lands in the vicinity and adopting the same as the market value of the property in question. He would contend that from 1943, the land was admittedly used as a shandy and, in fact, he had to close down the shandy which he was running on the land by the order Ex. A-3 and had to compulsorily hand over his property to the District Board to enable them to run a shandy thereon.

It is seen from Exs. A-4 and A-5 that the land acquired was used as a public market from 1943 to 1948 free of rent. But in 1947 under Ex. A-10, the appellant demanded rent for the acquired property as it appears from the record that the District Board was farming out the right to collect fees from the persons using the shandy and this activity of the District Board prompted the appellant to claim rent from them. P.W. 4, the claimant, says that in 1949 the District Board auctioned the right to collect fees from the market for the year 1949-50 for Rs. 6316 and the District Board agreed to pay him one-fourth of the auctioned money towards rent for that year. Thereafter he would say in his evidence that he was obtaining every year from the District Board one-fourth of such amount fetched in the public auction and that was one of the main terms of the agreement between him and the District Board.

When he was cross-examined, it was not elicited from him that such was not the arrangement and the agreement. As a matter of fact, it is seen from Exs. A-12, A-14, A-20, A-29, A-30, A-31, A-52, A-59, A-61, A-62, A-63 and A-66, that the appellant was receiving on an average between 1949 and 1963 an annual rent of about Rs. 1,500/-. On the basis of such data disclosed and spoken to by the appellant, Mr. Kanakaraj contends that the acquired land has to be valued not on the usual basis of adopting the market value of lands in the vicinity, but by capitalising the rental yield by the appropriate multiple, which has to be ascertained in the circumstances of this case.

Though the learned Additional Government Pleader initially thought that the reputation acquired by the land in question, that it was used and utilised and suitable for a shandy, need not be noticed and considered as if it has a potential worth for valuation in the process of compulsory acquisition, yet he had to and he did indeed concede that, at least with reference to the principle in sub-clause (4) of Section 23 of the Act, the earnings to which the appellant was deprived does give rise to a cause of action for a claim for compensation based under that head, and for this purpose the orthodox method of adopting the values of lands in the vicinity need not be followed in the instant case. As a matter of fact, Mr.

Ramaswami, learned Additional Government Pleader, has very fairly, but later, agreed that the method adopted by the Court below is not correct; but as the matter involved in this case raises an interesting question, we have to deal with it before we answer and consider the respective contentions of counsel.

3. The interesting question that arises in this appeal is not abounding, as is usual in land acquisition cases, in judicial precedents. When a property is acquired in exercise of the powers of eminent domain of the State, the owner has to be justly compensated for the same by paying him its market value together with the money equivalent of its existing advantages and future potentialities. In fact, the claimant is entitled to receive such market value of the property including such intelligible though speculative advance therein attributable to it, consequent upon the improvement of the locality and the surroundings and its inherent advantages as well. No doubt far-fetched capabilities cannot be noticed for purposes of assessment.

Even so, in a case where the land has obtained a reputation of being used and utilised as a public market place for well over fifteen continuous years before the valuation date and has thus acquired a secondary signification peculiar to its situation, then the problem is whether such a realised and patent potential of the property, which has become inhered in it, and whether such an advance and reputation gained, enter into the mechanics of the computation in compulsory acquisition proceedings. In the instant case the acquired land was admittedly used as a shandy place or as a public market from 1943 onwards by the District Board or latterly by the Panchayat Board. The owner, as already seen, by an agreement with the District Board, as it then was, was receiving his share of the proceeds by farming out of the right to sell in the market. He was indeed getting one-fourth of the auction amount in terms of the arrangement between himself and the District Board. This land was pitched upon because of this peculiar situation in the village. This is borne out by the report of the Land Acquisition Officer as well.

Though the claimant desired that the land has to be valued by capitalising the rent, it was not suggested that the continuity of the shandy at that place was purely at the discretion of the Panchayat and there was no certainty of such annual income being derived from the property. The public authority never shifted the market from 1943 to any other place. As a matter of fact, their desire to extend the market to S. No. 37-B/2B was thwarted by the Collector as it was not

suitable for the purpose and as one had to cross the railway line to reach it. It can therefore be fairly presumed that the appellant at or about the time when the notification under Section 4 was issued had a reasonable expectation of continuing to receive and realise such annual rent although it was considerably higher than the normal rent that might be obtainable under ordinary circumstances.

It cannot be denied that, as a general rule, the compensation to the owner has to be estimated by reference to the uses for which the property is suitable, having regard to the existing business, or wants of the community, or such as may be reasonably be expected in the immediate future. While adopting the above criteria, impractical and unimaginative benefits ought not to be noticed, but they should be judged and valued purely on commercial considerations.

The Privy Council in *Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatnam*, AIR 1939 PC 38 observed as follows at p. 101:

"The compensation must be determined therefore by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser.

"But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded."

The land in question has undoubtedly secured an adventitious value, which is something more than its normal or intrinsic value. Ordinarily, intrinsic value does not necessarily establish a fair and just value, because such value does not depend upon the exterior or surrounding circumstances. Fortuitous circumstances which are continuous and apparent and which prompt a particular mode of user of land inject into it a marketable value of a peculiar nature. It is common knowledge that persons wishing to purchase the said quality of land for the same purpose for which the land is peculiarly applicable and usable, usually give a higher price. *Prima facie* it may be a contingent benefit. But each case has to be decided on its own merits. If such a benefit is not sporadic, but has become annexed to the land by long user and if the locus of the land lends support to such a special adaptability, then such market value has to be found and such compensation found has to be awarded.

4. One other way of looking into the problem is by applying the principle

adumbrated in Section 23, clause (4) thereof. Section 23 enumerates the matters to be considered in determining compensation. One such matter is the damage sustained by the person interested at the time of the Collector taking possession of the land by reason of the acquisition injuriously affecting his other property, moveable or immovable, in any other manner, or his earnings. The loss of earning also is one of the matters to be considered in determining compensation.

In the instant case, the appellant was getting on the average about Rs. 1,500/- per annum ever since 1949. By the compulsory process he is deprived of such earnings. Therefore, this deprivation ought not to be lightly brushed aside without being considered while granting the just equivalent for the compulsorily acquired land. By the acquisition, the owner is likely to lose once and for all the rent obtained. Though it is not relatable to any direct activity of his, yet the situation of the shandy and the convenience of the public in the locality to gain access to it conveniently and that too for a good number of years indicate that the rent obtained by the appellant is what is often called as the sitting rent derived therefrom for nearly fifteen years and more. It is in this light that the intrinsic or normal market value which could be obtained from adopting the sale price of ordinary lands in the vicinity fades into insignificance.

At the Bar several decisions were cited and we should record that the learned Government Pleader has very fairly placed before us several decisions which would support the contention of the counsel for the appellant, rather than further his case. Mr. Kanakaraj referred to a decision in *Raja of Vizianagaram v. Revenue Divisional Officer, Vizagapatnam*, 1954-2 Mad LJ (Andhra) 1 = (AIR 1954 Andhra 12). Subba Rao, C. J., as he then was of the Andhra High Court, was therein evaluating a land which was suited for being used as a salt-pan and which was very near the neighbouring salt-pan near Baluchervu Salt-Pan. The learned Judges constituting the Division Bench therein noticed several sale deeds in respect of salt-pans in the vicinity, but in the absence of specific evidence as to the expenses that are to be incurred by the owner in that case to reclaim the waste land into a salt-pan, they did not resort to the orthodox method of evaluation. On the other hand, they would say that having regard to the evidence in the circumstances and as the lands were eminently fit for development as a salt-pan, the income from a working salt-pan may be taken and after deducting therefrom the expenditure incurred for converting the waste land into a salt-pan,

some reasonable rate may be fixed. In effect, the principle laid down therein is, if sale deeds of salt-pans in and around the locality are available, the value of the potentiality may be ascertained having regard to the expenditure incurred for conversion. If it is not available, then capitalising the rental yield would afford a surer and better guide for purpose.

In *Collector of Chingleput v. Kadir Mohideen Sahib*, AIR 1926 Mad 732 = 50 Mad LJ 566, Krishnan, J., speaking for the Bench, dealing with the acquisition of a brick field, observed as follows (page 567) = (at p. 733 of AIR):

"As regards the value of the land acquired, which is the most important item in the total valuation, it is conceded that the claimant is entitled to have his land valued with reference to the most profitable use it can be put to. The land is very suitable for a brick field as shown by the evidence; in fact the Government is acquiring it for the very purpose of using it as a brick field. It is also suitable as a building site as proved by witnesses.....The claimant is, therefore, entitled to have his land valued in both ways and given the higher value, whichever it may be."

Once again the learned Judges laid down the principle that if the property acquired in a compulsory acquisition is subject to a user which is beneficial and which can be commercialised, then such a factor is to be taken note of while valuing the property on the valuation date, regard being had to the potential of such secured or realised amenity.

In the instant case, the Government acquired the property for the purpose of a public market or a shandy. The owner also had a fair expectancy that he would receive the rent from the Panchayat Board for the use of his land as shandy for many years more. That the land is suitable for the purpose of a shandy is not in dispute. It is in such circumstances we should consider whether the value of lands which are not qualitatively comparable to the acquired lands can be taken into consideration by blindly following the orthodox rule of evaluation. We think not.

In *Bijaya Kanta v. Secretary of State*, AIR 1934 Cal 97 a land in which a bazar was run was acquired. In that case evidence was let in to show the value of the lands in the vicinity and such evidence was pressed into service for adoption. But as already stated, the property was being utilised as a market and was fetching a rent. The question, therefore, was whether the capitalisation of the rent was the proper method or the adoption of the market rate of the lands in the vicinity was better. In those circumstances, the

learned Judges in the said case observed (at p. 99):—

"In the absence of evidence of the selling value of similar class of lands in the neighbourhood it seems to me that the only course of proceeding was to estimate the rent at which the whole plot might be leased and the purchase money might be properly calculated at 25 years' purchase plus....."

The ratio in this case is again indicative of the fact that unless clinching evidence of sales in the neighbourhood of lands similar and similarly utilised, like the acquired land, is available, then it would be venturesome to blindly adopt the value of other lands for the purpose of awarding compensation under the Land Acquisition Act.

According to us, it is now fairly clear that though the price of land has to be valued by a reference to sales of lands in the vicinity, yet in a peculiar situation like the one on hand, it would be unfair to adopt the intrinsic value of the land as its market value, as that would mean, its special adaptability, its realised potentiality etc. ought to be ignored. This cannot be done, as the claimant is entitled to the just equivalent of the land in terms of money when it is compulsorily acquired.

In the case before us, the acquisition is for the purpose of establishing a shandy. The land was utilised as a shandy for several years. It gained a reputation as such and it is not denied. Such advance in the nature and potential of the property has to be turned to account. It is in this respect that the values arrived at by comparing the values of ordinary lands bereft of such potential in the vicinity do not reflect a fair method for computing the market value of the acquired land. The income derived from the property should, therefore, be taken into consideration and the same capitalised by applying a fair multiple as in the words of Venkata-subba Rao, J. in *Collector of Chingleput v. Kadir Mohideen Sahib*, 50 Mad LJ 566 at p. 574 = (AIR 1926 Mad 732 at p. 737):

"It is undoubtedly true that in awarding compensation, any and every element of value which the lands possess to the owner must be taken into consideration in so far as it increases the value to him." In the light of the above discussion, we are unable to accept the mode and method adopted by the Court below in ultimately evaluating the acquired land.

The learned Subordinate Judge was aware of the special adaptability and potential of the acquired land. But he valued such potential on an unknown basis. He valued the land with reference to the prevailing prices of lands which could not be compared, as they are not of the same quality and added to it a sum of Rs. 3000 arbitrarily as and towards

compensation for the potential noticed by him in the acquired land. This method is not the proper method and we have already indicated as to the lines on which properties similar to the acquired land have to be valued. Once the valuer finds that the prices of lands in the vicinity do not reflect the real price of the land acquired, then the alternative method of capitalising the net annual rental yield has to be resorted to. We have no hesitation in stating that the rental basis affords a fair guide for evaluation in the instant case.

5. According to the appellant, the average income derived by him from the land by reason of the use to which it was put by the District Board with his consent was about Rs. 1551-62 per year. But we notice in the particulars shown to us that in the years 1952-53 and 1956-57, the appellant derived a rent of about Rs. 1048-45, during the former year, and Rs. 1031-25 during the latter year. The notification under Section 4(1) of the Land Acquisition Act was issued on 29-2-1956. Therefore, it can safely be taken that Rs. 1,000 per year represents the net annual yield which the appellant was recovering from the land from the District Board by reason of its special adaptability discussed above.

6. The next question is as to the number of years purchase with which multiple, the annual rent has to be multiplied to arrive at the market value. The number of years purchase no doubt varies in accordance with the prevailing rate per cent of approved securities at or about the time of the notification and also the process by which the annual rent is derived. In the instant case the owner does not exert himself. It is the District Board or the Panchayat Board which runs the market, farms out the fees and pays him his agreed share. In such circumstances, what is the reasonable multiple that has to be fixed for arriving at the ultimate compensation.

7. In AIR 1934 Cal 97, the learned Judges capitalised the rent at 25 years purchase. But this related to an acquisition of the year 1927. Again, in 1954-2 Mad LJ (Andhra) 1 = (AIR 1954 Andhra 12) the learned Judges adopted the multiple of 20. But there also the acquisition related to the year 1944. It is no doubt true that the number of years adopted must depend on the rate of interest which a first class security will yield in the money market. But in the case under consideration the rate of interest cannot be blindly fixed with reference to Government securities, for, the rent derived from properties used as public markets, shops and business places will certainly be higher than the well-reco- gnised approved Government securities. The valuation date in this case is 29-2-

1956. It cannot be said that the rate per cent on such securities of business premises or business places would be the same as 4 to 4½ per cent as in the case of Govt. securities or other well-known securities. We are of the view that the rate per cent in such cases would vary in the year 1956 between 9 to 12 per cent. Having regard to the fact that the land in question is a village site, we fix the rate at 9 per cent and thus arrive at the multiple of 11. We fix the average rental yield at Rs. 1000 per year. Multiplying this by 11, we fix the value of the property acquired at Rs. 11,000. The excess compensation would be worked out on this basis and the appeal is allowed with proportionate costs. The appellant would be entitled to the usual 15 per cent solatium on the excess compensation.

Appeal allowed.

**AIR 1970 MADRAS 378 (V 57 C 112)
FULL BENCH**

**K. VEERASWAMI, C. J., NATESAN,
AND SOMASUNDARAM, JJ.**

M/s. M. Haji Mohamed Ismail Sahib and Co., Petitioner v. The State of Madras, represented by Dy. Commr., Commercial Taxes, Coimbatore, Respondent.

T.C.M.P. No. 66 of 1966 (Review) In T.C. 209 of 1963, D/- 19-11-1969.

Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 12-B(7) (a) — Power of review — Exercise of — General principles applicable — Review not intended to correct laches or omission or negligence of parties in not placing relevant decisions before Court. (Para 1)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 928 (V 50) =
14 STC 355, Firm A. T. B. Mehtab Majid and Co. v. State of Madras

M. R. M. Abdul Karim, for Petitioner; Advocate-General, First Govt. Pleader and J. Jayaraman, for Respondent.

K. VEERASWAMI, C. J.: We are not satisfied that there is any substance in this review petition. It is said that Firm A. T. B. Mehtab Majid and Co. v. State of Madras, 14 STC 355 = (AIR 1963 SC 928) was a fact and that having not been placed before the Court when T. C. No. 209 of 1963 was disposed of that will be within Section 12-B (7) (a) of the Madras General Sales Tax Act, 1939. That clause says that this court might, on the application either of the assessee or of the Deputy Commissioner, review any order passed by it under sub-section (4) "on the basis of facts which were not before it when it passed the order". Though prima facie those words may bring in a

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case like the one under consideration, we are inclined to think that the power being one of review, the general principles applicable to that power, which are so well settled by now, should be borne in mind in assessing the scope and effect of Section 12-B (7) (a). Obviously, review is not intended to correct the lapses or omission or negligence of the parties in not placing the relevant decisions before court. On that view, the petition is dismissed. No costs.

Petition dismissed.

AIR 1970 MADRAS 379 (V 57 C 113)

K. VEERASWAMI, C. J. AND
GOKULAKRISHNAN, J.

M/s. Gajendra Transports (P) Ltd. Tiruppur, Appellant v. Anamallais Bus Transports (P) Ltd., Pollachi and another, Respondents.

Writ Appeal No. 274 of 1968, D/- 6-10-1969.

(A) Motor Vehicles Act (1939), S. 47(3) — Prior order under, is essential for entertaining petitions for permit — No prior order — Disposal of petition is without jurisdiction.

Order under Section 48 is subject to provisions of Section 47 which includes Section 47(3) under which a general order limiting number of stage carriages may have been passed. Permits can be granted under Section 48 subject to the limit fixed under Section 47(3). Fixation of any limit or its modification is not a matter for consideration when the Regional Transport Authority is dealing with an actual grant of permit under S. 48. This means that an order under Section 47(3) is a condition precedent to the exercise of power under Section 48(1). AIR 1963 SC 64 & (1967) 2 SCWR 857 & AIR 1968 SC 410 & C. A. No. 727 of 1965 (SC) & (1969) 1 SCWR 569, Foll. (Paras 4, 5)

The right course in cases where there is no prior order under S. 47(3) would be to dismiss the applications under Sec. 57 in limine on the ground that there had been no prior order under Section 47(3), and not keep the applications pending in order to await an order under Sec. 47(3). AIR 1969 Mad 458 held not good law in view of (1969) 1 SCWR 569. (Para 6)

(B) Motor Vehicles Act (1939), S. 47(3) — Prior order under, absence of — Goes to the root of jurisdiction to exercise powers under S. 48 — Point can be raised at any stage of proceedings, even in writ petition for first time.

The absence of an Order under Section 47(3) goes to the root of the jurisdiction of the Regional Transport Authority to exercise its powers under Section 48(1)

read with Section 57. The point as to such an absence of prior order can be raised at any stage of the proceedings under Section 57(3), or thereafter, and its admissibility at any further stage, should not be made dependent on representations in that regard having been made in time under Section 57(3). (Para 6)

The point can be taken for the first time in a petition under Art. 226. Whether there was a prior order under Section 47 (3) does not involve elaborate enquiry into facts, and is easily and readily found out. AIR 1927 Mad 130, Distinguished. (Para 6)

Those disappointed before the Tribunal, but did not question its orders by petitions under Art. 226, or were not parties to proceedings under Art. 226, should not be allowed to take advantage of an order of the High Court in such proceedings and to have a fresh opportunity of entering into the contest. AIR 1966 SC 1366, Rel. on. (Para 7)

(C) Constitution of India, Art. 226 — New point — Absence of order under Section 47(3), Motor Vehicles Act can be raised for first time in petition under Article. (Para 6)

(D) Motor Vehicles Act (1939), S. 48 — Order under, is subject to prior order under S. 47(3) — Without prior order, disposal of petition under S. 48 is without jurisdiction. (Paras 4, 5)

Cases Referred: Chronological Paras
(1969) 1969-1 SCWR 569, R. Obli-swamy Naidu v. Addl State Transport Appellate Tribunal, Madras 5, 6

(1969) AIR 1969 Mad 458 (V 56) = 1969-1 Mad LJ 201, Sri Raja Rajeswari Bus Service v. Regional Transport Authority, South Arcot 6

(1968) AIR 1968 SC 410 (V 55) = 1968-1 SCR 635, Lakshmi Narain Agarwal v. State Transport Authority 4

(1968) C. A. No. 727 of 1965, D/- 22-3-1968 (SC), Baluram v. State Transport Authority M. P. 4

(1967) 1967-2 SCWR 857, Jaya Ram Motor Service v. S. Raja-rathanam 4, 5

(1966) AIR 1966 SC 1366 (V 53) = 1966-3 SCR 7, Cumbum Roadways Ltd. v. Somu Transport Ltd. 7

(1963) AIR 1963 SC 64 (V 50) = 1963-3 SCR 523, Abdul Mateen v. Ram Kailash 4, 5

(1927) AIR 1927 Mad 130 (V 14) = ILR 50 Mad 130, K. Latchmanan Chettiar v. Commr., Corpn. of Madras 6

V. K. Thiruvenkatachari for C. Ramaswami and M. Kalyanasundaram, for Appellant; Govt. Pleader, N. G. Krishna Iyengar, and S. Varadachari, for Respondents.

K. VEERASWAMI, C. J.— This appeal is from a judgment of Ramakrishnan, J., dismissing the appellant's petition under Art. 226 of the Constitution to quash an order of the second respondent, Additional State Transport Appellate Tribunal, Madras. The Regional Transport Authority Coimbatore, out of 42 applicants, selected the appellant for grant of a stage carriage permit to ply an additional bus on the route Pollachi to Tiruppur (Via) Kamanaickanpalayam and Palladam. Three of the disappointed applicants preferred appeals to the second respondent, which allowed them and remitted the matter to the Regional Transport Authority, for being proceeded with in accordance with law. The first respondent, which was one of the applicants, had raised a preliminary objection to the introduction of an additional bus on the route, on the ground that it was not given additional trips for its existing buses, and that further a new route bus had also been introduced between Erode and Pollachi (Via) Tiruppur. The Regional Transport Authority repelled the objection on the view that there was need for introducing more number of buses on the route connecting the important commercial centres, Tiruppur and Pollachi, and that a grant of further permit on the route was considered necessary.

It would appear that there were already six permits on the route. In the appeal filed by the first respondent, it, however, urged for the first time, a different objection that the Regional Transport Authority without making a prior order under S. 47(3) of the Motor Vehicles Act, limiting the number of stage carriages for which permits would be granted on the route, had no jurisdiction to proceed with the applications under Sec. 57(3) of the Act. The second respondent accepted the objection as valid, and it was on this sole ground, it is allowed the appeals remitting the matter as aforesaid. The propriety of this view of the second respondent is impeached by the appellant. As the same point is said to arise in a number of other petitions pending disposal in this Court, we have permitted arguments to be addressed to us not merely by counsel in the appeal under consideration, but also other counsel interested on the point.

2. Though the Tribunal's conclusion seems to be supported by abundant authority, as we shall notice presently, Mr. Thiruvengadachari, contends that it went no further than holding that where a limit had been fixed under Section 47(3), the Regional Transport Authority, while considering applications under Section 57(3) would be bound by it under the proviso to the sub-section, and should summarily dismiss the applications if a further grant of permits would transgress the limit. On

that view of the decided cases, he has submitted that Section 47(3) contemplates fixation of the maximum limit of the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region, that the limit so fixed is of a general character not affecting or preventing consideration, subject to the general limit fixed, of the question of adequacy of transport service already existing on a specified route, or in the region, or in specified area and that, therefore, where there has been no limit fixed under Section 47(3), for a route, area or region, there is no bar to grant of permits under Section 48, subject of course, to the question of adequacy.

On the other hand, it is pressed upon us that the Regional Transport Authority cannot proceed unless a limit had been fixed under Section 47(3) before a notification under Section 57(3). On this submission, prohibition has been asked for in a few petitions against the Regional Transport Authority from proceeding further without a prior order under Section 47(3). On the other view of the matter, orders of the Tribunal are sought to be quashed in certain other cases where the Tribunal had itself taken the point relating to Section 47(3) and set aside the orders of the Regional Transport Authority, granting a permit, or where it had the objection based on Section 47(3) raised in Appeals filed before it by unsuccessful applicant who raised the question either for the first time or not. If the controversy were res integra, it would have been necessary for us to embark on an elaborate consideration of it. But out of deference to the arguments presented before us, we shall first notice the relevant statutory provisions.

3. Chapter IV of the Motor Vehicles Act is devoted to the control of transport vehicles. After providing for necessity for permits for use of any vehicle in a public place, and for power of the State Government to control road transport and to issue orders and directions to Transport Authorities as well as for setting up of hierarchy of Transport Authorities, Ss. 35 and 46 state as to whom an application for permit should be made, and what particulars it should contain. Section 47(1) directs that in considering an application for a stage carriage permit, a Regional Transport Authority should have regard to the matters specified in Cls. (a) to (f) and also any representations made by the persons indicated. Among the matters to be so kept in view, are the interests of the public generally, and the adequacy of other passenger transport services operating or likely to operate in the near future, whether by road or other means, between the places to be served.

as well as the benefit to any particular locality or localities likely to be afforded by the service. A stage carriage permit should be refused, as directed by sub-section (2) if the time table furnished showed that the provisions as to speed limits prescribed by the Act were likely to be contravened. Then comes sub-section (3):

"A Regional Transport Authority, may having regard to the matters mentioned in sub-section (1), limit the number of stage carriage generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region."

Section 48 empowers a Regional Transport Authority to grant a stage carriage permit on an application made to it. But such a grant shall be subject to the provisions of Section 47. The procedure for applications, and granting permits, has been prescribed by Section 57. An application may be made at any time. But there should be an interval of not less than six weeks between the making of the application, and the date on which the permit is desired to take effect. Sub-section (3) requires notification of the applications or their substance in the prescribed manner, with a notice of the date before which representations might be made, and of the time and place at which the applications and representations received would be considered. This sub-section has a proviso:

"Provided that, if the grant of any permit in accordance with the application or with modifications would have the effect of increasing the number of vehicles operating in the region, or in any area or on any route within the region, under the class of permits to which the application relates, beyond the limit fixed in that behalf under sub-section (3) of S. 47 or sub-section (2) of S. 55, as the case may be, the Regional Transport Authority may summarily refuse the application without following the procedure laid down in this sub-section."

The rest of the provisions of S. 57, among other things, provide for a public hearing on the applications notified and representations duly received. Section 55(2) is analogous to Section 47(3) except that it relates to public carrier's permit.

Section 64(1) (a) gives a right of appeal to person aggrieved by a refusal of the appropriate authority to grant a permit, and Section 64-A gives powers of revision to the State Transport Authority, in respect of orders of a Regional Transport Authority and from which no appeal lies. In the foregoing setting of the statutory provisions, Sections 45, 46, 47(1) and (2) and 50 are related to making of applications for permits, the particulars which the applications should contain, and the

matters which the Regional Transport Authority must have regard to. Section 57, as we said, prescribes the procedure for disposing of such applications. Section 48(1) provides for the power of the Regional Transport Authority to grant, subject to Section 47, stage carriage permits, and Section 51(1) for the grant, subject to Section 50, of a contract carriage permit. Section 54 provides for an application for a public carrier's permit, and Section 55(1) contains matters which the Regional Transport Authority should take into account in considering such an application. Subject to Section 55, a Regional Transport Authority may grant a public carrier's permit. The orders contemplated under Sections 48, 51 and 56(1) are ad hoc, so to speak, in nature, and are related to particular grants of permits on applications made therefor, and the grants made on a selection basis after taking into account the relevant statutory considerations mentioned by the statutory provisions and subject to the limits fixed under Sections 47(3) and 55(2). Orders fixing limits under Sections 57(3) and 55(2) are not related to any particular application for any kind of permit, but are of a general character, though in making such orders the Regional Transport Authority is directed to bear in mind the matters specified by Sections 47(1) and 55(1) which include not merely public interest in general, but also the adequacy. But "adequacy" in the context of Sections 47(3) and 55(2) should be understood, as we think, not in the context of granting particular applications for permits, but in a general way so as to prescribe the maximum number of permits that may be granted in a region, area or any specified route within the region, for stage carriages generally, or stage carriages of any specified type, or of transport vehicles generally or transport vehicles of any specified type.

The approach to the consideration of adequacy cannot, therefore, be the same in considering grant of permits on a route, or for an area as for fixing the limit, which is indicative of the maximum number of stage carriages, or public carriers generally or of any specified type for which permits may be granted in the region or area or on a specified route as a whole. When a limit is fixed under Section 47(3) or 55(2) it should be adhered to by the Regional Transport Authority in granting permits because of the proviso to Section 57(3). If grant of a permit will be in excess of the limit fixed under Sections 47(3) and 55(2), the Regional Transport Authority should summarily refuse the application therefor without notifying it. So far there is no difficulty. But where no limit has been fixed under Section 47(3) or Section 55(2), is it required that there should first be such a fixation

of limit before reception or notification of an application for a permit? Mr. Thiruvengkatachari says that the answer should be in the negative. He submits that the opening words of Sections 48(1) and 56(1) read with the proviso to S. 57(3), should not, and cannot be construed as expressly or by implication naming any such requirement. If a limit has been fixed under Section 47(3) or 55(2) of the maximum number of permits that could be granted in any region, area or route, and if the permits for which applications have been made are within such maximum, no difficulty may arise, though even in such cases the question of adequacy may be open before the Regional Transport Authority which may think, on the representations made before it, that notwithstanding the maximum fixed, transport facility already existing in the region, area or on the route was adequate or sufficient, and no grant of further permits was necessary. It was urged that the position can be no different if a limit has not been fixed under Ss. 47(3) and 55(2), and there is nothing in the opening words of Sections 48(1) and 56(1) read with Sections 47(3), 55(2) and the proviso to Section 57(3), which points to a requirement that the notification of applications under Section 57(3) should be preceded by an earlier order either under Section 47(3) or 55(2) as the case may be.

On a careful consideration of the argument, in our view, it is not possible to say that it is without force. Our attention has been invited to the structure of Section 50 which seems to assist the contention. But the construction which Thiruvengkatachari wants us to place, as aforesaid, on the relative statutory provisions is not open to us in view of the well settled authorities to the contrary. The formidable difficulty in the way of Mr. Thiruvengkatachari's argument is the structure of the relative statutory provisions and their interrelation. Particularly, the proviso to Section 57(3) contemplates an order under Section 47(3) prior to the reception of applications for permits. The limit under Section 47(3) cannot also be decided in, or simultaneously with the proceedings under S. 57(3), the object of which is to select the best out of competing applicants, while Sec. 47(3) proceedings are devoted to determination of the ceiling for grant of stage carriage permits in a region, area or route.

There is also the further indication in the opening words of Section 48(1) that any permit issued for a stage carriage can only be subject to the provisions of Section 47(3), which means not only the limit fixed under Section 47(3), cannot be exceeded, but without fixation of any limit, in our view, the power to grant permits under Section 48(1) cannot be exercised.

Logically, therefore, grant of permits first, and then fixation of the ceiling next or simultaneously, will not be permissible. It follows further that any question related to fixation of limit under Section 47(3) cannot be within the purview of Section 64(1). The point as to adequacy will be relevant, as the proceedings under Section 57(3) will be subject to the limit fixed of the number of stage carriages for which permits can be granted in a region, area or on a route. This view of the effect of the relevant provisions of the Act is abundantly supported by authority.

4. In *Adbul Mateen v. Ram Kailash*, AIR 1963 SC 64 = 1963-3 SCR 523 which was concerned with the Motor Vehicles Act as amended by Bihar Act 27 of 1950, the Supreme Court, after referring to the related sections held:—

"The Scheme of the Act therefore, is that a limit is fixed under Section 47(3) and the applications received are dealt with in the manner provided by Sec. 57 and permits can be granted under Section 48 subject to the limit fixed under Section 47(3)."

The Court earlier pointed out that, although the power to fix a limit under Section 47(3) and the power to grant permit under Section 48(1) following the procedure prescribed by Section 57, are vested in the same Regional Transport Authority; nevertheless, fixation of any limit or its modification is not a matter for consideration when the Regional Transport Authority is dealing with an actual grant of permit under Section 48 read with Section 57, for, at that stage what the Regional Transport Authority has to do is only to choose between various applicants who may have made applications under Section 46 read with Section 57. The Court proceeded to say:—

"That in our opinion is not the stage where the general order passed under Section 47(3) can be re-considered, for the order under Section 48 is subject to the provisions of Section 47, which includes Section 47(3) under which a general order limiting the number of stage carriages etc. may have been passed."

That was a case of a new route in respect of which applications were invited for grant of two stage carriage permits. Two of the applicants were granted each a permit. One of the unsuccessful applicants who had failed before the appellate authority, took the matter in revision to the State Government of Bihar. While declining to interfere with the appellate order, the State Government considered that an additional service could be allowed on that route, and that would add to the facility provided for without affecting the efficiency of existing service, and on that view, granted a permit to the petitioner before it. Another

disappointed applicant who moved the Government to exercise its revision powers, but failed to get a permit, filed a writ petition before the High Court challenging the order of the Minister for Transport. The High Court held, and its conclusion was upheld by the Supreme Court, that the State Government had no power when dealing with an application under Section 64-A to increase the number of permits to be granted from two (fixed by the Regional Transport Authority) to three, and quashed the order of the Government granting the third permit. Dealing with the contention that there were no permits fixed by the Regional Transport Authority, and, therefore, it was open to the State Government to increase the number of permits from two to three the Supreme Court held, again agreeing with the High Court, that the route being a new one, it should be deemed from the notification calling for applications for two permits that the Regional Transport Authority had fixed the limit at two.

In expressing that view, the Supreme Court stated:—

"It may be conceded that it may not be generally possible to conclude from the number of vacancies shown in an advertisement of this kind that that is the number fixed under Section 47(3) by the Regional Transport Authority. There is, however, in our opinion, one exception to this general rule, and that is when a new route is being advertised for the first time.

In the case of a new route it is clear that the Regional Transport Authority must have come to some conclusion as to the number of stage carriages which were to be permitted to operate on that route and the advertisement would only be issued on behalf of the Regional Transport Authority calling for applications for the number so fixed.

Otherwise, it is impossible to understand in the case of a new route why the advertisement was only for two vacancies and not (say) for four or six.

Where the advertisement is with respect to an old route the fact that the advertisement mentions a particular number of vacancies would not necessarily mean that that was the number fixed under S. 47(3) for the number fixed may be much more and there may be only a few vacancies because a few permits had expired."

Jaya Ram Motor Service v. S. Rajarathinam, (1967) 2 SCWR 857 substantially accepted the view in AIR 1963 SC 64 = (1963) 3 SCR 523 as to the scheme, scope and effect of Sections 47, 48 and 57. The Regional Transport Authority, Ramnathapuram, had in that case decided earlier to introduce a new bus route, and called for applications for a permit. While considering the applications under Section 57(3), it modified its earlier decision

and decided to refuse all applications on the ground that there was no longer any need for any such permit. The Supreme Court held that the order of the Regional Transport Authority was contrary to its previous order passed under Section 47(3). On an examination of the Scheme of the Act, the Supreme Court observed:—

"Therefore, Section 47 envisages two stages of the inquiry; (i) the fixing of the number of permits under Section 47(3) and (ii) the consideration thereafter of the application for grant of a permit and the representations if any by the persons mentioned in Section 47 (1)

Therefore, once the limit is fixed, if the grant of an application does not have the effect of exceeding that limit the only question before the Authority would be whether the applicant is a person fit to be granted the permit or not in the light of the matters set out in sub-section (1) of S. 47. The question of the number of permits to be granted, having been already canvassed and decided, cannot become the subject at that stage of any further controversy. This is clear from the fact that Section 48(1) which empowers the Authority to grant or refuse to grant the permit starts with the words "subject to the provisions of Section 47." It is therefore, clear that the Authority has first to fix the limit and after having done so, consider the application or representation in connection therewith in accordance with the procedure laid down in Section 57."

The question in *Lakshmi Narain Agarwal v. State Transport Authority U. P.*, (1968) 1 SCR 635 = (AIR 1968 SC 410) was whether a revision lay under Section 64-A against an order under Section 47(3), which was answered in the affirmative. The Supreme Court declined to accept as valid the view of the State Transport Authority that the only way to question the order under Section 47(3) was by means of a representation to be made under Section 57(3), and in case the representation was rejected, the representator would have a right of appeal before the State Transport Appellate Tribunal. The High Court had dismissed the writ petition to quash that order on the view that an existing operator had no say in the matter of determination of the strength on a route under Section 47(3), and it was in the discretion of the Regional Transport Authority to determine the strength on a route, after considering various matters enumerated in Cls. (a) to (f) of sub-section (1) of Section 47. Since the High Court also considered that the order under Section 47(3) was a good one on its merits, it did not think it necessary to decide whether a revision lay under Section 64-A against an order under Section 47(3). The Supreme Court was, for the purpose of the case, unable to say

representation etc., it cannot be said legally that an agreement has been arrived at. The agreement contemplated under the rule envisages the two parties coming to certain terms voluntarily and of a free will so as to put an end to the litigation pending between them in the court. If it decides that the agreement or compromise is vitiated, it can reject it and proceed to dispose of the suit on merits. AIR 1956 Bom 569 & AIR 1952 Nag 84 and AIR 1955 All 187, Rel. on; AIR 1940 Bom 60 & AIR 1928 All 494 & AIR 1935 All 137 & AIR 1952 Cal 73 & AIR 1950 Mad 728 & AIR 1959 Ker 130 & AIR 1963 Raj 63, Dissented from.

(Para 5)

Cases Referred: Chronological Paras

- (1963) AIR 1963 Raj 63 (V 50) =
ILR (1962) 12 Raj 912, Putto Lal v. Sumersinghji 4
(1959) AIR 1959 Ker 130 (V 46) =
ILR (1958) Ker 1396, Krishnan Nair v. Rayarappan Nair 4
(1956) AIR 1956 Bom 569 (V 43).
Misrilal v. Sobhachand 4
(1955) AIR 1955 All 187 (V 42).
Mst. Kalpa v. Sita Ram 4
(1952) AIR 1952 Cal 73 (V 39).
Harbans Singh v. Bawa Singh 4
(1952) AIR 1952 Nag 84 (V 39) =
ILR (1951) Nag 841, Pannalal v. Kisanlal 4
(1950) AIR 1950 Mad 728 (V 37) =
1950-1 Mad LJ 524, Kuppuswami Reddi v. Pavanambal 4
(1940) AIR 1940 Bom 60 (V 27) =
ILR (1940) Bom 13, Western Electric Co. Ltd. v. Kailas Chand 4
(1935) AIR 1935 All 137 (V 22) =
ILR 57 All 426, Husain Yar Beg v. Radha Kishan 4
(1928) AIR 1928 All 494 (V 15) =
ILR 50 All 748, Qadri Jahan Begam v. Fazal Ahmad 4
B. P. Holla, for Petitioner; U. L. Narayana Rao, for Respondent.

ORDER:— This revision petition is directed against the order of the Civil Judge, Mangalore, South Kanara, passed in Miscellaneous Appeal No. 21 of 1965.

2. The respondent filed O. S. 256 of 1964 for cancellation of a registered deed of sale dated 20-8-43 against the present petitioner and others. The present petitioner, during the course of the suit, filed an application under Order XXIII, R. 3 read with Section 151 of the Code of Civil Procedure praying that a decree be drawn up in terms of the compromise, according to which the suit was to be dismissed as having been settled out of court. The plaintiff-respondent contended that there was no agreement as set up by the present petitioner that he had not received the sum of Rs. 500/- as mentioned in the endorsement to the memo of compromise and that the document had been brought about fraudulently and by

misrepresentation. According to the respondent, his signatures were taken on a paper as also a printed form of vakalat representing that an adjournment of the suit was to be obtained and his signatures were required on them. The learned Munsiff recorded the evidence and came to the conclusion that the suit had been settled out of court and the same was accordingly required to be dismissed.

3. The plaintiff then preferred a Civil Miscellaneous Appeal No. 21 of 1965 in the court of the Principal Civil Judge, Mangalore, South Kanara. The learned Civil Judge took a different view, allowed the appeal and set aside the decree passed by the learned Munsiff and directed him to take the suit on file and proceed with the suit in accordance with law. The defendant-petitioner has approached this court in revision.

4. Mr. Holla, the learned Advocate, appearing for the petitioner has contended that the learned Civil Judge had exceeded his jurisdiction in as much he had gone into the investigation of allegations relating to fraud and misrepresentation and that it was not within his competence to do so in view of the words contained in Order XXIII, Rule 3 of the Code of Civil Procedure. Order XXIII, Rule 3 provides for adjustment of suit by compromise. Rule 3 reads as follows:—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

The plain wording of this rule requires that there should be proof to the satisfaction of the court that the suit has been adjusted wholly or in part by an agreement, and further such agreement should be lawful. I have heard at length arguments by the learned Advocates appearing for both the parties about the scope of this rule. Many of the decisions which were cited by Mr. Holla, (AIR 1940 Bom 60, AIR 1928 All 494, AIR 1935 All 137, AIR 1952 Cal 73, AIR 1950 Mad 728, AIR 1959 Ker 130 and AIR 1963 Raj 63) lay down that if the allegations of fraud or misrepresentation are incidental to an admitted agreement having been arrived at between the parties, it is not within the competence of the Court to enquire into such incidental matter but leave the parties to a separate suit to get an adjudication on the question whether the admitted agreement was voidable. As against these decisions, Mr. U. L. Narayana Rao has placed reliance on the deci-

sions in AIR 1956 Bom 569, AIR 1952 Nag 84 and AIR 1955 All 187, in which a contrary view has been taken. The latter decisions lay down that while enquiring into the questions required to be investigated into under Rule 3, it is necessary for the court to be satisfied that the agreement set up is a valid agreement not vitiated by fraud, misrepresentation or coercion which might render the agreement voidable.

5. Though it is not necessary for the decision of this case to decide which of the two conflicting views is acceptable I would however indicate my views on the question, since no decision of this court on the point has been brought to my notice by the Advocates. The object of the rule is to enable the court to give effect to a lawful agreement or compromise in respect of the whole or part of the claim in the suit, if the parties put forward such agreement or compromise before the suit is decided on merits by the court. The agreement or compromise recorded under this rule would result in the passing of a decree in accordance with the terms of compromise in so far as they relate to the suit. It should therefore follow that a decree passed in terms of the compromise or agreement must be 'conclusive of the rights of parties' and executable without further objection by any of the parties as being inherent in the decree itself. The words "where it is proved to the satisfaction of the court" with which the rule opens impose, in my opinion, an obligation on the court to be satisfied that the suit has been genuinely adjusted in whole or in part. If one party to the suit sets up an agreement or compromise whose terms are lawful and the other party to such alleged agreement or compromise denies it or alleges that it has been brought about by fraud, undue influence, coercion or misrepresentation as vitiating the agreement or compromise and if, during the course of the enquiry as to the allegations made by the party disagreeing with the agreement or compromise the court is satisfied that the agreement or compromise is to vitiate, I do not think that the rule intends the recording of such compromise, because, it cannot be said in such a case that the suit has been adjusted wholly or in part to the satisfaction of the court. The agreement or compromise by this rule is intended to put an end to the whole litigation by an amicable settlement to the party's own free will and consent; it is not intended either to sow the seeds of fresh litigation or to leave the contentions raised by the parties to a further suit; undoubtedly in the latter event the object of the rule to put an end to the litigation by passing a decree in terms of agreement or compromise would stand frustrated. On a careful consideration of

the decisions cited at the Bar by both the Advocates. I am of the opinion that the words "proved to the satisfaction of the Court" are comprehensive enough and indeed seem to have been intended to empower the Court to go into the merits of the allegations set up by the party denying or disagreeing with the terms of compromise or agreement and decide them, so that the parties get full justice in the suit in which a decree in terms of the compromise is to be passed under the rule. Where the court finds during the course of the enquiry that the alleged agreement or compromise is vitiated by fraud, misrepresentation etc., it cannot be said legally that an agreement has been arrived at. The agreement contemplated under the rule envisages the two parties coming to certain terms voluntarily and of a free will so as to put an end to the litigation pending between them in the court. I am in respectful agreement with the observation found at page 1295 of Mulla's commentary on the Code of Civil Procedure, Volume II, Thirteenth Edition — "The words 'where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part' clearly show that the court has power under this rule, where an agreement or compromise is denied, to decide whether, as a fact, the alleged agreement or compromise was made and if it is satisfied that it was made, to record it." If it decides that the agreement or compromise is vitiated, it can reject it and proceed to dispose of the suit on merits.

6. In spite of my view that it is competent to the Court to go into the question as to whether the alleged agreement is vitiated by fraud etc., I wanted to find out whether, in fact there had been an agreement or compromise in this case as alleged by the defendant, and therefore requested Mr. Holla to read to me the order of Civil Judge, the depositions of the plaintiff and the defendant. I have come to the conclusion after going through these depositions and the order, that it is not necessary for the disposal of this petition to go into the disputed question as to whether the court has competence under Rule 3 to find out whether the agreement set up by one of the parties was in fact vitiated by fraud, undue influence, misrepresentation etc. On facts, the learned appellate Judge has come to the conclusion that there was no agreement as alleged by the defendant. That is also my conclusion, as I shall presently point out.

7. The learned Appellate Judge has reviewed the evidence carefully and considered also all the circumstances appearing in the case. He has stated at the end of paragraph 10 of his order—

".....it will be abundantly clear that Exhibit P-1 (i.e., the agreement in

question) was brought about in mysterious circumstances and the present respondent and his worthy brother and his associates appear to have conspired together and brought about Exhibit P-1."

Again, at the end of paragraph 11 he has noticed that the endorsement in Kannada about the payment of Rs. 500 to the plaintiff was below his signature and that circumstance also belied the genuineness of Exhibit P-1. After discussing the entire evidence, this is what the learned Judge has concluded at the end of paragraph 13—

".....The evidence in the case and the circumstances that led to the execution of Exhibits P-1 and P-2 would point to the conclusion that they were brought about under suspicious circumstances and that R. W. 2 (plaintiff) was not aware of their contents."

This conclusion of the learned Judge would show that there was no agreement as contemplated by Rule 3.

8. I find substantial confirmation of this view from the evidence of the parties. The present petitioner was examined as P. W. 1. In his examination-in-chief itself he has stated that the terms of the compromise were. He deposed that it was decided that the plaintiff should be paid Rs. 500/- towards the expenses of the suit and the plaintiff had to withdraw the suit. If we examine Exhibit P-1 in the light of this statement, we find that in the main body of the compromise petition, there is no reference to these terms. On the other hand, Exhibit P-1 states in English thus "Memo filed on behalf of the plaintiff. As the above suit is settled out of Court, the same may be dismissed and each party to bear their costs." The plaintiff has signed this document in Kannada and the words 'Mangalore and the figure 9.10.1963' are written in English, quite in line with the signature of the plaintiff. The word 'Plaintiff' is also written below the signature. Then, there is an endorsement down below in Kannada stating that the present petitioner paid to the plaintiff Rs. 500/- in person. This endorsement does not however bear the signature of the plaintiff. When the plaintiff was examined as R. W. 2 he admitted his signature but denied his knowledge of the contents and the alleged agreement. According to him, his signatures were taken to some English writing stating that it was an adjournment petition and a vakalat and that they were required to be filed by an advocate for whom another vakalath was needed, and his signature was taken thereon. It was nowhere suggested in the cross-examination of the plaintiff that the contents of the documents were read over and translated to him by any of the persons. Mr. Holla, however, submits that the evidence adduced on behalf of the defendant shows that the document was

interpreted to the plaintiff. Taking the evidence as a whole, I am one with the learned appellate Judge in holding that there was no agreement as set up by the defendant and that the order of remand of the suit for disposal according to law requires to be affirmed.

9. For these reasons, this petition is dismissed with costs.

Petition dismissed.

AIR 1970 MYSORE 212 (V 57 C 55)

K. R. GOPIVALLABHA IYENGAR AND
M. SADANANDASWAMY, JJ.

Workmen Mysore Paper Mills Ltd., Bhadravathi represented by Secy. Mysore Paper Mills Staff Union, Petitioner v. The Management Mysore Paper Mills Ltd. represented by Managing Director, Mysore Paper Mills Ltd. and another, Respondents.

Writ Petn. No. 164 of 1968, D/- 13-2-1970.

(A) Industrial Disputes Act (1947), S. 10 (4) (as amended in 1952) — Powers of Tribunal — Reference referring to seven workmen and discrimination between them only — Discrimination between these seven workmen on one hand and others not named in the reference on the other was not incidental to the reference but was outside the reference.

It is settled law that the parties cannot be allowed to challenge the very basis of the dispute set out in the order of reference. The pleadings of the parties can be looked into only to clarify the points of dispute set out in the order of reference but cannot be allowed to alter the terms of reference or the basis of the reference. There is no doubt that the Tribunal can go into the matters incidental to the dispute. (Para 11)

The relevant portion of the order of reference by the State Government reads:

"Points of dispute. Is the management of Mysore Paper Mills Ltd. Bhadravathi justified in confirming the following seven foremen in different grades and different rates of salary, thereby discriminating one against other with effect from the year 1940 and onwards, even though the nature of work and degree of responsibility is the same?"

Held, that from the wordings of the reference, it was clear that the entire reference was confined to the discrimination inter se amongst the seven workmen referred to therein. The discrimination of these workmen on the one hand and the other workmen who were not named in the reference could not be taken as being incidental to the reference. The question relating to the discrimination of the seven work-

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men on the one hand and the other workmen was beyond the scope of the reference.

The terms of reference were not wide or ambiguous. The point in dispute was specifically set out in the reference. Case law discussed. (Paras 8, 9, 10)

(B) Industrial Disputes Act (1947), Section 10 — Reference by Government — Duty of Government to avoid mistakes.

In order to avoid glaring mistakes in references it is necessary that before making the reference the Government must bestow great care so as to obviate references which are baseless and do not represent the actual dispute between the parties. AIR 1963 SC 569, Rel. on.

(Para 11)

Cases Referred: Chronological Paras

(1968) 1968 Lab IC 847 = 1968-1 Lab LJ 369 (Pat), Minimax Ltd. v. Its Workmen 110

(1967) AIR 1967 SC 469 (V 54) = (1967) 1 Lab LJ 423, Delhi Cloth and General Mills Co. Ltd. v. Their Workmen 8, 10, 11

(1965) AIR 1965 SC 1803 (V 52) = 1965-2 Lab LJ 162, Workmen of Motipur Sugar Factory Private Ltd. v. Motipur Sugar Factory Private Ltd. 10

(1963) AIR 1963 SC 569 (V 50) = (1962) 2 Lab LJ 227, Express Newspaper Ltd. v. Their Workers and Staff 11

(1963) 1963-1 Lab LJ 507 = (1963) 1 Mad LJ 80, Ramamoorthy v. Tirunelveli District National Plantation Workers Union 12

(1963) 1963-1 Lab LJ 563 = 1962 (5) Fac LR 493 (Cal), Ganges Rope Employees' Union v. State of West Bengal 12

(1959) AIR 1959 SC 1191 (V 46) = (1959-60) 16 FJR 182, Calcutta Electric Supply Corporation Ltd. v. Calcutta Electric Supply Workers' Union 8, 12

(1959) 1959-2 Lab LJ 656 = ILR (1960) 10 Raj 171, Jaipur Spinning and Weaving Mills Ltd. v. Jaipur Spinning and Weaving Mills Ltd. Mazdoor Union 8

(1953) AIR 1953 SC 53 (V 40) = 1953 SCR 334, State of Madras v. C. P. Sarathy 11

(1949) AIR 1949 FC 148 (V 36) = 1949 FCR 348, India Paper Pulp Co. Ltd. v. India Paper Pulp Workers' Union 7

K. Subba Rao, for Petitioner; V. L. Narasimha Murthy, for Respondent No. 11.

ORDER:— The reference out of which Industrial Dispute No. 147/66 before the Industrial Tribunal, Bangalore, arose, and the Award dated 30th October 1967 came to be passed by it, was made by the Government of Mysore in its Order No. LMA

268 LLD 66 dated 28th July 1966. The relevant portion of the said order reads as follows:—

"ORDER

Whereas the Government of Mysore are of opinion that an Industrial Dispute exists between the workmen and the Management of the Mysore Paper Mills Ltd., Bhadravathi, on the points noted below:

Now therefore, in exercise of the powers conferred by Cl. (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (Central Act No. XIV of 1947), the Government of Mysore hereby refer the said dispute for adjudication to the Industrial Tribunal at Bangalore.

POINTS OF DISPUTE.

Is the Management of Mysore Paper Mills Ltd. Bhadravathi justified in confirming the following seven Foremen in different Grades and different rates of salary, thereby discriminating one against other with effect from the year 1940 and onwards, even though the nature of work and degree of responsibility is the same.

1. Sri N. C. Channakeshavaiah
2. Sri A. V. Krishna Swamy
3. Sri H. K. Venkataramiah
4. Sri A. M. Subba Rao
5. Sri M. V. Narayana Rao
6. Sri A. B. Sanjeeva Rao and
7. Sri P. S. Prabhakar.

BY ORDER AND IN THE
NAME OF THE
GOVERNOR OF MYSORE

Sd/-

Deputy Secretary to
Government, Labour
and Municipal Adm.
Department.

....."

2. After this reference was registered, the parties have filed their statements. The tribunal framed the following issues in addition to points in dispute scheduled in the order of reference.

ISSUE

"1. Do the first party workmen prove that the second party has adopted a policy of discrimination and are they entitled to be treated alike. Sri Narayanaswamy, Sri Madhusudan and Sri Ranganana and to be placed in grade Rs. 125-10-200-12-50-300?

2. Have they lost the financial benefits as pleaded by them in para 7 of their claim statement and are they entitled to the loss of this financial benefits?

3. Is this Reference bad in law as contended by the Second Party in paras 2, 3 and 5 of their Counter Statement?

4. Is the Government not competent to make a Reference of the type that is before this tribunal and is this Reference illegal, void and inoperative and liable to be rejected?

5. To what relief is the first party entitled?

3. After recording the evidence, the Tribunal made the Award dated 30th October 1967 rejecting the reference. It is this Award that is now sought to be quashed in this writ petition.

4. In paragraph 2 of the claim statement made by the petitioners it was mentioned that the dispute referred for adjudication is in respect of seven foremen who have been discriminated by the II Party Management in fixation of their grades and in granting them increments. It was set out in paragraph 3 that the discrimination was with reference to one Sri T. M. Narayanaswamy, who, it is alleged was doing the same kind of work like the first three workmen referred to in the reference and was given a higher grade of salary and higher rate of annual increment even though the work done by him is of the same kind and nature as those made by persons named above.

Similarly, it was stated that the next three persons mentioned in the reference are also discriminated as two other foremen Sri M. R. Gopalaswamy Rao and Sri P. S. Madhusudan who are doing the same kind of work as the three persons mentioned above are given higher grades of salary and increment. So far as the last workman named in the reference it was set out that other persons viz., Sri K. Ranganna, Sri Venkatesan and Sri C. V. Sreenivasa Iyer who are doing the same kind of work as Sri P. S. Prabhakar, were fixed at higher grades of salary. Thus, the complaint was that these seven workmen are discriminated with reference to the other workmen who are discharging the same kind of work. Another complaint was that while granting the annual increment to the seven foremen named in the Order of Reference, they are given lower grades while their juniors have been given higher grades and this is in utter disregard of all fair-play and justice. The aggrieved workmen claimed that they are entitled for equal treatment with the others referred to above by them in the fixation of grades.

5. The management first respondent in its counter statement, amongst other contentions pleaded in paragraph 6 as follows:

"Even if the reference is said to be valid the claim made by the workmen in their claim statement is entirely different from and beyond the scope of the reference. According to the reference the point of dispute is to an alleged discrimination of one against the other, regarding grades and rates of salary of the 7 persons mentioned in the order of reference. In the claim statement it is sought to be made out on behalf of the workmen that there was discrimination against all the seven workmen vis-a-vis some of the persons whose names are mentioned therein. Hence the claim statement is liable to be

rejected as travelling beyond the terms of reference."

In view of this contention, the question that arises is whether it was open to the Tribunal to consider the first issue framed by it as set out earlier. The first issue deals with the question of discrimination between the first party workmen and the persons like Narayanaswamy, Madhusudan and Ranganna etc. and they are entitled to any reliefs. While dealing with this question, the Tribunal in paragraph 9 of its Award, after setting out the terms of reference, observes as follows:—

".....A plain reading of this Reference will show that the discrimination if at all either in the matter of salary or in the matter of fixation of grades, must confine itself only to those 7 people because the Reference does not say that compared to the other class of Foremen who are nearly 115 in number, these people have been discriminated. That is what exactly the I Party is trying to make out and in doing so the I Party is trying to enlarge the scope of this Reference and the powers of the Tribunal....."

The Tribunal further observes as follows:

"It is therefore, clear from the wordings of Section 10(4) that the tribunal has no option but to confine itself to the order of Reference and adjudicate upon the same. When the Reference very specifically says in this case that the discrimination if at all, is between these 7 people it is not open to the tribunal to go beyond this Reference and bring in other class of Foremen who are not parties to this dispute and who are not before this tribunal. If the I party felt that the scope of the present Reference is too narrow it could have been open to the I party to have moved the Government for an amendment of the Reference. Such a thing has not been done." (sic)

The Tribunal after making these observations went into the question of discrimination as set out in the claim statement and came to the conclusion that the I Party petitioners have failed to prove that the II Party management has adopted a policy of discrimination. The other issues were also held against the petitioners.

6. Sri K. Subba Rao, learned counsel appearing for the I. Party-petitioners, frankly conceded that if the first issue in the case relating to discrimination is to be considered as beyond the scope of the reference, the other issues would not come up for consideration. Therefore, the arguments were mainly addressed in this case on the scope of the Reference. As set out earlier, the opinion of the Tribunal was that the discrimination if at all, is amongst the seven workmen mentioned in the reference, and it is not open to the Tribunal to go beyond this reference and bring in other class of Foremen who were named in the claim statement. If on this

question relating to the scope of reference, the view of the Tribunal is correct, the petitioners would fail in this writ petition.

7. While appreciating that the wording of the Reference was unsatisfactory, inasmuch as it does not correctly embody the dispute between the parties, the petitioners' learned counsel endeavoured to persuade the Court to take the view that the reference really referred to the discrimination of the seven workmen mentioned in the reference on the one hand and those workmen who are referred to in the claim statement on the other. Sri Subba Rao contended that the pleadings of the case must be taken into consideration as setting out the exact nature of the dispute and the reference must be understood with reference to the pleadings of the parties before the Tribunal.

He further contended that the demands made by the I Party before the Conciliation Officer and the report of the Conciliation Officer should also be taken into consideration to understand the scope of the dispute. He further submitted that it is not disputed that there is a dispute between the workmen and the management, and hence it was open to the Tribunal to understand the nature of the dispute between the parties even though it has not been set out in the order of reference.

In support of this argument, Sri Subba Rao placed reliance on several decisions. One of them is the decision of the Federal Court reported in *India Paper Pulp Co., v. The Indian Paper Pulp Workers' Union*, AIR 1949 FC 148. The Federal Court takes the view that Section 10 does not require that the particular dispute should be mentioned in the order of reference of the Government. It is sufficient if the existence of a dispute and the fact that the dispute is referred to the Tribunal are clear from the order.

The next decision on which reliance is placed is the Supreme Court decision reported in *State of Madras v. C. P. Sarathy*, AIR 1953 SC 53 at p. 57 wherein the Supreme Court has observed as follows:

"Moreover, it may not always be possible for the Government, on the material placed before it, to particularise the dispute in its order of reference, for situations might conceivably arise where public interest requires that a strike or a lock-out, either existing or imminent should be ended or averted without delay, which under the scheme of the Act, could be done only after dispute giving rise to it has been referred to a Board or a Tribunal But, beyond this no obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under Section 10(1) or to specify them in the order."

It is, therefore, contended that it was not obligatory on the part of the Government

to set out the dispute, and it is therefore, open to the Tribunal to ascertain the real nature of the dispute and pass the Award.

8. It was pointed out by Sri V. L. Narasimhamurthy, learned counsel appearing for the Management-I respondent that these two decisions relate to references made under the Industrial Disputes Act of 1947 prior to the amendment to the Industrial Disputes Act by Act 18 of 1952. This factor to a very large extent dilutes the applicability of the said decisions to the case before us and cannot render any support to the petitioners. He invited our attention to several decisions in support of the proposition that in construing the terms of reference and in determining the scope and nature of points referred to the Industrial Tribunal, the Industrial Tribunal has to look to the order of reference and it is only the subject-matter of reference with which the Industrial Tribunal can deal. This view is supported by the decision of the Supreme Court reported in *Calcutta Electric Supply Corporation Ltd. v. Calcutta Electric Supply Workers' Union*, AIR 1959 SC 1191.

He also invited our attention to the decision of the Supreme Court reported in *Delhi Cloth and General Mills Co. Ltd. v. Their Workmen*, (1967) 1 Lab LJ 423 = (AIR 1967 SC 469). After setting out the provisions of Section 10(4), which is as follows:

"Where in an order referring an industrial dispute to a labour Court, tribunal or national tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the labour Court or the tribunal or the national tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto."

The Supreme Court has observed as hereunder in (1967) 1 Lab LJ 423 = (AIR 1967 SC 469):

"From the above it, therefore, appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto."

The Supreme Court takes the view that the parties cannot be allowed to challenge the very basis of the issue set forth in the order of reference. In the present case, from the wordings of the reference, it is clear that the seven foremen referred to have been confirmed in different grades and different rates of salary and that one is discriminated against the other. The

entire reference is confined to the discrimination inter se amongst the seven workmen referred to therein. The discrimination of these workmen on the one hand and the other workmen who are not named in the reference, cannot be taken as being incidental to the reference.

It is useful to refer to the decision of the Rajasthan High Court reported in Jaipur Spinning and Weaving Mills Ltd. v. Jaipur Spinning and Weaving Mills Ltd. Mazdoor Union, 1959-2 Lab LJ 656 (Raj), to which our attention is drawn. It deals with the scope of reference of an Industrial Dispute under the Industrial Disputes Act of 1947 before its amendment in 1952 and after its amendment in 1952. After referring to the several decisions, they observe as hereunder:

"In view, of the above discussion of case-law, the contention of the learned counsel for any unduly liberal interpretation of the expression 'matters incidental thereto' cannot be accepted.

The same conclusion is reached on consideration of the amendments introduced in Section 10(1), (c) of the Act by the Industrial Disputes Amendment Act, 1952. Section 10(1) (c) of the Industrial Disputes Act, 1947, before the amendment, stood as follows:—

The amendment Act inserted the words, "or any matter appearing to be connected with or relevant to, the dispute" after the word "dispute." It further introduced sub-section (4) directing that where the appropriate Government has specified the points of dispute for adjudication, the tribunal shall confine its adjudication to those points and matters incidental thereto.

"On the language of the old law, it was held in some cases that it was not necessary that the dispute should be specified in the order of reference. On a consideration of the amendment in the light of the observation referred to above, the legal position, to my mind, appears to be as follows:—

(1) The Government may make a reference of the dispute without specifying any matter. In such a case, the tribunal has jurisdiction to ascertain the points of dispute from the pleadings of the parties or otherwise and may adjudicate upon them all.

(2) If the Government, instead of referring the dispute generally, specify the matter, the industrial tribunal has to confine its adjudication to those points only. Insertion of this provision of reference to specific matters in the Act, considered with the further fact that it is open to the Government to amend the reference or to make an additional reference, leads me to infer that the words "matters incidental thereto" should not be interpreted so as to give vague and indeterminate jurisdiction to the tribunals especially over indepen-

dent matters. After all, an industrial tribunal has no inherent absolute jurisdiction and it derives its jurisdiction only from the order of reference of the Government and, therefore, should not be permitted to ignore the intention of the Government as expressed by the plain language of the order of reference.

Yet another mode of approach, I may state that the word "incidental" according to its dictionary meaning and the ordinary accepted popular sense implied a subordinate and subsidiary thing related to some other main or principal thing requiring casual attention while considering the main thing. Obviously, matters which require independent consideration or treatment and have their own importance, cannot be considered "incidental."

9. We respectfully agree with the above observation of the Rajasthan High Court. The matter covered by the first issue cannot be considered as incidental to the dispute in the reference. It changes the basis of the reference. We cannot, therefore, consider that the question now raised before the Industrial Tribunal can be treated as incidental to the dispute referred to in the reference. Therefore, the question relating to the discrimination of seven persons on the one hand and the other workmen named in the claim statement on the other appears to us to be beyond the scope of the reference.

10. While dealing with the proposition that in order to fix the ambit of the dispute it was necessary to refer to the pleadings of the parties, the Supreme Court has observed in Delhi Cloth and General Mills Co. Ltd., (1967) 1 Lab LJ 423 = (AIR 1967 SC 469) that the tribunal had to examine the pleadings of the parties, to find out the exact nature of the dispute.

"because in most cases, the order of reference is so cryptic that it is impossible to cull out therefrom the various points about which parties were at variance leading to the trouble" (sic).

It is on this observation that Sri K. Subba Rao strongly relied and wants us to look into the pleadings to understand the scope of the reference. But, the first respondent's counsel placed reliance on the later observation of the Supreme Court in the same decision (1967) 1 Lab LJ 423 = (AIR 1967 SC 469) to the effect that the parties cannot be allowed to contend that the foundation of the dispute mentioned in the order of reference was something else. Under Section 10(4) of the Act, he submits that the Tribunal is not competent to entertain such a question.

It is submitted that the entire reference proceeds on the existence of discrimination amongst the seven workmen named in it and inter se amongst them. It does not deal with any other type of discrimi-

mination and to accept the case as set out in the pleadings would alter the basis of the decision. There is much force in this submission.

Sri Subba Rao invited our attention to a decision of the Patna High Court reported in *Minimax Ltd. v. Its Workmen* (represented by the Minimax Workmen's Union), (1968) 1 Lab LJ 369 = (1968) Lab IC 847 (Pat). It holds that there is a duty cast on the Tribunal to find out what was the real dispute referred to and to decide it and not to throw it out on mere technicality and that the Tribunal has no power to construe the reference and to look into the pleadings of parties for the purposes. It was pointed out by the learned counsel for the first respondent that Section 10(4) of the Industrial Disputes Act, 1947, did not come up for consideration in the said case as the reference was under S. 10(1) of the Act. Therefore, the observation made in the said decision cannot be of any help to the petitioners in this case, where the reference is under S. 10(4).

Sri Subba Rao also referred to the decision of the Supreme Court reported in *Workmen of Motipur Sugar Factory (Private), Ltd. v. Motipur Sugar Factory (Private) Ltd.*, 1965-2 Lab LJ 162 = (AIR 1965 SC 1803) from which it can be inferred that the notices of demand issued by the workmen can be taken into consideration in order to understand the scope of the reference. The reference in the said case was in very wide terms and the Supreme Court with reference to the circumstance of the case observed as follows:—

"Therefore, taking into account the wide terms of the reference, the manner in which it was understood before the tribunal, and the fact that it must be read along with the two notices of 15 and 17 December 1960, particularly because it was made soon thereafter at the joint application of the parties, we have no doubt that the tribunal was entitled to go into the real dispute between the parties....."

The position in this case is as mentioned already different. The terms of reference are not wide or ambiguous. The point in dispute is specifically set out in the reference. The notice of demand and the annexure thereto, viz., Exhibits 6 and 6(a) do not support the contention of Sri Subba Rao as they are also in general terms and do not clarify the exact dispute that is sought to be placed before the Tribunal.

11. It is settled law that the parties cannot be allowed to challenge the very basis of the dispute set out in the order of reference. The pleadings of the parties can be looked into only to clarify the points of dispute set out in the order of reference; but cannot be allowed to alter the terms of reference or the basis of the

reference. There is no doubt that the Tribunal can go into the matters incidental to the dispute. Looking at the reference in this case, from these points of view, the contention of Sri K. Subba Rao cannot be accepted as the contention set forth in the claim statement are not incidental to the main dispute. Further, it would totally alter the scope of the reference. The wordings of the references are clear. What can be said in this case is that the Government of Mysore which made the reference did not clearly understand the exact nature of the dispute between the parties. What has been referred to is quite different from what the first party-petitioner intended. Sri Subba Rao frankly conceded that if the reference is taken on the face of it, the first party-petitioners cannot support the reference as it does not represent the real nature of the dispute.

Their contention is that they have stated in the claim statement filed by them before the Tribunal. Obviously, reference has been made in a very mechanical manner, perhaps adopting the wordings used in the demand sent by the I Party-petitioners to the Management-first respondent on 16-2-1966 (Exhibit 6). What is stated in it is as follows:—

".....The enclosed chart with the names of persons and the salary they have drawn and how they have been unilaterally and arbitrarily chanted at the time of confirmation and fitment to grade discriminating 'the one against the other' is also shown." (Underlining (here in ') is ours).

In the chart which is marked as Exhibit 6(a) before the Tribunal, the names of 8 persons are mentioned including seven persons who are referred to in the reference. One person who has been omitted in the order of reference is T. M. Narayanaswamy. We are told that he is not a member of the petitioners' Union. In the reference his name has been omitted and the names of the other seven persons are mentioned and the discrimination referred to is sought to be confined as being made one against the other. This was not the grievance of the petitioners.

In order to avoid such glaring mistakes in references it is necessary that before making the reference the Government must bestow great care so as to obviate references which are baseless and do not represent the actual dispute between the parties. We may in this connection refer to the observation of the Supreme Court reported in *Express Newspaper Ltd. v. Their Workers and Staff*, (1962) 2 Lab LJ 227 = (AIR 1963 SC 569), wherein the Supreme Court has observed as follows:

"It is hardly necessary to emphasise that since the jurisdiction of the industrial tribunal in dealing with industrial

dispute referred to it under Section 10 is limited by Section 10(4) to the points specifically mentioned in the reference and matters incidental thereto, the appropriate Government should frame the relevant orders of reference carefully and the questions which are intended to be tried by the industrial tribunal should be so worded as to leave no scope for ambiguity or controversy. An order of reference hastily drawn or drawn in a casual manner often gives rise to unnecessary disputes and thereby prolongs the life of industrial adjudication which must always be avoided. Even so, when the question of this kind is raised before the Courts, the Courts must attempt to construe the reference not too technically or in a pedantic manner, but fairly and reasonably."

Sri Subba Rao relying on the last sentence in the above extract wants us not to take a too technical or a pedantic view in understanding the Reference. This contention is answered by the respondents' counsel in two ways. One is the question of interpreting the order arises if it is ambiguous. In this case, the order of reference is clear and there is no ambiguity. Secondly, it is pointed out that this decision is referred to in (1967) 1 Lab LJ 423 = (AIR 1967 SC 469) and has justified this observation stating that the facts of that case were very special and the decision must be limited to those special facts. Hence, it appears to us that the petitioners cannot get any assistance from the observation in the said decision.

12. Sri V. L. Narasimha Murthy, learned counsel for the first respondent invited our attention to the observation of the Madras High Court reported in *Ramamoorthy v. Tirunelveli District National Plantation Workers' Union*, (1963) 1 Lab LJ 507 (Mad) where the scope of Section 10(4) has been explained as follows:—

"Section 10(4) of the Industrial Disputes Act, 1947 makes it clear that where a reference is made to a Labour Court for adjudication it shall confine its adjudication to the points of dispute referred for adjudication. If the reference is made on an incorrect assumption, it is certainly not open to the industrial tribunal, while so holding, to enlarge, by its own choice, the scope of the reference and widen the issues for decision and the field for enquiry including the evidence."

Our attention has been drawn to the observation of the Calcutta High Court in the same volume (1963-1 Lab LJ) at page 563 that an Industrial tribunal has no inherent jurisdiction over industrial disputes and it derives its jurisdiction only from the order of reference by the Government and should not be permitted to travel beyond the plain language of the order of reference. In construing the terms of reference and in determining the scope and

nature of the points referred to the Industrial tribunal, it must look at the order of reference itself. That is the only subject-matter which an Industrial Tribunal can deal. We have already referred to the decision of the Supreme Court reported in AIR 1959 SC 1191 on which the Calcutta High Court, 1963-1 Lab LJ 563 (Cal), has relied.

13. In our view, the contention now raised by the petitioners in their claim statement before the Tribunal is beyond the scope of the reference. Reference as it is worded is not supported by the petitioners. On this ground alone the petitioners fail as the Award rejecting the reference is correct. In view of the fact that the questions comprised in other issues do not arise for consideration, the Tribunal had no jurisdiction to deal with those questions. The findings given by the Tribunal, therefore, are without jurisdiction and hence invalid, and not binding on any of the parties.

14. In the result, this petition fails and the same is dismissed. Each party will bear his or its own costs.

Petition dismissed.

AIR 1970 MYSORE 218 (V 57 C 56)

A. R. SOMNATH IYER, J.

Gulam Ibrahim and others, Petitioners v. Basheer Ahmed, Respondent.

Criminal Revn. Petn. No. 158 of 1968, D/-17-2-1969, against order of S. J. Gulbarga, D/-1-2-1968.

Penal Code (1860), Ss. 482, 483 and 486 — Offences under Penal Code sections — Period of limitation prescribed under Section 92 of Trade and Merchandise Marks Act does not apply — That provision concerns prosecutions for offences under that special law — (Trade and Merchandise Marks Act (1958), S. 92). (Para 2)

Muralidhar Rao, for Petitioners; Manohar Rao Jahagirdar, for Respondent.

ORDER:— The order of the Magistrate who dismissed the complaint on the ground that it was a time barred prosecution was reversed by the Court of Session on the ground that the period of limitation applicable to the prosecution was that prescribed by Section 92 of the Trade and Merchandise Marks Act, 1958, and not that prescribed by Section 15 of the Merchandise Marks Act, 1889 which was repealed. The petitioner who is the accused makes complaint that there was a misapplication of Section 92 of the 1958 Act, and that the prosecution was really governed by the provisions of the repealed Act.

2. It is clear that both the Magistrate and the Court of Session overlooked the

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fact that the offences with which the accused was charged are those said to have been committed under Sections 482, 483 and 486 of the Penal Code, whereas the period of limitation to which Section 92 of the 1958 Act and that to which the repealed Act refers, do not refer to prosecutions in respect of offences punishable under the Penal Code and prescribe a period of limitation for a prosecution for offences committed under those special laws.

3. That being so, the view taken by the Court of Session is unexceptionable, although the process by which it reached that conclusion is unsupportable.

4. Mr. Muralidhara Rao appearing for the petitioner however, contended that the Court of Session had no jurisdiction to set aside the order of discharge made by the Magistrate, and that all that it could have done was to make a reference to this Court. This argument cannot be of assistance to Mr. Muralidhar Rao for the reason that, if it is otherwise acceptable, I can set aside the order of the Magistrate in the exercise of my revisional jurisdiction.

5. Mr. Muralidhara Rao contends that having regard to the language of Sections 482, 483 and 486 of the Penal Code, as those sections stood amended at the relevant point of time, the prosecutions are unsustainable. But, into that question, no investigation has so far been made by any one, and if the petitioner is so advised he is at liberty to advance that contention before the Magistrate even now.

6. With these observations I dismiss this revision petition.

Petition dismissed.

AIR 1970 MYSORE 219 (V 57 C 57)

**A. R. SOMNATH IYER AND
AHMED ALI KHAN, JJ.**

M. R. Revanna and others, Petitioners v. The Mysore Revenue Appellate Tribunal, Bangalore and others, Respondents.

Writ Petns. Nos. 1443, 1643 and 1456 of 1968, D/-12-11-1968.

(A) Motor Vehicles Act (1939), S. 68-C — Scheme under—Kolar scheme, Cl. (d) — Exclusion of private operators from operating on notified route — Extent of — To earn exemption under scheme private operator must hold inter-State permit on date of commencement of scheme — Commencement of operation on basis of such permit not necessary.

Under the Kolar scheme prepared under Section 68-C of the Act the exclusion of private operators from the notified route was not complete exclusion and in the case of "existing permit holders on the

inter-State routes" to whom sub-cl. (a) appearing against Cl. (d) of the scheme refers, there was no exclusion, and the Corporation could not exclude them from operation on an inter-State route. The meaning of this exemption created is that, if on the date on which the approved scheme commenced to operate, there was a person who was a holder of an inter-State permit, he is unaffected by the exclusion provided for by the scheme.

(Paras 9, 10)

What earns the exemption created by that sub-clause is the right flowing from an inter-State permit, whether or not on the basis of that inter-State permit the operation on such inter-State route has been commenced. All that the words "may continue to operate" mean is that the holder of an inter-State permit, if he held one when the scheme commenced to operate, shall have the right to operate on the inter-State route in the same way in which he would have been entitled to operate had there been no exclusion such as the one which the scheme creates. Any other interpretation of the Clause would result in unjust consequences. So it is not the commencement of operation on the strength of an inter-State permit that earns the exemption, but the right to commence such operation on the basis of such inter-State permit of which the operator must be a holder at the relevant point of time.

(Paras 20 to 22)

(B) Motor Vehicles Act (1939), Ss. 63(1) and 2(20) — Inter-State permit — Grant of, by authority of one State— Counter signature by authority of other State essential to make it valid as such — Till then it is a primary permit operative in State which granted it.

Under Section 63(1), an inter-State permit granted by the authority of one State shall not be valid in the other State, unless the concerned authority of the other State affixes its counter-signature to it. The words in Section 63(1) clearly indicate that until the counter-signature is secured the primary permit does not become an inter-State permit. This view is also supported by the definition of 'permit' in Section 2(20). So Section 63(1) read with Section 2(10) makes it that a primary permit which purports to be an inter-State permit granted by the authority of one State becomes an inter-State permit only when it is countersigned by the concerned authority of that other State, and not until then.

(Paras 15, 26, 28)

(C) Motor Vehicles Act (1939), S. 63(3), Proviso — Inter-State agreement providing for counter-signature of inter-State permits — Counter-signature neither made nor refused by other State till commencement of scheme under S. 68-C excluding private operators — Permit not valid in other State — Refusal to countersign could be enforced by mandamus but not after

commencement of scheme — (Constitution of India, Art. 226).

When there is an inter-State agreement between two States as is contemplated by the proviso to Section 63(3) of the M. V. Act counter-signature of an inter-State permit granted by one State cannot be opposed or refused by the authority of the other State. But if it was neither refused nor granted until the scheme framed under Section 68-C of the Act commenced to operate it could not be said that the counter-signature which could be claimed as of right and which could not be refused must be deemed to have been granted by the State Transport Authority. AIR 1969 Mys 242, Rel. on. (Para 33)

What is essential to make that permit valid in the State is the counter-signature, whether it is claimable as of right or not. And counter-signature which cannot be refused but is not made, could be compelled in an appropriate proceeding such as an application for a mandamus. The existence of an alternative remedy of appeal under Section 64 of the Act is no bar to an application under Art. 226. But once the scheme commenced to operate and the S.T.A. of the other State refused to countersign the inter-State permit, the refusal cannot be enforced by mandamus as the S.T.A. would have no power to grant the counter-signature after the commencement of the scheme excluding private operators.

(Prs. 34, 35, 36 & 38)

Cases Referred: Chronological Paras
(1969) AIR 1969 Mys 242 (V 56) =
1968-2 Mys LJ 219, Akbar Saheb
v. Presiding Officer, M.S.T.A.T. 33

N. S. Narayana Rao and C. S. Shan-
thamallappa, (In W.P. No. 1443 of 1968);
M. R. Venkatanarasimhachar and C.
Narasimhachar, (In W.P. No. 1643 of
1968), for Petitioners; C. Narayan for S. J.
Srinivasan and P. R. Srirangaiah (for No.
3) (In W.P. No. 1443 of 1968); Sri Narayan
and P. R. Srirangaiah (for No. 3), (In
W.P. No. 1643 of 1968), for Respondents.

SOMNATH IYER, J.:— On June 30, 1967, the Regional Transport Authority, Chittoor, in the State of Andhra Pradesh, granted a permit to respondent 3 to operate his stage carriage on an inter-State route between Tumkur and Thirupathi which is in the State of Mysore. Part of that route between Mulbagal and Doddaballapura which lies within the State of Mysore, became a notified route under a Scheme called the Kolar Scheme which was published on January 25, 1968, after it received approval under Section 68-D of the Motor Vehicles Act.

2. Meanwhile, respondent 3 had made an application to the State Transport Authority, Bangalore, on September 5, 1967, for its counter-signature under

Section 63 of the Motor Vehicles Act in respect of the route which was within the Mysore State. That counter-signature became necessary by reason of the provision contained in Section 63(1) of the Act that a permit granted by one State shall have no validity in another State unless it is counter-signed by the concerned Transport Authority of that State.

3. But, the Mysore State Transport Authority by an order made by it on March 2, 1968, refused counter-signature on the basis of the exclusion of private operators from the nationalised routes. But, in the appeal preferred to it by respondent 3, the Revenue Appellate Tribunal directed the State Transport Authority to countersign the permit, and, it is this direction which is called in question in these three writ petitions.

4. The petitioner in Writ Petition No. 1443 of 1968 is an operator on the same route under an inter-State permit granted to him by the concerned Mysore State Transport Authority. The petitioner in Writ Petition No. 1456 of 1968 is the Mysore State Road Transport Corporation. The Petitioner in Writ Petition No. 1643 of 1968 was one of those who opposed the counter-signature.

5. These three petitioners ask us to quash the order made by the Revenue Appellate Tribunal on the principal ground that the exclusion of respondent 3 from the notified route between Mulbagal and Doddaballapura is so complete and effective that the State Transport Authority had no power to countersign the primary permit granted to respondent 3.

6. In the appeal before the Revenue Appellate Tribunal in which the impugned order was made by it, the Petitioner in W.P. No. 1443 of 1968 was respondent 3, the Corporation which is the petitioner, in W.P. No. 1456 of 1968 was respondent 6 and the petitioners in W.P. No. 1643 of 1968 were respondents 4 and 5. In its order the Tribunal made the observation that the opposition to the counter-signature sought by respondent 3 emanated only from the Corporation, and that the other respondents before it advanced an argument only with respect of timings. The petitioners in W.P. No. 1643 of 1968 state in their affidavit that that observation made by the Tribunal is inaccurate, and that what was done by those petitioners was to adopt the argument advanced on behalf of the Corporation which opposed the counter-signature.

7. However that may be, since the Corporation, even according to the Tribunal, did oppose the counter-signature in the appeal preferred to the Tribunal on the ground of exclusion which the Kolar Scheme incorporates, and that question arises in all the three writ peti-

tions, we proceed to consider the correctness of the conclusion reached by the Tribunal that that exclusion had no impact on respondent 3.

8. The reason why the Tribunal reached that conclusion was that the

"(d) Whether the services are to be operated by the State Transport Undertakings to the exclusion, complete or partial of other persons or otherwise,

9. Since the scheme prepared under Section 68-C of the Motor Vehicles Act may provide for complete or partial exclusion of private operators, it is clear from this part of the scheme that the exclusion which the Kolar Scheme incorporated was not a complete exclusion, and that in the case of "existing permit holders on the inter-State routes" to whom sub-clause (a) appearing against clause (d) of the scheme refers, there was no exclusion, and that the Corporation could not exclude them from operation on an inter-State route.

10. The meaning of this exemption created is that, if on the date on which the approved scheme commenced to operate, there was a person who was a holder of an inter-State permit, he is unaffected by the exclusion provided for by the scheme.

11. The question which the Tribunal, therefore, had to decide was whether respondent 3 was the holder of an inter-State permit on the date on which the scheme came into being. It came to the conclusion that he was, and, the ground on which that conclusion was founded was that, under an agreement entered into between the Governments of Andhra Pradesh and Mysore State with respect to inter-State operation, the concerned Transport Authority of the one State was under a duty to grant counter-signature to an inter-State permit granted by the other State. It also thought that notwithstanding the fact that the State Transport Authority in the State of Mysore deferred the consideration of the question whether respondent 3 was entitled to the counter-signature sought by him until the Kolar Scheme commenced to operate, there was an acquisition of the right by respondent 3 to such counter-signature even after the scheme came into force, and that he therefore fell within the exemption.

12. It is the correctness of this view which is assailed before us, and it was contended for the Corporation by Mr. Krishna Rao that the view taken by the

Kolar Scheme "exempted" an existing permit holder on the inter-State route from the complete exclusion of private operators which was provided for by clause (d) of the Scheme. The relevant part of that clause reads:—

The State Transport undertaking will operate services on all the routes to the complete exclusion of other persons except that—

(a) the existing permit holders on the inter-State routes, may continue to operate such inter-State routes, subject to the condition that their permit shall be rendered ineffective for the over-lapping portions of the notified routes; * * *

Tribunal overlooks the provisions of Section 63 or the other relevant provisions of the Act such as Sections 2(20), 42, 45, 46, 47 and 48.

13. Now, Section 63 which regulates the counter-signature with respect to a permit granted by one regional authority, in respect of a permit which authorises operation in more than one region and also with respect to a permit granted by the transport authority of one State in respect of an inter-State route part of which falls within another State reads:—

"63(1) Except as may be otherwise prescribed a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region unless the permit has been counter-signed by the Regional Transport Authority of that other region, and a permit granted in any one State shall not be valid in any other State unless counter-signed by the State Transport Authority of that other State or by the Regional Transport Authority concerned:

Provided that a private carrier's permit, granted by the Regional Transport Authority of any one region with the approval of the State Transport Authority, for any area in any other region or regions within the same State shall be valid in that area without the counter-signature of the Regional Transport Authority of the other region or of each of the other regions concerned. * * *

(3) The provisions of this Chapter relating to the grant, revocation and suspension of permits shall apply to the grant, revocation and suspension of counter-signatures of permits:

Provided that it shall not be necessary to follow the procedure laid down in Section 57 for the grant of counter-signatures of permits, where the permits granted in any one State are required to be counter-signed by the State Transport Authority of another State or by the Regional Transport Authority concerned as a result of any agreement arrived at between the States."

14. The clear provision which sub-section (1) of the section incorporates is that, if the Regional Transport Authority of one region of a State grants a permit which is effective in another region of that State, that permit, until it is counter-signed by the concerned authority of the other region, has no validity in that region, but is efficacious only in the region the Regional Transport Authority of which granted the permit. But we are not concerned in these cases with that part of sub-section (1) since the permit granted by the Chittoor Regional Transport Authority to respondent 3 was not an inter-regional permit but was an inter-State permit.

15. In respect of an inter-State permit what that sub-section further provides is that that permit granted by the authority of one State shall not be valid in the other State, unless the concerned authority of the other State affixes its counter-signature to it, and, it is this part of sub-section (1) which has relevance to the question which we have to decide.

16. It is common ground that, when the Kolar Scheme after it received approval under Section 68-D, was published, the inter-State permit which had been granted by the Chittoor Regional Transport Authority had not been yet counter-signed by the State Transport Authority of Mysore which had the power to affix such counter-signature at the relevant point of time. It may be recalled that the Chittoor authority granted the inter-State permit on June 30, 1967 and the application for counter-signature to the State Transport Authority of Mysore was made only on September 5, 1967. That application was still pending and had not been disposed of when the Kolar Scheme was published on January 25, 1968 after it received approval under Section 68-D.

17. It has been explained by Mr. Narayan appearing for respondent 3 that although the Chittoor Regional Transport Authority passed its resolution for the grant of the permit to respondent 3 on June 30, 1967, the communication of that resolution was made only on September 1, 1967. But we think that that aspect of the matter has really no materiality in the circumstances of the present case.

18. So, on January 25, 1968 when the Kolar Scheme commenced to operate, the counter-signature for the inter-State permit granted by the Andhra Pradesh State Authority had not yet been granted or made by the State Transport Authority of Mysore. The question is whether in that situation respondent 3 could make a claim to the exemption which the Kolar Scheme created in favour of inter-State operators to which it refers in sub-section (a) which appears against clause (d) of the scheme.

19. That exemption, it will be seen, is available to "existing permit holders on the inter-State routes". While it was asserted by respondent 3 that, whether there was counter-signature or not by the Mysore State Authority, respondent 3 became an existing permit holder on an inter-State route within the meaning of that expression occurring in the scheme when the Andhra Pradesh State authority granted him an inter-State permit, it was equally strongly maintained by the petitioners before us that the status of an inter-State permit holder can be attained by the grantee of an inter-State permit by the authority of one State only at the point of time when that inter-State permit is counter-signed by the authority of the other State. It is however manifest that an operator who can claim exemption should be the holder of an inter-State permit on the date when the scheme commenced to operate.

20. We do not accede to the argument advanced by Mr. Narayana Rao appearing in W.P. No. 1443 of 1968 that that inter-State permit holder should have by then also commenced his operation on the inter-State route. We do not think that that construction suggested by him receives support even from the words "may continue to operate such inter-State routes" occurring in sub-clause (a) which appears against clause (d) of the scheme. What earns the exemption created by that sub-clause is the right flowing from an inter-State permit, whether or not on the basis of that inter-State permit the operation on such inter-State route has been commenced. All that the words "may continue to operate" mean is that the holder of an inter-State permit, if he held one when the scheme commenced to operate, shall have the right to operate on the inter-State route in the same way in which he would have been entitled to operate had there been no exclusion such as the one which the scheme creates.

21. Any other view would lead to the strange result that, if the holder of an inter-State permit had been unable to put his stage-carriage on the route by reason of the fact that the inter-State permit became effective a very short time before the scheme commenced to operate, or by reason of the fact that such operation had become difficult on account of external circumstances over which he had no control such as a break down or a strike, the exemption created by the scheme would become unavailable to him. An interpretation resulting in such consequences, which Mr. Krishna Rao very rightly did not support, is in our opinion quite unacceptable.

22. So it is not the commencement of operation on the strength of an inter-State permit that earns the exemption,

but the right to commence such operation on the basis of such inter-State permit of which the operator must be a holder at the relevant point of time. The question is whether respondent 3 was one. The answer to this question depends upon the interpretation which we should place upon the relevant statutory provisions contained in Section 63.

23. The basic assumption made by the Tribunal before it proceeded to embark upon an elucidation of those provisions was that there was an inter-State agreement between the Governments of the Mysore and the Andhra Pradesh States under which the two Governments entered into a reciprocal agreement that each Government shall grant an inter-State permit with respect to the inter-State route between Tumkur and Tirupati or between Tirupati and Tumkur. What was also further observed by the Tribunal was that under that agreement the Government of one State agreed to counter-sign the inter-State permit granted by the other State.

24. Although at one stage the advocates appearing for the petitioners contended before us that the Tribunal was in error in proceeding upon this assumption, since no evidence was produced before the State Transport authority with respect to any such inter-State agreement, it is seen from the affidavit produced in these writ petitions that the petitioners do not controvert the correctness of the statement contained in the Tribunal's order that there was an inter-State agreement like the one to which it refers. So, we proceed to discuss the question arising before us on the hypothesis that there was such an agreement, and, the question which therefore arises is whether that agreement can assist the claim made on behalf of respondent 3 that on the date when there was a grant of the inter-State permit by the Andhra State Transport Authority he became an inter-State permit holder.

25. Now, Section 63(1) says that, if an inter-State permit is granted by the authority of one State it shall not be valid in the region of another State until it is counter-signed by the authority of that other State. The clear meaning of this part of the sub-section is that that inter-State permit so granted shall have validity only in the State in which it was granted, and that in the other State, what infuses validity into the permit is the counter-signature by the authority of that State. Until it becomes efficacious and valid in that way in the other State, it is obvious that the operation which is authorised by the permit is the operation in the State in which the primary permit was granted. And Mr. Narayan appearing for respondent 3 did not dispute that

what gives the right to operate a stage carriage in the other State is the counter-signature and until that counter-signature is granted, operation in the other State is impermissible.

26. The words "a permit granted in any one State shall not be valid in any other State unless counter-signed by the State Transport Authority of that other State or by the Regional Transport Authority concerned" clearly indicate that until the counter-signature is secured the primary permit does not become an inter-State permit.

27. That, that is the correct view to take is clear from Section 2(20) of the Act which reads:—

"'Permit' means the document issued by the Commission or a State or Regional Transport Authority authorising the use of a transport vehicle as a contract carriage, or stage carriage, or authorising the owner as a private carrier or public carrier to use such vehicle."

28. The purpose for which a permit is obtained by an operator is to use his vehicle on the route to which that permit relates. And, if in the case of a primary permit granted by one State which purports to be an inter-State permit, the right to such user in the other State does not accrue until the counter-signature in that other State is granted, it should be clear that the primary permit does not become a permit in the other State such as would create the right to operate the stage carriage in that other State. So, what is clear from Section 63(1) is that a primary permit which purports to be an inter-State permit granted by the authority of one State becomes an inter-State permit only when it is counter-signed by the concerned authority of that other State, and not until then.

29. In that view of the matter the permit granted to respondent 3 by the Andhra State Transport Authority although called and described as an inter-State permit, could become an inter-State permit authorising operation on the whole stretch of the inter-State route only on counter-signature by the concerned authority in the State of Mysore.

30. But it was urged by Mr. Narayan that that view which may be possible in the case of ordinary inter-State permits granted under Section 63(1) does not cover a case which is regulated by an inter-State agreement between the Governments of the two States under which counter-signature is imperative and not discretionary. Mr. Narayan contended that that is so is clear from the proviso to sub-section (3) of Section 63.

31. Sub-section (3) states that the counter-signature which sub-section (1) refers shall stand regulated by the same procedure by which the grant of a permit

stands regulated. In other words the procedure prescribed by Section 57 and the other relevant provisions of the Act are equally applicable to an application in which a counter-signature is sought. The application has to be published and representations have to be invited and considered. But the proviso to that sub-section states that if an inter-State agreement between the Governments of the two States requires the Government of one State to counter-sign an inter-State permit granted by the other State, and so no discretion is left to refuse such counter-signature, it shall not be necessary to follow the procedure laid down in Section 57 of the Act in so far as it is applicable.

32. The argument constructed on this proviso was that when respondent 3 made an application for counter-signature, it was the imperative duty on the Mysore State Transport Authority which could not refuse such counter-signature, to grant it, and that if without doing so, the State Transport Authority kept the matter pending until the scheme came into force, the acquisition by respondent 3 of the status of an inter-State permit holder did not stand postponed. It was said that the grant of counter-signature in that situation was a mere matter of form and not of substance, and that the same right which could have been claimed by a person to whom counter-signature had been granted could be claimed by respondent 3 who was entitled to such counter-signature as of right.

32A. It is seen that the application for counter-signature was made on September 5, 1967 and it is surprising that the State Transport Authority made no decision on that application until March 2, 1968. In the meanwhile the scheme began to operate. The delay in the disposal of the matter is perhaps attributable to the unawareness on the part of the State Transport Authority, as it was, it is plain, on the part of respondent 3 also, of the existence of the absolute right to claim the counter-signature under the proviso to Section 63(3) of the Act.

33. It was explained by this court in Akbar Saheb v. Presiding Officer, M.S.T. A.T., (1968) 2 Mys LJ 219= (AIR 1969 Mys 242) that when there is an inter-State agreement like the one to which it refers, counter-signature of the permit could not be opposed, and so, could not be refused. But if it was neither refused nor granted until the scheme commenced to operate, could it be said that the counter-signature which could be claimed as of right and which could not be refused must be deemed to have been granted by the State Transport Authority? In our opinion, the answer to this question must be in the negative.

34. If a primary permit becomes an inter-State permit only on counter-signature, for the reasons that until such counter-signature, that permit has no validity in a State other than the State by which it was granted, what is essential to make that permit valid in the State is the counter-signature, whether it is claimable as of right or not. And counter-signature which cannot be refused but is not made, could be compelled in an appropriate proceeding such as an application for a mandamus. But respondent 3 resorted to no such remedy.

35. It is undisputed that the draft scheme had been published in the year 1964, and, when the application was presented in September 1967 it should have occurred to respondent 3 that any delay in the grant of counter-signature would involve him in difficulty, especially if the exemption created by the approved scheme was also the exemption proposed in the draft scheme, as we are informed it was. But respondent 3 made no such endeavour, and, we are not impressed by the argument advanced before us by Mr. Narayan that if he had sought a mandamus in that way, his application would have failed on the ground that he had an alternative remedy in the form of an appeal under Section 64. It is plain that an appeal to our jurisdiction under Article 226 of the Constitution does not always fail by reason of the existence of an alternative remedy.

36. However that may be, if the exclusion under the scheme becomes inapplicable only to an operator who is an inter-State permit holder, on the date when the approved scheme commenced to operate, respondent 3 would fall within the orbit of the exclusion if he was not one. And the mere fact that he could have become an inter-State permit holder on the grant of counter-signature in recognition of the absolute right to it claimable under the inter-State agreement between the Governments of the two States, does not transform a primary permit which had not yet become an inter-State permit into an inter-State permit.

37. The Revenue Appellate Tribunal, it is clear, did not correctly comprehend the provisions of Section 63 of the Motor Vehicles Act. It was in error in thinking that the right to operate a stage carriage between Tirupathi and the State border of the State of Mysore had any relevance to the question whether the exemption created by the scheme was applicable to respondent 3. What was overlooked by the Tribunal was that what was relevant for the question which had to be decided was not the right to operate on that sector, but the right to operate also on the sector inside the Mysore State, and, if there was no right, as there was none in the cases before us, when the scheme

came into being, it would not be possible for respondent 3 to maintain that he was an existing inter-State permit holder, to whom alone the exemption is available.

38. In the view that we take that respondent 3 was not an existing permit holder on an inter-State route within the meaning of sub-clause (a) appearing against clause (d) of the scheme, he did not stand removed from the exclusion which the scheme otherwise created. That being so, the State Transport Authority did not have the power to grant him the counter-signature which had not yet been granted to him when the scheme commenced to operate. So the Revenue Appellate Tribunal was in error in directing the State Transport Authority to exercise a power which it did not possess.

39. In this view of the matter it becomes unnecessary for us to discuss the argument maintained by Mr. Narayan Rao, that the appeal preferred by respondent 3 to the Revenue Appellate Tribunal from the decision of the State Transport Authority was an incompetent appeal, or that we should understand the words "Regional Transport Authority" occurring in sub-sections (2) and (3) of Section 68-F of the Motor Vehicles Act as having reference only to the State Transport Authority, and that the omission to make an amendment of these two sub-sections was a careless omission in respect of which we could ourselves make a rectification, on that question and abstain from expressing any opinion in these writ petitions.

40. So we allow these writ petitions and set aside the order made by the Revenue Appellate Tribunal. In consequence the order made by the State Transport Authority stands restored.

No costs.

Writ petitions allowed.

AIR 1970 MYSORE 225 (V 57 C 58)

**M. SADASIVAYYA, Ag. C. J. AND
D. M. CHANDRASHEKHAR, J.**

The Management of Government Soap Factory, Bangalore-12, Petitioner v. The Presiding Officer, Labour Court, Bangalore and others, Respondents.

Writ Petn. No. 277 of 1967, D/- 14-10-1969.

(A) Industrial Disputes Act (1947), S. 33-C(2) — Application by retired workman for recovery of money due from employer — Maintainability.

An application under S. 33-C(2) of the Act may be made by a person who was a workman during the period in respect of which he was entitled to any benefit. Consequently, an application by a person

under S. 33-C(2) for recovery of money due from the employer is competent even after his retirement. AIR 1961 Mad 307 & (1961) 1 Lab LJ 592 (Mad), Rel. on. (Paras 11 and 12)

(B) Constitution of India, Art. 226 — Finding of fact and law — Grounds of interference — Question whether nature of work of employee brings him within definition of "workman" under Industrial Disputes Act or within definition of "worker" under Factories Act is one of law — Decision thereon of Labour Court when can be interfered by High Court.

What exactly is the nature of duties and functions of a category of employees, is generally a question of fact which is for the Tribunal or the Labour Court to decide. Unless its finding is based on no evidence, or unless there is any violation of principles of natural justice in reaching that conclusion, the High Court will not interfere with such finding. Whether the nature of the work of an employee, as found by the Tribunal or the Labour Court brings such an employee within the definition of 'workmen' under Section 2(s) of the Industrial Disputes Act or within the definition of 'worker' under Section 2(l) of the Factories Act, is a question of law and the finding of the Tribunal or the Labour Court on such question can be interfered with by High Court, if it (such finding) suffers from an error of law apparent on the face of the record. (Para 24)

(C) Factories Act (1948), S. 2 (l) — Expression "subject of manufacturing process" — Interpretation of — Expression refers not to finished product but to articles to which manufacturing activity is being applied for deriving such finished product.

The word 'process' occurring after the word 'manufacturing' in Section 2(l) of the Act, can be taken to mean activity. The expression 'the subject of the manufacturing process', may be construed, as any article, material, thing or ingredient which is used in the activity of manufacture for deriving the end product of the manufacturing activity. This expression does not refer to the finished product or end product of the manufacturing activity but refers to the articles or raw materials to which the manufacturing activity is being applied for deriving such finished product or end product. (1950) 2 All ER 719 and AIR 1960 SC 569, Referred. (Paras 31 and 32)

(D) Factories Act (1948), Ss. 2(l) and 103 — "Worker" — Expression "incidental to, or connected with manufacturing process" in S. 2(l) — Interpretation — Watchman employed in a soap factory — Not a worker within meaning of S. 2(l) — Presumption under S. 103 not helpful in deciding whether a watchman is a

worker. (1962) 2 Lab LJ 335 (All) & (1966) 2 Lab LJ 717 (All), Diss. from:

The expression, 'incidental to, or connected with' should be construed so as to imply proximate and not remote relationship between the work of the employees in question and the manufacturing process. Unless there is such proximate relationship, a work done by an employee cannot be said to be incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process. (Para 41)

Where the normal duties and functions of a watchman in a soap factory were to look after the premises of the factory and of the properties therein and to check at the gate of the factory incoming and outgoing motor cars and carts and to search the employees of the factory at ingress or egress, the relationship between the work done by a watchman of the factory and the manufacturing process or the subject of the manufacturing process, is too remote to regard such work as being incidental to, or connected with, the manufacturing process. Whether a watchman comes within the definition of 'worker' must depend upon the nature of his work and whether such work has any proximate relation to the manufacturing process or the subject of the manufacturing process, does not depend on his service conditions. The presumption under Section 103 also is of no assistance to determine whether a watchman in the factory is a worker. (Paras 44 & 46, 47)

The activities of altering, breaking up, demolishing and adapting, referred to in sub-clause (1) of Section 2(k) of the Act, are all those done in the course of manufacture, that is, in the process of transformation of raw materials into the finished product. The mere fact that the watchman was employed in dismantling of machinery and plant in the existing premises of the factory and transporting the same for being shifted to new premises, cannot be said to be any part of the process of manufacturing. Such shifting of plant and machinery to new premises, is not a normal activity of a factory. It is an extraordinary activity which is de hors the ordinary manufacturing process. (1962) 2 Lab LJ 335 (All) & (1962) 2 Lab LJ 717 (All), Diss. from. Case law discussed. (Para 54)

Cases Referred: Chronological Paras
(1966) 1966-2 Lab LJ 717 = 1966

All LJ 507 (All), Central Rly.
Workshop v. Vishwanath 39

(1962) 1962-2 Lab LJ 335 = (1961)
3 Fac LR 500 (All), Abdul Latif
v. Karamat Ali 38

(1961) AIR 1961 Mad 307 (V 48) =
(1961) 1 Mad LJ 228, Tiruchi Sri-
rangam Transport Co. Private
Ltd. v. Labour Court, Madurai 10

(1961) 1961-1 Lab LJ 592 = (1960-
61) 19 FJR 408, (Mad), Manicka
Mudaliar v. Labour Court,
Madras 11

(1960) AIR 1960 SC 569. (V 47) =
1960 Cri LJ 750, State of Uttar
Pradesh v. M. P. Singh 31-A

(1959) AIR 1959 SC 1226 (V 46) =
(1960) 1 SCR 137, B. P. Hira,
Works Manager Central Rly. v.
C. N. Pradhan 36

(1959) AIR 1959 Ker 326 (V 46) =
ILR (1959) Ker 974, Malabar In-
dustrial Co. Ltd. v. Industrial
Tribunal, Trivandrum 22

(1959) AIR 1959 All 794 (V 46) =
1959 Cri LJ 1396, Hari Krishna
v. State 51

(1955) AIR 1955 Mad 45 (V 42) =
ILR (1954) Mad 1033, South India
Estate Labour Relations Organisa-
tion v. State of Madras 21

(1953) AIR 1953 Mad 406 (V 40) =
1953 Cri LJ 726, In re. Kadar
Moideen 21

(1951) 1951-2 KB 1 = (1951) 1 All
ER 482, Rex v. Fulham 21

(1950) 1950-2 All ER 719 = 94
Sol J 536, Joyce v. Boots Cash
Chemists 31

(1947) AIR 1947 Nag 83 (V 34) =
47 Cri LJ 784, Provincial Govt.
C. P. & Berar v. R. Robinson 52

(1927) AIR 1927 Mad 345 (V 14) =
28 Cri LJ 267, Ramanandam v.
Emperor 37

D. S. Huglur, for Petitioner; S. Krish-
naiah, for Respondents Nos. 2 and 3.

CHANDRASHEKHAR, J.: This is a
petition for quashing the order of the
Labour Court, Bangalore, which directed
the management of the Government Soap
Factory, Bangalore (hereinafter referred
to as the Management) to pay extra wages
to respondents 2 and 3 for overtime work.

2. Most of the material facts are not
in dispute. Respondents 2 and 3 were
employed as watchmen in the petitioner-
Factory (hereinafter referred to as the
Factory) and they have since retired from
such employment. Between the years
1957 and 1959 the Factory was shifted
from its premises near Vidhana Soudha
to its new building in Rajajinagar. Dur-
ing that period respondents 2 and 3 work-
ed overtime. The respective numbers of
hours of overtime work done by them
are not in dispute. They claimed extra
wages for such overtime work. The
management paid each of them such extra
wages at the respective single rate of
wage without Dearness Allowance.
Rs. 576-47 and Rs. 553-88 were paid to
respondents 2 and 3 respectively.

3. Not being satisfied with the
amounts paid to them, respondents 2 and 3
presented before the Labour Court, Ban-
galore, an application under Sec. 33-C(2)
of the Industrial Disputes Act (herein-

after referred to as the I.D. Act). They claimed extra wages at the rate of twice the ordinary rate of wages including Dearness Allowance. Their claim was resisted by the Management. The Labour Court upheld their claim and directed the Management to pay respondents 2 and 3 Rs. 1886-47 and Rs. 1302-88 respectively. Feeling aggrieved by the order of the Labour Court, the Management has presented this petition.

4. At the stage of the hearing of the petition, a memo was filed on behalf of the Management stating that it was willing to pay to respondents 2 and 3 a further sum of Rs. 1550 to be divided amongst them proportionate to their claims and that this sum would be paid without prejudice to the contentions of the Management in this petition. Mr. S. Krishnaiah, learned counsel for respondents 2 and 3, received this sum without prejudice to their claim as upheld by the Labour Court.

5. Elaborate arguments were addressed by Mr. Hulgur learned Government Pleader, who appeared for the Management, and Mr. Krishnaiah.

6. The principal ground on which the order of the Labour Court is assailed by the Management is that respondents 2 and 3 were not workers within the meaning of Section 2(1) of the Factories Act, 1948 (hereinafter referred to as the Act) and hence they were not entitled to extra wages for overtime work at the rate of twice the ordinary rate of wages under Section 59 of Act. Another ground on which the order of the Labour Court is impugned, is that after respondents 2 and 3 had retired from employment of the Factory, they could not make an application under Section 33-C(2) of the I. D. Act.

7. The second ground can conveniently be dealt with first.

8. Section 33-C(2) of the I. D. Act provides, inter alia, that where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or/as to the amount at which such benefit should be computed, then the question may be decided by such Labour Court as may be specified in this behalf by the appropriate Government.

9. It was contended by the Management that though respondents 2 and 3 were, before their retirement, workmen as defined in the I. D. Act, they had ceased to be workmen when they presented their application before the Labour Court, that their application could be regarded as one under Section 33-C(2) of the I. D. Act, and that the Labour Court had no jurisdiction to entertain that application and to make the impugned order.

10. A similar contention was repelled by the Madras High Court in Tiruchi-Srirangam Transport Co., Private Ltd. v. Labour Court, Madurai, AIR 1961 Mad 307 in which Ramachandra Iyer, J. (as he then was) said that the clear object of Section 33-C of the I. D. Act, is to provide for the adjudication of individual claims not necessarily by persons who are still under the employment of the Management but by discharged persons as well. His Lordship added that the words, 'any workman', should necessarily include a discharged workman as well and that the Labour Court would have jurisdiction to entertain the claim of a discharged workman.

11. In Manicka Mudaliar v. Labour Court, Madras, (1961) 1 Lab LJ 592 (Mad), Rajamannar, C. J., who spoke for the Bench, said that an application under Section 33-C(2) of the I. D. Act may be made by a person who was a workman during the period in respect of which he was entitled to any benefit.

12. We are in respectful agreement with the view expressed in the above decisions of the Madras High Court. We think the Labour Court was right in following the aforesaid decisions and holding that it was competent for respondents 2 and 3 to make the application under Section 33-C(2) of the I. D. Act even though they had retired from employment of the factory.

13. We shall now deal with the principal ground urged by the management.

14. There is no dispute that the petitioner-Factory comes within the meaning of 'Factory' as defined in Section 2 (m) of the Act. Section 59 of the Act provides for payment of extra wages for overtime work at the rate of twice the ordinary rate of wages. This benefit is, however, available only to persons who are workers within the meaning of Section 2(1) of the Act. The term, 'worker', has somewhat a restricted meaning in the Act and not every employee in a factory comes within the definition of 'worker'.

15. Section 2(1) of the Act defines 'worker' as a person employed, directly or through any agency, whether for wages or not,

- (i) in any manufacturing process, or
- (ii) in cleaning any part of the machinery or premises used for a manufacturing process, or
- (iii) in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

16. The material part of Section 2 (k) which defines the expression, 'manufacturing process', reads.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (k) 'manufacturing process' means any process for—
- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal:

17. Thus it is seen that unless a person employed in a factory, is engaged in any of the aforesaid categories of work, he cannot be regarded as a worker for the purpose of the Act, though he may be an employee in that factory.

18. Mr. Hulgur contended that respondents 2 and 3 who were watchmen, were not workers within the meaning of Section 2(1) of the Act, as they were not employed in any of the aforesaid categories of work.

19. Mr. Krishnaiah contended that the question whether respondents 2 and 3 were workers within the meaning of Section 2(1) of the Act, was purely a question of fact, that it was for the Labour Court to come to a conclusion whether they were or were not such workers, and that its decision on that question cannot be interfered with by this court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution.

20. We shall first deal with the contention of Mr. Krishnaiah that the finding of the Labour Court that respondents 2 and 3 were workers, is a finding of fact which cannot be interfered in this writ petition.

21. Mr. Krishnaiah sought support for his contention from the observations in *South India Estate Labour Relations Organisation v. State of Madras*, AIR 1955 Mad 45. There a question arose whether certain categories of employees were workmen as defined in Section 2(s) of the I. D. Act. Venkatarama Aiyar, J., who spoke for the Bench, said at page 50:

"Whether a particular person is or is not a workman is a question that has to be decided on proof of the nature of the work which he is to perform and that is a question of fact. It is for the Tribunal to come to a conclusion on the evidence whether having regard to the nature of their duties, maistries and kole-maistries are workmen as defined in the Act. Vide *In re: Kadar Moideen*, AIR 1953 Mad 406. If the Tribunal decides that maistries and kole maistries are not workmen, then it will not make any award with reference to them. It is not for this court now to decide whether they are workmen or not. That jurisdiction is vested in the Tribunal. See—*Rex v. Fulham*, (1951) 2 KB 1 at pp. 6, 9 and 11."

On the other hand, Mr. Hulgur contended that the question whether an em-

ployee is a worker within the meaning of Section 2(1) of the Act, is a collateral fact upon which the jurisdiction of the Industrial Tribunal (hereinafter referred to as the Tribunal) or the Labour Court, turns, that the Tribunal or the Labour Court cannot conclusively decide such collateral question, and that its decision on that question is amenable to scrutiny by this court in exercise of its writ jurisdiction.

22. In support of his contention, Mr. Hulgur relied on the decision in *Malabar Industrial Co., Ltd. v. Industrial Tribunal*, AIR 1959 Ker 326. There also, the question that arose for decision, was whether certain categories of employees were or were not workmen as defined in Section 2(s) of the I. D. Act. After referring to several Indian and English decisions *M. S. Menon, J.*, who spoke for the Bench, observed at page 329:

"As far as action under Article 226 of the Constitution is concerned, we think that the scrutiny of facts found by the Tribunal should be no more and no less than what this court will undertake in the case of an appeal where appeals are competent. Anything more will be unnecessary, anything less will be insufficient. All this, of course, is subject to the overriding principle that the issue of writs and directions under the Article is in the discretion of the Court, and cannot be claimed as matter of right."

23. As to the scope of review by the High Court, of a finding of the Tribunal (or the Labour Court) whether certain categories of employees are or are not workmen as defined in Section 2(s) of the I. D. Act, the diametrically opposite views expressed by the Madras and the Kerala High Courts in the aforesaid two decisions, appear to us to be two extreme views, if we may say so with respect.

24. What exactly is the nature of duties and functions of a category of employees, is generally a question of fact which is for the Tribunal or the Labour Court to decide. Unless its finding is based on no evidence, or unless there is any violation of principles of natural justice in reaching that conclusion, this Court will not interfere with such finding. Whether the nature of the work of an employee, as found by the Tribunal or the Labour Court, brings such an employee within the definition of 'workmen' under Section 2(s) of the I. D. Act or within the definition of 'worker' under Section 2(1) of the Act, is, in our opinion, a question of law and the finding of the Tribunal or the Labour Court on such question can be interfered with by this Court, if it (such finding) suffers from an error of law apparent on the face of the record.

25. Mr. Krishnaiah next contended that the work of a watchman though not connected with the manufacturing process,

can be regarded as being incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process. Alternatively, Mr. Krishnaiah contended that even if the normal work of a watchman cannot be regarded as incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process, the extra work which respondents 2 and 3 were entrusted when they worked overtime, was of such a character which must be regarded as part of the manufacturing process of incidental to, or connected with it.

26. As to the nature of the normal duties and functions of respondents 2 and 3, as watchmen, there is no dispute. They had to look after the premises of the Factory and of the properties therein to check at the gate of Factory incoming and outgoing motor lorries and carts, and to search the employees of the Factory at ingress or egress.

27. Respondents 2 and 3 alleged that during the shifting of the Factory, they were asked to do, in addition to their normal duties and functions, the work of dismantling the machinery, loading the same into lorries and to generally assist in the work of shifting. The Management denied that they (respondents 2 and 3) were asked to do such extra work. After assessing the evidence on this point, of respondents 2 and 3 and of the witnesses examined on the side of the Management, the Labour Court held that respondents 2 and 3 were helping in dismantling of the machinery of the Factory and loading such machinery into lorries during the shifting of the Factory. This finding is a pure finding of fact. It cannot be said that there is no evidence in support of that finding. Hence this finding of fact does not warrant interference in this writ petition.

28. We shall now examine—

- (i) Whether the normal duties and functions of respondents 2 and 3 as watchmen, would fall within any of the categories of work specified in Section 2(1) of the Act; and
- (ii) Whether the extra work which had been entrusted to respondents 2 and 3 during the shifting of the Factory, would fall within any of such categories of work.

29. Mr. Krishnaiah did not contend that watchman as such, can be regarded as being employed in any manufacturing process. He did not also contend that respondents 2 and 3 were employed in cleaning any part of the machinery or premises used for manufacturing process. But he argues that the normal duties and functions of a watchman should be regarded as being incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

30. On the other hand, it was contended by Mr. Hulgur that none of the functions and duties of a watchman, namely, keeping a watch over the premises of the factory and the properties therein, checking at the gate of the factory lorries and carts entering or leaving the premises of the Factory, or searching employees at the ingress or egress of the Factory, can be said to be incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

31. The word 'process' occurring after the word, 'manufacturing', in Section 2(1) of the Act, can be taken to mean activity. That was how that word which occurs in Section 151 of the Factories Act, 1937 (the English Act) was construed in *Joyce v. Boots Cash Chemists*, (1950) 2 All ER 719.

31-A. Neither of learned counsel cited any decision in which the expression, 'the subject of the manufacturing process', occurring in Section 2(1), has been explained. In *State of Uttar Pradesh v. M. P. Singh*, AIR 1960 SC 569, the Supreme Court did not decide but left open the question as what the precise meaning of that expression is.

32. Of the several meanings of the word, 'subject', stated in the *Shorter Oxford Dictionary*, those which are appropriate to the present context, appear to us to be: 'a thing affording matter for action of a specified kind; that which is or may be operated upon mechanically or manually.' Applying these meanings, the expression, 'the subject of the manufacturing process', may be construed, as any article, material, thing or ingredient which is used in the activity of manufacture for deriving the end product of the manufacturing activity. It seems to us that this expression does not refer to the finished product or end product of the manufacturing activity but refers to the articles or raw materials to which the manufacturing activity is being applied for deriving such finished product or end product.

33. In the present case, the expression, 'the subject of the manufacturing process', does not, in our opinion, refer to soaps which are finished products of the Factory, but to raw materials and other things subjected to the manufacturing activity for obtaining the finished product, namely, soap.

34. The more important expression which calls for interpretation in the present case, is, 'incidental to, or connected with'.

35. We shall now refer to certain decisions cited by learned counsel in which the question whether a particular employee in a factory was a worker, came up for consideration.

36. In *B. P. Hira Works Manager, Central Rly. v. C. N. Pradhan*, AIR 1959 SC 1226, the *Payment of Wages Authority*,

Bombay, held that time-keepers in the Railway workshop who maintain official record of attendance of workshop staff, prepare pay-sheets for them, maintain their leave accounts, dispose of final settlement cases for the said staff and maintain records for statistical information, were employees of the workshop but were not workers under the Factories Act. On the other hand, the Progress Time-keepers whose work consists in preparing the progress time-sheets and operation time-sheets of machine shop staff working on various jobs dealing with production of railway spare parts, were held to be persons employed in work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process and as such they were workers within the meaning of Section 2(1) of the Factories Act. In the appeal before the Supreme Court, the management contended that Progress Time keepers were not workers, while it was contended for the respondents that time-keepers were also workers as defined in Section 2(1) of the Act. But the Supreme Court did not decide those questions.

37. In *Ramandam v. Emperor*, AIR 1927 Mad 345, children employed in sorting groundnuts in a yard close to the room where the machinery for decortication of groundnuts was used, were held to be engaged in the work incidental to the manufacturing process or connected with the article subject to the process of manufacturing. We are in respectful agreement with this decision.

38. In *Abdul Latif v. Karamat Ali*, (1962) 2 Lab LJ 335 (All) a single Judge of the Allahabad High Court held that a Munim in a Glass Factory was a worker as defined in Section 2(1) of the Act. *Mithan Lal J* took the view that keeping accounts of a factory is a work incidental to the manufacturing process in such factory. With all respect to His Lordship, we find it difficult to agree with that view.

39. The above decision of *Mithan Lal J.* was followed in *Central Rly. Workshop v. Vishwanath*, (1965) 2 Lab LJ 717 (All). There, the nature of the work of Time-keepers was to prepare the pay-sheets of the workshop staff, maintain leave accounts, dispose of settlement cases and maintain records for statistical purposes. *Katju, J.* held that they were workers for the purpose of the Act. The reasoning of His Lordship is that the work of persons who are actually engaged in handling machines cannot be done properly if there is lack of the necessary arrangements and regulation of their duties and that Time-Keepers who keep information regarding the work done by such persons should be regarded as doing work incidental to, or connected with, the manufacturing process.

40. With all respect to His Lordship, we find it difficult to subscribe to the view that mere keeping information regarding work done by persons handling machines, can be regarded as being incidental to, or connected with, the manufacturing process.

41. Mr. Krishnaiah argued that the expression, 'incidental to', or 'connected with', should be construed very liberally so as to include every activity in a factory which has some nexus, however, remote, with the manufacturing process or the subject of the manufacturing process. But such a construction would render every employee in a factory a worker. But it could not have been the intention of the Legislature to treat every employee in a factory as a worker for the purpose of the Act. If such was the intention of the Legislature, there was no need for such an elaborate definition of the term, 'worker', and equally elaborate definition of the term 'manufacturing process.' We think the expression, 'incidental to, or connected with' should be construed so as to imply proximate and not remote relationship between the work of the employees in question and the manufacturing process. Unless there is such proximate relationship, a work done by an employee cannot be said to be incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

42. In the present case, the reasoning of the Labour Court for holding that respondents 2 and 3 who were watchmen in the Factory, were workers, is as follows:

"Keeping a watch over the premises including the machinery and the goods manufactured in the Factory, searching the workmen connected with the manufacturing process and then preventing the goods being pilfered out, searching the lorries incoming and outgoing for the same purpose, cannot but be considered as work connected with the manufacturing process. Even a person cleaning the premises used for manufacturing process is considered to be a 'worker' under the definition. I cannot understand why a person keeping a watch over the premises to prevent untoward incidents happening, cannot be considered as 'worker' under the Act."

43. Labour Court has overlooked that a person cleaning the premises used for manufacturing process, is, by the statute, expressly brought within the definition of 'worker'. But for such inclusive definition, it is doubtful whether such person could be regarded as being employed in any work incidental to, or connected with, the manufacturing process. That a person cleaning any part of such premises is included in the definition of 'worker', is of no assistance in determining the question whether a watchman is or is not a

worker as defined under the Act.

44. We think the relationship between the work done by respondents 2 and 3 as watchmen of the Factory and the manufacturing process or the subject of the manufacturing process, is too remote to regard such work as being incidental to, or connected with, the manufacturing process. Likewise, the relationship between such work and the articles which are the subject of the manufacturing process, is also too remote to regard such work as being incidental to, or connected with, the subject of the manufacturing process.

45. In support of its conclusion that respondents 2 and 3 were workers under the Factories Act, the Labour Court, has also relied on the following circumstances:

- (i) The names of respondents 2 and 3 appeared in the Attendance and Acquittance Registers maintained in the Factory;
- (ii) Watchmen were also paid by the Management incentive bonus, production bonus which were payable to workers;
- (iii) The work Service Rules of the Factory governed watchmen also.
- (iv) Watchmen also worked according to usual shifts hours of the Factory; and
- (v) In a general shift watchmen assigned for the shift, were given tokens like all other workmen in the general shift.

46. We think none of the above circumstances has any relevance to the nature of the work done by the watchmen. Whether a watchmen comes within the definition of 'worker', must depend upon the nature of his work and whether such work has any proximate relation to the manufacturing process, or the subject of the manufacturing process, does not depend on his service conditions. We think the Labour Court erred in relying on these wholly irrelevant circumstances in coming to the conclusion that watchmen were workers as defined in the Act.

47. The Labour Court also relied on the presumption under Section 103 of the Act, to support its conclusion, that watchmen were workers as defined in the Act. Section 103 provides that if a person is in a factory at any time, except during intervals for meals or rest, when the work is going on or the machinery is in motion, he shall, until the contrary is proved, be deemed, for the purpose of the Act and the rules made thereunder, to have been at that time employed in the factory. The presumption under this section is that, in such circumstances, a person is employed and not that he is a worker, in the factory. Hence the presumption is of no assistance to determine whether a watchman in the factory is a worker.

48. We shall now examine whether the special work entrusted to respondents 2

and 3 during the course of shifting of the factory, was such as could be regarded as being incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.

49. The Labour Court has not given a finding on this question because it took the view that this aspect was not material to determine the question whether respondents 2 and 3 were workers and to decide the dispute involved in the case.

50. Mr. Krishnaiah referred to the definition of 'manufacturing process' in Sec. 2(k) and submitted that that definition could bring a wide range of activities like altering, repairing, breaking up, demolishing and adapting any article or substance with a view to its use, transport and delivery. Mr. Krishnaiah argued that dismantling of the plant and machinery in the old premises of the Factory loading and unloading of dismantled materials into lorries in the course of shifting of the Factory, would come within the ambit of the activities of altering, breaking up, and adapting, specified in sub-clause (i) of Cl. (k) of S. 2 of the Act.

51. In support of this contention, Mr. Krishnaiah referred to the decision in *Hari Krishna v. State*, AIR 1959 All 794. There, the question was whether certain persons temporarily employed to repair the compressor of a Rice Mill, which had gone out of order, while the manufacturing process was going on, were workers as defined in Section 2(1) of the Act. It was held that such repair was incidental to, or connected with, the manufacturing process. But that decision is not of any assistance to Mr. Krishnaiah, because repair of machinery cannot be put on the same footing as dismantling of machinery and transporting it during the shifting of a factory. Such dismantling and shifting are unusual activities and cannot be said to be incidental to, or connected with, the manufacturing process, or the subject of manufacturing process in that factory.

52. Mr. Krishnaiah, next relied on *Provincial Govt. C. P. & Berar v. R. Robinson*, AIR 1947 Nag 83. There, the facts are these. A new battery of boilers was being erected in the premises of the Jabbalpore Electric Supply Co., Ltd. The work of erection was done by another firm of Engineers, which had employed certain persons. The sole question was whether such persons were workers as defined in Section 2(h) of the Factories Act 1934. The Magistrate had taken the view that as the new boilers were merely being erected, and could not be used for generating power, the persons employed in erecting them were not engaged in any manufacturing process or in any work incidental to, or connected with it. Reversing that view, a Bench of the Nagpur High Court said:

"If a boiler had burst and persons were employed in repairing it, the boiler could not, while the repair was going on, be used for the purpose of generating power, but we think it is clear that such persons would be persons employed in the work connected with the subject of the manufacturing process. In the same way we think that persons erecting new boilers would be persons employed in the work connected with the subject of the manufacturing process. The definition of 'worker' is a very wide one, and it is wide enough, in our opinion, to include persons employed in repairing machinery or putting up new machinery, even if such machinery is not in actual use."

53. It is not necessary for the purpose of this case to express any opinion as to the correctness of the view taken by their Lordships of Nagpur High Court that erection of new boilers by way of expansion of a factory, is of the same character as repairing a boiler which has gone out of order or even replacing a worn-out or damaged boiler by a new one. The present case is distinguishable from Nagpur case, because the activities in question in the present case were not erection of additional machinery in an existing factory but dismantling the machinery in the existing premises and transporting the same for being re-erected in new premises.

54. The activities of altering, breaking up, demolishing and adapting, referred to in sub-clause (i) of Section 2(k) of the Act, are all those done in the course of manufacture, that is, in the process of transformation of raw materials into the finished product. In our opinion, dismantling of machinery and plant in the existing premises of a factory and transporting the same for being shifted to new premises, cannot be said to be any part of the process of manufacturing. Such shifting of plant and machinery to new premises, is not a normal activity of a factory. It is an extraordinary activity which is de hors the ordinary manufacturing process. In the present case, dismantling and transport of plant and machinery of the Factory were not for the purpose of normal activity of repair or replacement, but were for the unusual purpose of shifting of the Factory itself from old premises to new premises.

55. Thus, even the special work assigned to respondents 2 and 3 during the period of shifting of the Factory, cannot be said to be a work which was incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process so as to make respondents 2 and 3 come within the definition of workers even during this period.

56. The finding of the Labour Court that respondents 2 and 3 were workers as defined in Section 2(1) of the Act, is the result of relying on irrelevant circum-

stances, and is manifestly erroneous. Consequently, the conclusion based on such finding, that respondents 2 and 3 are entitled to over-time wages under Section 59 of the Act, cannot stand.

57. In the result, we allow this petition and quash the order of the Labour Court. But in the circumstances of the case, we direct the parties to bear their own costs.

Petition allowed.

AIR 1970 MYSORE 232 (V 57 C 59)

M. SANTHOSH AND K. BHIMIAH, JJ.

N. Sreepadachar, Appellant v. Vasantha Bai, Respondent.

Misc. First Appeal No. 25 of 1968, D/- 3-12-1969.

(A) Hindu Marriage Act (1955), S. 10 (1) (b) — "Cruelty" — Cruelty can also be mental — Insulting conduct indulged in by the wife in public against her husband would cause mental agony and pain, and prove harmful and injurious to the health of husband.

Cruelty under Section 10(1) (b) need not be only physical, but there can be mental cruelty. The question of cruelty must be determined from the whole facts and the matrimonial relations between the spouses. It must be determined as a cumulative effect of all the circumstances. Case law discussed. (Paras 15, 20)

Abusing the husband in public, in a bus and catching hold of his collar, making the husband cook food for her and when he served the food, throwing the plate on his head on the ground that the food was not properly prepared and insisting on his asking her forgiveness, threatening to burn herself and to give a false complaint to the police so that her husband may come to trouble, when he was starting to the office with his colleague, catching hold of his neck and preventing him from taking the instruments used for his work, stating before others that her husband may be killed in an accident so that she may get his insurance and provident fund amounts, all these would make it impossible for the husband to live with his wife. (Para 23)

Where the wife treats the husband with such cruelty and causes reasonable apprehension in his mind that it would be harmful or injurious for him to live with her, a decree for judicial separation can be granted to the husband. (Para 25)

(B) Evidence Act (1872), S. 3 — Proved — Appreciation of evidence — Independent witness — Witness produced by husband in support of his application for judicial separation, an elderly man of 63 years — Wife admitting that there was no enmity

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between herself and the witness — Witness in no way interested in applicant — Parties living in a portion of his house for about 3 years — Hence it is natural that the witness should know about quarrels between husband and wife — There is no reason why an elderly gentleman who was in no way connected with the husband, should come and depose falsely against the opposite party, against whom he had no ill-will. (Para 10)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mys 115 (V 55) =
 (1967) 2 Mys LJ 185, Siddagangiah v. Lakshmamamma 5, 17
 (1966) AIR 1966 Madh Pra 205 (V 53) = 1965 MPLJ 549, Umri Bai v. Chittar 20
 (1965) 1965-1 Mys LJ 683 = ILR (1965) Mys 505, Gangamma v. Hanumanthappa 5, 17A
 (1959) AIR 1959 Ker 75 (V 46) = ILR (1958) Ker 643, Serah Abraham v. Pyli Abraham 20
 (1957) AIR 1957 Trav-Co 277 (V 44) = ILR (1955) Trav-Co 1142, Soosannamma v. Varghese Abraham 19
 (1957) 1957-1 All ER 161 = 1957 P 19, Thompson v. Thompson 22
 (1954) AIR 1954 Orissa 117 (V 41) = ILR (1954) Cut 14, Anjani Devi v. Krushna Chandra 21
 (1954) 1954-3 All ER 159 = 1954 P. 403 Eastland v. Eastland 6
 (1950) 1950-2 All ER 398 = 1951 P 38, Kaslefsky v. Kaslefsky 6
 (1949) 1949-1 All ER 247 = 1949 P 219, Barker v. Barker 6
 (1924) AIR 1924 Mad 49 (V 11) = ILR 46 Mad 791, Kondal Rayal Reddiar v. Ranganayaki Ammal 18
 (1897) 1897 AC 395 = 1895 P 315, Russell v. Russell 16, 17A
 (1794) 1 Hag Ecc 773 = 162 ER 748, D. Aguilar v. D'Aguilar 19

K. R. Karanth and K. R. D. Karanth, for Appellant; K. S. Chandrashekhar, for Respondent.

SANTHOSH, J.:— This is an appeal filed by the husband against the order of the learned First Additional Civil Judge, Mysore, rejecting the petition filed by him for judicial separation under Section 10 (1) (b) of the Hindu Marriage Act.

2. The appellant's case is that he was married to the respondent on 3-7-1953. After living for a short while in Hubli, he was transferred to Mysore in April 1954, and thereafter, they were residing in Mysore City. The respondent had a very irritable temper and a foul tongue. She quarrelled with the appellant over trivial matters and on account of her quarrels and abuses, the appellant had to spend sleepless nights many a time. The respondent used to abuse the appellant in the foulest language and used to behave to-

wards him in public most insultingly. She used to subject him to humiliation and shame in the eyes of the public and make him a laughing stock in the locality and feel very miserable. She used to hold out threats of consisting suicide and the appellant had to keep himself constantly watchful in order to prevent her from committing suicide. The respondent had expressed many a time that she would feel very happy by getting the insurance and Provident Fund amounts if the appellant dies early. As a result of the respondent's abuses and temper the appellant found it impossible to live with her and he was obliged to quit the house on 30-9-1961 in sheer desperation and disappointment. It was harmful and injurious to live with the respondent because of the ill-treatment. The appellant prayed that the Court may be pleased to grant him a decree for judicial separation.

3. The respondent denied the allegations made by her husband. She stated that her husband was not paying her sufficient money to run the house-hold. She complained that the appellant was coming to the house at odd hours and some times late at night. In spite of the inhuman conduct of the appellant, she behaved like a dutiful wife. She accused her husband of carrying on propaganda among his friends and relatives that she was mentally unsound. She has maintained that it was the appellant who was behaving in inhuman manner towards her and that she has been a dutiful wife. She contended that there are absolutely no grounds for granting a decree for judicial separation and prayed that the petition may be dismissed with costs.

4. In support of his case, the appellant examined himself and 6 witnesses. The respondent examined, apart from herself, 4 witnesses on her behalf. The learned Civil Judge held that the appellant had not made out his case and dismissed the petition. He was of the opinion that the various incidents of ill-treatment referred to by the husband had not been proved and the witnesses examined by the appellant were all interested and no reliance could be placed on their evidence. He was of the view that the incompatibility of temperament had resulted in serious differences and disharmony between the parties and this was not a sufficient ground for getting the relief of judicial separation.

5. Sri K. R. Karanth, learned counsel appearing for the appellant, has contended that the learned Civil Judge has not appreciated the evidence properly. He argued that there is absolutely no reason to reject the independent and disinterested evidence of P. W. 1 Deva Rao, in whose premises the parties resided as tenants from 1955 to 1958. He is an elderly gentleman and a retired official not in any way related to or interested in

the appellant. P. W. 1 has deposed to 5 different incidents of misbehaviour on the part of the wife when the parties were residing in a portion of his house. The respondent herself has admitted that some of those incidents had taken place, but has denied that the incidents had taken place in the manner alleged by her husband and P. W. 1. It is also pointed out that there is no reason whatsoever to reject the evidence of P. W. 3 Mud-daveerappa, a person belonging to a different community; altogether. It is also urged by Sri Karanth that the documentary evidence produced on behalf of the appellant fully supports his case. Exhibit P-1, a letter written by the respondent's mother, shows that the respondent's mother herself has written that her daughter has no sense and she has been behaving stupidly.

It is argued that the tone and the tenor of the letter, Exhibit P-2 written by the respondent stating that she does not care and is not afraid of her husband and that she would set the police on him, clearly shows what type of a woman the respondent is. Sri Karanth has also relied on Exhibit D-1, a letter written by the appellant to the respondent's father wherein he has stated that he had brought to his notice several times, the worst behaviour of his daughter but nothing had been done in the matter and that it was impossible for him to stay with his wife because of her behaviour and if he continued to stay, a major disaster was sure to happen. It is argued by Sri Karanth that the evidence let in on behalf of the appellant makes out clearly a case of cruelty in law entitling the appellant to a decree for judicial separation. Sri Karanth has strongly relied on two decisions of this Court viz., (1) *Siddagangaiah v. Lakshamma*, AIR 1968 Mys 115 and (2) *Gangamma v. Hanumanthappa*, (1965) 1 Mys LJ 683 in support of his contention that the incidents narrated by the appellant would amount to legal cruelty. Sri Karanth has also cited before us some English decisions and also decisions of the various High Courts and also passages in Mulla's Hindu Law and Raghavachariar's Hindu Law.

6. Sri N. S. Chandrashekhar, learned counsel appearing on behalf of the respondent, has argued that the evidence let in on behalf the appellant was interested and discrepant and the learned Civil Judge was right in not accepting the same. He contends that the evidence at best only shows that the respondent was temperamental but incompatibility of temperament would not constitute cruelty as per Section 10(1) (b) of the Hindu Marriage Act. It is the duty of the appellant to prove either harm or injury has been caused to him. He has relied on certain passages in Mulla's Hindu Law, at pages

660, 661, 665 and 666 in support of his said contention that the allegations relied on by the appellant would not constitute cruelty in law entitling the husband to get a decree for judicial separation. Sri Chandrashekhar has also stressed that it is well settled that there should be strict proof in matrimonial proceedings and that it is for the appellant to prove beyond all reasonable doubt the various charges made by him.

It has also been stressed that the parties, during the short period of 9 years of their marriage, had six children, though the respondent protested against frequent pregnancies, the husband refused to abide by her request and imposed his wishes on her. It is argued that this clearly shows that the appellant was not a quiet and docile husband which he pretends to be. It is also stressed that when the respondent had given birth to her last child, the appellant left the respondent and his children and went away. This shows the cruel and callous attitude and the mind of the appellant. Sri Chandrashekhar has cited before us (1954) 3 All ER 159; (1949) 1 All ER 247 and (1950) 2 All ER 398, in support of his contentions.

7. The two points that arise for determination in this case are:

- (1) Whether the appellant has proved by satisfactory evidence, the various incidents narrated by him?
- (2) If so, whether the incidents referred to above, would amount to cruelty as mentioned in Cl. (b) of sub-section (1) of Section 10 of the Hindu Marriage Act?

8. When examined as P. W. 5, the appellant has narrated the various incidents wherein his wife ill-treated him, abused him and insulted him in public. He has stated that in 1960 he and his wife were returning after a visit to Dasara Exhibition at Mysore, his wife abused him, caught him of his collar and threatened him in the crowded bus. He has also stated that his wife even refused to cook food for him and that he had to take leave and cook food and serve her; when he served food to her she stated that the food was not prepared well and threw the rice plate on his head. He has also stated how, on a number of occasions, the respondent threatened to burn herself and report to the police that he had set fire to her. He has also stated that case when they went to his father's house for some betrothal ceremony, as he did not accede to her request to take her to her parents' house before the completion of the ceremony, she got into a fit of temper and refused to take food and left the place. When he tried to stop her, she broke her bangles and scratched his wrist and went away. After some hours, on search by his relation, she was found in the railway station

and was brought home by P. W. 2. He has also narrated that once when he had used the hot water which she had prepared for her oil-bath, she abused him in the presence of P. W. 3 and asked him to prostrate before her and beg her pardon.

9. The various incidents mentioned above have been corroborated by the witnesses examined by the appellant on his behalf. P.W. 1 Deva Rao has corroborated the evidence of appellant with regard to what had happened in the bus during Dasara. He has also stated that the respondent threatened that she would pour oil and burn herself so that her husband might come to trouble. He has further stated that the wife was ill-treating the husband and making him cook food, serve her meals and when served, refused to take meals on the ground that it was badly prepared. He has further stated that once there was an accident and the train had run over a person; the respondent stated why that accident did not happen to her husband so that she could get the insurance and provident fund amounts. He has also stated that the wife used to say that 40 to 50 persons like her husband, who was only a Supervisor, were working under her father, who was an Executive Engineer. P.W. 3 Muddaveerappa has corroborated the petitioner's evidence about the incident with regard to hot water-bath taken by the appellant. He has also stated that once when the appellant was starting to go out for work, his wife caught hold of him by the neck and stated that he should not go out. Later, when he remonstrated she allowed him to go, but refused to permit him to take the chain and crow-bar which he had to take for his work. P.W. 2 Narayanachar has spoken to the scene created by the wife in the appellant's father's house at Bangalore, when she refused to take food and walked out of the house, how they all searched for her, and how he discovered her in the railway station and brought her home.

10. There is considerable force in the contention of Sri Karanth that there was no justification for the learned Civil Judge to reject the evidence of P.W. 1 Deva Rao. The reason why the learned Civil Judge rejected the evidence of P.W. 1 is that he was very much interested in the appellant and had narrated certain incidents which the appellant himself has not stated. The learned Civil Judge also thought that it was the duty of P.W. 1, who was an elderly man of 63 years, to have advised both the husband and wife not to quarrel. There is nothing on record to show that P.W. 1 was in any way interested in the appellant. The respondent herself has admitted that there was no enmity between herself and P.W. 1. There is absolutely no reason why an elderly gentleman like P.W. 1,

who was in no way connected with the appellant should come and depose falsely against the respondent, against whom he had no ill-will. Though during the course of the cross-examination of P.W. 1, an attempt was made to question the fact that the parties were living in his house, the respondent herself has admitted that they were living in the house of P.W. 1.

According to P.W. 1, the parties were living in a portion of his house for about 3 years. Hence it is only natural that P.W. 1 should know about the quarrels between the husband and wife. It may be mentioned that the appellant ceased to be a tenant of P.W. 1 after 1958. There is not even a suggestion that P.W. 1 was in anyway interested in the appellant. With regard to the criticism that P.W. 1 stated certain matters which the appellant himself did not state, it may be pointed out that those incidents relate to the observations made by the respondent about getting the insurance and provident fund amounts which obviously were made when the appellant was not present. Though P.W. 1 is an elderly man, one cannot expect him to interfere in the quarrels between a husband and wife, particularly when the evidence discloses that the respondent is not a lady of mild temper. There is nothing in the evidence of P.W. 1 to show that he is an unreliable witness or he had come to depose falsely to help the appellant. It is difficult to believe that he would concoct the various incidents referred to by him.

11. Similarly, there is no reason to reject the evidence of P.W. 3 Muddaveerappa merely on the ground that he and the appellant were working together for some time as Surveyors. His evidence also clearly shows how the respondent was treating her husband. The learned counsel for the respondent argued that this witness is obviously giving false evidence, because he has stated that the appellant was living in a house behind Ganesha Talkies. The appellant has not stated anywhere that he was living in any such house while he was in Mysore. But, it may be pointed out that it has been suggested in cross-examination to the appellant that on a number of occasions, he used to go home late in the company of P.W. 3. There is nothing in the evidence of P.W. 3 to indicate that he was giving false evidence.

12. The documentary evidence produced in the case by the appellant lends strong support to his case. In the letter, Exhibit P-1, the mother of the respondent herself has referred to her daughter as not having the least sense and being stupid. Exhibit P-2, a card dated 11-10-1961 written by the respondent in her own hand, shows what type of a lady she is. She has stated therein that she does

not care for the notice sent by her husband. She has also stated that she was not afraid and the people in the street are helping her. She has also threatened the appellant that if he does not return home early, she would set the police on him. In Exhibit D-1, dated 4-10-1961, a letter written by the appellant to his father-in-law, shortly after he left the respondent, he has stated that he had several time brought to his notice the worst behaviour of the respondent and that no action had been taken by him for mending his daughter's behaviour. He has also stated that "it is highly impossible to stay at home with her even a minute" because of her conduct, and that her wild behaviour had made him desperate in life, and if he continued to stay with her in the house some major disaster was sure to happen for which he did not want to give room. The documents referred to above written long before the parties contemplated any proceedings, lend assurance to the truth of the version put forward by the appellant before the court.

13. In the evidence given by her, the respondent has only denied the various incidents of misbehaviour referred to by the appellant and his witnesses. The witnesses examined on her behalf have gone very much further than the respondent herself and have stated that the relations between the husband and wife were very good and cordial. R.W. 1 Vasantharaj is the respondent's sister's husband. R.W. 2 Vedamurthy is the husband of the aunt of the respondent. R.W. 3 Indira Bai is the aunt of the respondent. R.W. 5 is the sister of R.W. 3. These are all interested witnesses and their evidence that the appellant and the respondent were living very cordial and amicable life cannot be accepted.

14. The evidence of the various incidents of misbehaviour by respondent has been corroborated by the independent witnesses, P.Ws. 1 and 3. The evidence of these two witnesses is satisfactory and there is no good reason to reject their evidence. The learned Civil Judge was therefore not right in thinking that the appellant had not proved his case by satisfactory evidence.

15. The next question for consideration is whether the abovesaid acts of the respondent amounts to cruelty as per clause (b) of sub-section (1) of Section 10 of the Hindu Marriage Act, which will be referred to hereinafter as the Act. It is well settled that cruelty need not be only physical, but there can be mental cruelty. At page 662 of Mulla's Hindu Law, (13th Edition), in his commentary under Section 10 of the Act, dealing with mental cruelty, this is what the learned author observes:—

"The language of the clause is comprehensive enough to apply to cases of mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole of facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty."

16. While considering this question, it is unnecessary to discuss the various English decisions starting from the leading case *Russel v. Russel*, (1897 AC 395) cited by both the counsel for the appellant and the respondent, as we have the benefit of two Bench decisions of this court by which we are bound, wherein, after discussing the law on the subject, this court has laid down what constitutes cruelty as per clause (b) of sub-section (1) of Section 10 of the Act.

17. In AIR 1968 Mys 115, *Somnath Iyer, J.* (as he then was) held down that wilful and unjustifiable interference by one spouse in the sphere of the life of the other, is one species of cruelty in the same way in which rough or domineering conduct or unnatural sexual practice or disgusting accusations of unchastity or adultery, and some times even studied unkindness or persistent nagging can in a proper case be regarded a cruelty. Cruelty about which the Act speaks is not restricted to acts of physical violence and may extend to behaviour which may cause pain and injury to the mind as well and so renders the continuance in the matrimonial home an agonising ordeal.

17-A. In (1965) 1 Mys LJ 683, *Kalagate and Govinda Bhat, JJ.* have held that false imputation made by the husband against his wife that she is living in adultery amounts to cruelty. At page 686, their Lordships have observed as follows:—

"The word 'cruelty' as it appears in the clause is not confined to the conduct, which would be a danger to life, limb or health only. The test of cruelty is that conduct which would cause a reasonable apprehension in the mind of the wife that it would be harmful or injurious for her to live with her husband. The words 'harmful' and 'injurious' are generally used and are not qualified by the words to life, limb or health, therefore, 'harm' and 'injury' may relate to the mind of the wife also. Thus not only physical

but mental cruelty is recognised. As laid down by the majority in *Russel v. Russel*, 1897 AC 395, the words 'it will be harmful or injurious for the petitioner to live with the other party' seem to recognise the test of impossibility of discharging the duties of married life. Therefore, if the husband falsely imputes unchastity to his wife, then such imputation must necessarily wound the feeling of the wife. Character of chastity of a woman is a precious thing to her and she would always be anxious to save the same and every respectable woman would feel offended if a baseless allegation is made regarding her chastity or character. In our opinion, therefore, the false imputation made by the husband against his wife that she is living an adulterous life amounts to such cruelty as to cause reasonable apprehension in her mind that it will be harmful or injurious for her to live with the husband. In such circumstances, we must hold that it would be impossible for the wife to discharge her marital obligation to her husband;

... ..
It may be pointed out that in the said decision the wife had not stated that the allegation made by her husband had caused reasonable apprehension in her mind that it was injurious or harmful to live with her husband. On the contrary, in the said case, the wife had volunteered to live with the husband. Her case was that the husband had made false allegation against her. The Court refused to grant the decree prayed for by the husband for restitution of conjugal rights on the ground of cruelty by the husband.

18. In *Kondal Rayal Reddiar v. Ranganayaki Ammal*, ILR 46 Mad 791=(AIR 1924 Mad 49) their Lordships have observed as follows:—

"Under the Indian Law, cruelty, in the legal sense, need not necessarily be physical violence, a course of conduct, which, if persisted, it would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights."

19. In *Soosannamma v. Varghese Abraham*, AIR 1957 Trav-Co 277, their Lordships have pointed out that if a spouse is subjected to conduct insults, abuses and accusation of adulterous conduct, that would make a state of married life impossible to be endured and would cause a very unhappy and miserable state of existence. This was cruelty of a worse kind than physical violence. At page 279, their Lordships have referred to an English Case in *D' Aguilar v. D' Aguilar*, (1794) 1 Hag Ecc. 773, wherein the wife alleged that her husband spat upon her; Lord Stowell said that nothing could be more gross cruelty.

20. In *Serah Abraham v. Pyli Abraham*, AIR 1959 Ker 75, their Lordships

have pointed out that the general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusation or taunts. Their Lordships have also pointed out that though the Indian Courts originally construed 'legal cruelty' in the strict sense, there has come about a gradual change and the tendency has been in favour of the view that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. The harm apprehended may be mental suffering as distinct from bodily harm, for, pain of mind may be even more severe than bodily pain and a husband disposed to evil, may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind than if, in fits of anger, he were to inflict occasional blows upon her person.

In *Umri Bai v. Chittar*, AIR 1966 Madh Pra 205, their Lordships have pointed out that the legal concept of cruelty has varied from time to time, not in theory but in application, according as the social and economic conditions changed. They have pointed out that clause (b) of Section 10(1) applies as well to cases of mental cruelty, which may cause even more serious injury than physical harm and create in the mind of the injured such apprehension as is contemplated in this section. The question of cruelty must be determined from the whole of facts and the matrimonial relations between the spouses. It has to be determined as a cumulative effect of all the circumstances.

21. In *Anjani Dei v. Krushna Chandra*, AIR 1954 Orissa 117, their Lordships have observed as follows:—

"To establish legal cruelty, it is not necessary that physical violence should be used. Continuance should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect and indifference on the part of the husband are all factors which may undermine the health of a wife. xx xx xx

Where a husband habitually insults his wife and behaves towards her with neglect and studied unkindness, so as to impair her health, he is held guilty of cruelty. Where evidence of physical violence is not per se sufficient to warrant a finding of cruelty, the court is bound to take into consideration the general conduct of the husband towards the wife and if this is of a character tending to degrade the wife and subjecting her to a course of intense indignity injurious to her health the court is at liberty to pronounce the cruelty proved."

22. At page 983, this is what is stated in *Raghavachariar's Hindu Law, Princi-*

ples and Precedents (5th Edition):—

"Verbal abuse and insults; the continual use of abusive and insulting words spitefully indulged in to bring shame and mental agony to the other spouse which will tend to undermine the health of that spouse may in the circumstances of any particular case amount to legal cruelty. More trivial incidents which are merely the wear and tear of married life do not constitute cruelty." *Thompson v. Thompson*, (1957) 1 All ER 161."

Again, at page 984 of the same book, it is stated as follows:—

"Refusal to speak: Where one of the spouses though living under the same roof refuses to speak to the other for a considerably long time and on that ground the other spouse becomes wretched and worried, such conduct may be a ground for holding that there has been cruelty on the part of the spouse who refuses to speak. This conduct must no doubt be taken along with other circumstances of the case to come to the conclusion that cruelty has been established."

Again, at page 986, it is stated as follows:

"Cruelty by words — It is implicit in law in order to find cruelty proved, it is not necessary to find physical violence. Cruelty by words, by talk, or by conduct other than violence may be cruelty nonetheless and possibly may even be more dastardly cruelty than the cruelty of blows."

23. From the various incidents held proved, it is clear that the insulting conduct indulged in by the respondent in the public against her husband would undoubtedly cause mental agony and pain, and prove harmful and injurious to the health of the husband. Abusing the husband in public in a bus and catching hold of his collar, making the husband cook food for her and when he served the food, throwing the plate on his head on the ground that the food was not properly prepared and insisting on his asking her forgiveness, threatening to burn herself and to give a false complaint to the police so that her husband may come to trouble, when he was starting to the office with his colleague, catching hold of his neck and preventing him from taking the instruments used for his work, stating before others that her husband may be killed in an accident so that she may get his insurance and provident fund amounts, all these would make it impossible for the husband to live with his wife.

There can be no doubt that such continuous conduct on the part of the wife would undermine and impair the health of the husband. This kind of abuses and quarrels made him spend sleepless nights many a time. Because of such insulting behaviour of the wife in public, the hus-

band had to face humiliation and shame in the eyes of the public and he was a laughing stock of the locality. From the evidence on record, it is clear that the respondent treated the appellant with such cruelty as to cause reasonable apprehension in his mind that it would be harmful or injurious for him to live with her.

24. Before we part with this case, it is necessary to mention that the charge made by the wife at a late stage of the case that the appellant was moving with one Kamala has not been proved. The learned Civil Judge himself has not relied on this aspect of the case. It is therefore unnecessary to discuss the same.

25. The appellant, for the reasons mentioned above, has, by satisfactory evidence, established the charge of cruelty against the respondent. The appeal is therefore allowed and the order passed by the learned Civil Judge dismissing the appellant's petition is set aside, and a decree for judicial separation as prayed for by the appellant is granted. There will be no order as to costs.

Appeal allowed.

AIR 1970 MYSORE 238 (V 57 C 60)

M. SADASIVAYYA Acq. C. J. AND
D. M. CHANDRASHEKHAR J.

M. C. Srinivasan, Petitioner v. Collector of Central Excise and another, Respondents.

Writ Petn. No. 941 of 1966, D/- 23-9-1969.

(A) Constitution of India, Art. 311 — Reversion — Lower Division Clerks promoted expressly to officiate as U. D. clerks and until further orders — Promotees do not acquire any right to hold the post of U. D. clerks — Reversion does not amount to reduction within meaning of Art. 311. (Paras 13, 14)

(B) Constitution of India, Arts. 16, 14 — Article 16 gives effect to doctrine of equality in matter of appointment and promotion — Reasonable classification — Test for determination — Upgrading of posts in order to relieve stagnation — Only basis of promotion on seniority cum fitness — Method of promotion held did not violate Arts. 14 and 16.

Article 16 is only an incident of the application of the concept of equality enshrined in Article 14 and it gives effect to the doctrine of equality in the matter of appointment and promotion. There can be reasonable classification of the employees for the purpose of appointment or promotion. AIR 1962 SC 36, Rel. on. (Para 16)

Whether there is a reasonable classification or not depends upon the facts of

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each case and the circumstances obtaining at the time the recruitment is made. When a State makes a classification between two sources of recruitment, unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to prove that the classification is unreasonable and violative of Article 16 of the Constitution. AIR 1967 SC 839, Appld. (Para 26)

In order to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things grouped together from those left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute (or executive action) in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a reasonable nexus between the basis of classification and the object of the Act (or executive action) in question. AIR 1958 SC 538, Rel. on. (Para 27)

When a specified number of posts in Upper Division were created for relieving stagnation in the lower cadre, and to achieve it, it was considered necessary that promotion to those posts should be based on seniority-cum-fitness only, such method of promotion to those posts, could not be said to violate equality guaranteed by Articles 14 and 16 of the Constitution. (Paras 28, 31)

There is nothing unreasonable or discriminatory in reducing the proportion of promotion to the cadre of U. D. Clerks on the basis of only merit and increasing the proportion of promotions on the basis of seniority-cum-fitness. (Para 32)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 52 (V 54) =
 (1966) 3 SCR 600, *Mervyn Continho v. Collector of Customs.* 24
 (1967) AIR 1967 SC 839 (V 54) =
 (1967) 2 SCR 29, *Govind Datatray v. Chief Controller of Imports and Exports* 26
 (1967) AIR 1967 SC 1427 (V 54) =
 (1967) 2 SCR 703, *Jaisinghani v. Union of India* 21, 23
 (1967) AIR 1967 SC 1889 (V 54) =
 (1968) 1 SCR 185, *Roshanlal Tandon v. Union of India* 24
 (1962) AIR 1962 SC 36 (V 49) =
 (1962) 2 SCR 586, *General Manager Southern Ry. v. Rangachari* 16
 (1958) AIR 1958 SC 538 (V 45) =
 1959 SCR 279, *Ram Krishna Dalmia v. Justice Tendolkar* 27
 S. C. Chatre for K. A. Swami, for Petitioner; B. S. Keshava Iyengar Central Govt. Pleader, for Respondents.

CHANDRASHEKHAR, J.: The principal question that arises for determina-

tion in this petition is whether in the same cadre it is permissible to provide a method of promotion for some posts; different from the method of promotion for the remaining posts in that cadre. It is contended for the petitioner that such different methods of promotion in the same cadre, are offensive to equality guaranteed by Articles 14 and 16 of the Constitution.

2. In the Central Excise Department, up to the year 1959, 50% of the vacancies in the cadre of Upper Division Clerks (hereinafter referred to as U. D. Clerks) were filled by direct recruitment. On the recommendation of the Pay Commission, direct recruitment to the cadre of U. D. Clerks was discontinued and all the posts of U. D. Clerks are filled by promotion of Lower Division Clerks (hereinafter referred to as L. D. Clerks).

3. In 1962 the Government of India decided that 25% of the posts of U. D. Clerks should be set apart for being filled on the basis of competitive examination limited to L. D. Clerks. However, no separate competitive examination is held to determine merit. The performance of L. D. Clerks in the Departmental Examination and in one extra paper in precis-writing and drafting, has been made the basis for determining merit.

4. The Central Excise Reorganisation Committee (constituted by the Government of India under the Chairmanship of Mr. A. K. Chanda) stated in its report that in the Central Excise Department a substantial proportion of L. D. Clerks were employed in doing work of non-routine, which should ordinarily be assigned to U. D. Clerks. That Committee opined that it would be unfair to use L. D. Clerks for doing the work of U. D. Clerks without grading them accordingly, and recommended that adjustments should be made in the strength of L. D. Clerks to conform to the responsibilities envisaged for them by the Pay Commission.

5. Presumably, on the basis of the recommendation of that Committee, the Government of India sanctioned in April 1966 upgrading of about 1000 posts of L. D. Clerks into U. D. Clerks, and in the Mysore Collectorate the number of posts so upgraded is 66.

6. The posts so upgraded were filled according to the normal method of promotion, namely, 75% of these posts were filled by promotion of L. D. Clerks on the basis of seniority cum fitness and the remaining 25% by promoting L. D. Clerks on the basis of merit (The result in the Departmental examination in one extra paper in precis-writing and drafting). The petitioner was one among the persons so promoted on the basis of merit.

7. In the order dated 20-5-1966 (marked Exhibit J) issued by the Collector of Central Excise in Mysore (respondent 1), it was stated that 66 promotees (including the petitioner) would officiate as U. D. Clerks until further orders with effect from 1-6-1966. By his subsequent order dated 29-6-1966 (marked Exhibit K), the Collector reverted the petitioner and 6 others who had been promoted as U. D. Clerks in the merit quota to the posts of L. D. Clerks, with effect from 30-6-1966. Feeling aggrieved by that order, the petitioner has presented this petition assailing such reversion.

8. In the counter-affidavit filed on behalf of the Union of India (respondent 2) and the Collector of Central Excise in Mysore (respondent 1), it has been explained that the reversion of the petitioner and 6 others under the order, Exhibit K, was due to change in the policy of the Government in regard to the method of promotion to the upgraded posts. At the stage of hearing of this petition, the learned Central Government pleader produced letter F. No. 16/11/66-Ad-III-A dated the 8th June 1966 addressed to the Central Excise Collector, Allahabad, with copies of all other Collectors of Central Excise, for information. In that letter, it is stated that after careful consideration the Government of India decided that there should be no reservation for merit quota candidates in the upgraded posts sanctioned in April 1966 and that all those posts should accordingly be filled by promotion of L. D. Clerks on the basis of seniority-cum-fitness. The stand taken by the respondents is that the reversion of the petitioner, was to give effect to the revised policy in regard to the method of promotion to the upgraded posts.

9. The petitioner and the respondents were permitted to file further affidavits.

10. It has been explained in the additional counter-affidavit filed on behalf of the respondents that the main reason for upgrading over 1000 posts of L. D. Clerks, was to relieve acute stagnation in grade of L. D. Clerks. It is stated that before such upgrading, the number of posts of U. D. Clerks was very limited, that the prospects of L. D. Clerks gaining promotion to the cadre of U. D. Clerks, were very remote and that there were some cases in which L. D. Clerks had worked as such for about 15 years without being promoted to Upper Division. It is also stated that the Government, at first, directed that these upgraded posts should be filled up in accordance with the usual basis, namely 25% by promotion on the basis of merit and 75% by promotion on the basis of seniority-cum-fitness, that immediately thereafter hundreds of representations were made to the Government of India and the Central Board of Excise and Customs, by several L. D.

Clerks protesting against filling up 25% of these posts otherwise than on the basis of seniority-cum-fitness, and that it was represented that such promotions on the basis of merit, would defeat the very purpose for which such upgraded posts were ordered by the Government.

11. It is further stated in the additional counter-affidavit that the matter was examined by the authorities who felt that the grievance of L. D. Clerks was well founded, and that the Government directed that the upgraded posts should be earmarked exclusively for promotion on the basis of seniority-cum-fitness so that the effect of such upgrading should be available to the fullest extent to L. D. Clerks who had been stagnating.

12. Before going to the principal question, namely, the constitutionality of the separate method of promotion to these upgraded posts, it is convenient to dispose of two minor contentions of the petitioner.

13. It was contended by Mr. K. A. Swami, learned counsel for the petitioner, that the reversion of the petitioner from the post of U. D. Clerk to that of L. D. Clerk, was violative of Article 311 of the Constitution. The very order, Exhibit J, by which the petitioner was promoted, expressly stated that the officials promoted would officiate as U. D. Clerks and until further orders. The petitioner's promotion being only officiating and until further orders and not permanent, he had not acquired any right to hold the post of U. D. Clerk and he cannot complain that his reversion to his substantive post, amounts to reduction in rank within the meaning of Article 311 of the Constitution.

14. It was also contended by Mr. Swami that having once made the promotions to the upgraded posts in accordance with the usual method of promotion, it was not open to the Government to change its policy and reverse these promotions. But Mr. Swami was not able to state on what principle the Government should be denied the competence to change its policy and to make consequential changes in the action taken in pursuance of its earlier policy, when the promotion of the petitioner was only until further orders and he had acquired no other right to hold that promotional post. It is not necessary for the purpose of this case to express any opinion on the question whether the Government can reverse its action after others have acquired rights in consequence of its action before such reversal. In the present case, the petitioner had not acquired any right under the action taken by the authorities in pursuance of its earlier policy regarding promotion, because his promotion was only officiating and until

duty of delivering the consignment to the consignee had been representing to the plaintiff that the consignment in question had not arrived. Once in a particular case the authorised officer makes the representation that the consignment has not arrived and on the basis of such representation the consignee acts, would not a plea of estoppel be available to the consignee against the Railway Administration? To my mind, the answer is obvious and in the affirmative. Their Lordships of the Supreme Court in AIR 1962 SC 1716 referred to above have not negatived the plea of estoppel in such cases or in such circumstances. In AIR 1933 Pat 45 (B. & N. W. Rly. Co. Ltd. v. Karneswar Singh) the facts and circumstances were different and estoppel was found not to be available against the Railway on the facts of the said case. In the present case, I am led to accept the position that a clear case of estoppel is made out in relation to the non-receipt of the consignment until 17-1-61 and it is not open to the Railway Administration to establish that this very consignment had arrived earlier and on that basis "what is reasonable time" can be established to the material prejudice of the consignee. It is to this limited extent that the plea of estoppel, according to me, can be raised. Such a position does not run counter to the ratio decided in AIR 1962 SC 1716.

12. On the aforesaid analysis of the matter, the lower appellate Court's decision seems to be invulnerable and there is no merit in this Second Appeal. The Second Appeal is, therefore, dismissed. The plaintiff's suit is decreed with costs throughout.

13. Leave, as prayed for under clause 10 of the Orissa High Court Order, is granted.

Appeal dismissed.

AIR 1970 ORISSA 161 (V 57 C 53)

R. N. MISRA, J.

Mali Bewa and others, Appellants v. Dhunda Samal and another, Respondents.

Second Appeal No. 252 of 1965, D/-13-11-1969, from decision of 5th Addl. S. J., Cuttack, D/-26-2-1965.

(A) Specific Relief Act (1877), S. 24—Suit for specific performance — Plaintiff must show readiness to do his part of contract until end of trial.

In a suit for specific performance, it is for the plaintiff to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract and in case that fact is controverted by the defendant to prove it at the trial. If he fails to do so, his

claim for specific performance must fail. It is mandatory that not only it should be averred in the plaint, but also should be stated in Court during trial, otherwise readiness until the end of the trial cannot be indicated at the time of filing of the suit. AIR 1967 SC 868 & AIR 1928 PC 208, Foll. (Para 6)

(B) Contract Act (1872), S. 70 — Obligation to return benefit — Once the specific performance is refused the part payment made by plaintiff to defendant must be returned. (Para 7)

Cases. Referred: Chronological Paras

(1967) AIR 1967 SC 868 (V 54) =

1967-1 SCR 227, Gomathinayagam

Pillai v. Palaniswami Nadar

(1928) AIR 1928 PC 208 (V 15) =55

Ind App 360, Ardesbir v. Flora

Sassoon

S. Mohanty, for Appellants; B. Patnaik, for Respondents.

JUDGMENT:— The plaintiffs are in appeal against a reversing judgment of the lower appellate court in a suit for specific performance of a contract of sale. Defendant No. 1 was the original owner of the Ka and Kha Schedule lands, and for legal necessity, the plaintiffs allege, she entered into an agreement to sell the properties in dispute on 27-8-57 for a total consideration of Rs. 400/-. Rs. 200/- as a part consideration was paid that day to defendant No. 1 and it is claimed that she put the plaintiffs in possession. The agreement is marked as Ext. 2. It is asserted by the plaintiffs that in spite of repeated demands by them defendant No. 1 postponed the execution of the document and ultimately on 29-11-57 she executed a sale deed in respect of the Kha schedule land of the plaint, which was a part of the contract, under Ext. 2 for Rs. 275/- in favour of defendant No. 2. The sale deed is marked as Ext. A.

2. On the footing that defendant No. 2 had notice of the contract between the plaintiffs and defendant No. 1 the suit for specific performance was filed on 5-1-59. Defendant No. 1 filed a written statement denying the suit contract, but did not contest the litigation at the trial. Defendant No. 2 denied the agreement, delivery of possession, passing of part consideration and took the stand that he was a bona fide purchaser for value without notice.

3. The learned Munsif discussed the evidence at length, but did not record any categorical finding on the question of delivery of possession or passing of consideration. He held, "I come to the conclusion that the defendant No. 1 definitely entered into a contract to sell the suit land to the plaintiffs as alleged and the deed of contract is genuine and for consideration". The treatment of the issues in the hands of the trial Court under issue Nos. 3 and 4 shows that they have been very perfunctorily decided though there

was certain evidence on either side. Apart from making a running statement what each of the witnesses had deposed, conclusions were not drawn from such evidence. The trial Court, however, gave a decree to the plaintiffs.

4. Thereupon defendant No. 2 appealed to the lower appellate court. The learned Additional Subordinate Judge reassessed the evidence and took into account the various documents that were placed before him and came to hold that the plaintiffs had failed to prove due execution of the suit agreement and as such the said document cannot be the basis for a suit for specific performance. He negatived the claim of defendant No. 2 under the sale deeds, the first sale deed being a fraud on registration, and the second sale deed being pendente lite. It is against the reversing judgment of the lower appellate Court that this Second Appeal has been filed by the plaintiffs.

5. It is unfortunate that even the lower appellate Court did not examine the evidence with a view to recording positive findings on material aspects that arose for determination in a suit for specific performance. In the facts of the present case, it becomes necessary to find whether there was a valid agreement, whether part performance had been done by the plaintiffs as alleged, and whether in terms of the contract the plaintiffs had been put into possession. Many other aspects which were not very material engaged the attention of the lower appellate Court and, therefore, it lost sight of the real aspects and ultimately disposed of the appeal by holding that the plaintiffs were not entitled to relief.

6. I was myself thinking of going into the matter to reassess the evidence and record findings in exercise of powers under Section 107, C.P.C. But I find, as Mr. Patnaik for the respondents, rightly indicates, that there is want of a basic assertion in the plaint and there does not appear to be evidence to support the stand that the plaintiffs were always ready and willing to perform their part of the contract. It is one of the fundamental requirements in a suit for specific performance that the plaintiffs must assert their such readiness and in case that fact is controverted by the defendants, to prove at the trial that they are ready to perform their part of the contract. Mr. Patnaik placed before me a decision in AIR 1967 SC 868, Gomathinayagam Pillai v. Palaniswami Nadar. Mr. Justice Shah, speaking for the Court, stated,

"But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail."

A decision of the Judicial Committee reported in AIR 1928 PC 208, Ardesbir v. Flora Sassoon was quoted with approval in the said decision. A portion of the view expressed by their Lordships of the Judicial Committee may also be indicated below:—

"In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

In view of what has been indicated by the Judicial Committee in the portion extracted above, it becomes mandatory that not only it should be averred in the plaint, but also it should be stated in Court during trial, otherwise readiness until the end of the trial cannot be indicated at the time of filing of the suit. Keeping this aspect in view, I looked into the plaint and deposition of P. W. 5, one of the plaintiffs. I find that there is clear absence of such an averment in the plaint. P. W. 5 is also silent about this aspect of the matter. In the circumstances, it is difficult for me to hold with Mr. Mohanty on the basis of the statement in para. 3 of the plaint that the plaintiffs had demanded performance of the contract and defendant No. 1 on some plea or other had postponed the performance and, therefore, it is sufficient to hold that there was readiness on the part of the plaintiffs to perform their part of the contract. On the aforesaid finding, that there is no assertion in the pleadings nor evidence in Court that there was readiness from the date of contract until the date of decree to be passed, the suit is bound to fail. I, therefore, do not propose to go into the assessment of the evidence or record findings which Courts below have failed to do.

7. One aspect, however, remains to be answered. There seems to have been a positive finding by the trial Court that consideration had passed in part to the extent of Rs. 200. The lower appellate Court has not vacated the finding. I also looked into the evidence and I am prepared to hold that the finding of the trial Court must be accepted as being based on evidence. P. Ws. 2 and 3 have clearly deposed about passing of consideration of Rs. 200 on the date of the contract. On this basis once specific performance is refused, the part payment which had been made by the plaintiffs to defendant No. 1 must be ordered to be refunded. I would, therefore, give a direction that defendant No. 1 must refund Rs. 200 together with interest at the rate of 6 per cent per

annum to the plaintiffs from the date of the breach.

8. The Second Appeal fails and is dismissed. Parties will bear their own costs of this litigation throughout.

Appeal dismissed.

AIR 1970 ORISSA 163 (V 57 C 54)

G. K. MISRA, C. J. AND S. K. RAY, J.

Bhima Das, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 916 of 1969, D/- 5-11-1969.

Public Safety — Preventive Detention Act (4 of 1950), S. 3 (1) (a) (ii) — Subjective satisfaction of detaining authority, not justiciable — Grounds of detention — If any one of them is very vague so as to abort effective representation against the detention, the order must be quashed. AIR 1964 SC 334, Rel. on.

(Paras 2 and 3)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 334 (V 51) =

(1964) (1) Cri LJ 257, Rameshwar Shaw v. District Magistrate, Burdwan

D. P. Kar, for Petitioner.

G. K. MISRA, C. J.:— On 7-9-1969, the petitioner was served with Annexure A, an order dated 6-9-1969 passed by the District Magistrate, Cuttack, in exercise of his powers under sub-clause (ii) of Cl. (a) of sub-section (1) of S. 3 of the Preventive Detention Act, 1950, directing that the petitioner shall be detained in Cuttack Jail until further orders. The impugned order of detention was served on him as on the next day in pursuance of the provisions of Section 7(1) of the Act. The grounds may be enumerated hereunder.

(1) You, taking advantage of the students' agitation since July 1969, protesting against the increase in bus fare and levy of octroi by the Cuttack Municipality made every effort to induce the students to resort to violent activities which would ultimately have led to complete breakdown of public order. Specifically, your activities prejudiced the maintenance of public order as evidenced by the following incidents:—

(i) On 21-8-1969 the students damaged the public phone box at Cuttack Chandi Crossing and assaulted the constable on duty there. They also assaulted the traffic constable. The students manhandled the City traffic S. I. at Buxi Bazar, stopped and pelted stones at a State Transport Service bus at Nuapatna.

(ii) You were also a member of the unlawful assembly who damaged a police vehicle at College crossing on 21-3-1969 and manhandled the driver.

(iii) At your instance, there was heavy brick-batting at the Police party at College square on 31-8-1969.

(iv) On 22-8-1969, the students resorted to heavy brickbatting at the police party at Cuttack Chandi crossing and college square.

(v) On 23-8-1969 at Ravenshaw college the students severely assaulted a Sub-Inspector belonging to the Central C. I. D. Organization.

(vi) On 25-8-1969, the Reader S. I. to the City A. S. P. was severely assaulted by the students in the Medical College premises.

(vii) On 27-8-1969 the State Education Minister was gheraoed by the students in the Ravenshaw college premises between 6 p. m. to 1.50 a. m."

2. Mr. Kar on behalf of the petitioner contends that the grounds of detention were vague, and the petitioner is not in a position to make an effective representation against the grounds on account of vagueness.

Position of law is now well settled that the subjective satisfaction of detaining authority is not justiciable. The reasonableness of the satisfaction and the adequacy of the materials cannot be examined by a Court of law. If however, any of the grounds is irrelevant or foreign to the act, or is so vague that the detenu would not be in a position to make an effective representation, then the order of detention is liable to be quashed. Further, if the detenu has been detained on a large many grounds and any one of them is found to be foreign or irrelevant, then the entire detention order must be quashed for the simple reason that the Court is not in a position to predicate as to what particular ground influenced the detaining authority. See AIR 1964 SC 334.

It is in the light of these principles that the present case must be examined.

3. It would appear from the grounds of detention that the first part of paragraph (1) is in general terms. It says that the petitioner, taking advantage of the students' agitation in July 1969 protesting against the increase in bus fares and levy of octroi by the Cuttack Municipality, made every effort to induce the students to resort to violent activities which would ultimately lead to complete breakdown of public order. If the general statement constitutes the ground of detention, it is wholly vague. It does not show how, where and when the petitioner made every effort to induce the students to resort to violent activities. This general statement is followed by a statement of specific activities prejudicial to the maintenance of public order "as evidenced by the incidents". 7 instances have been given. Excepting incidents (ii) and (iii) all the rest do not at all connect the petitioner with the activities of the students. Assuming

that the activities of the students referred to in the incidents are not vague, the petitioner cannot be detained for the activities of the students unless a ground is made out that it was at his instance that the students were induced to do so or that in fact he took part in those activities. Except (ii) and (iii) the other grounds are therefore, wholly irrelevant and foreign to the Act.

Confronted with this difficulty Mr. Mohapatra, on behalf of the opposite parties advanced a contention that the general observation made in the first part of paragraph (1) that the petitioner made every effort to induce the students to resort to violent activities would also govern the specific incidents. We are unable to accept this contention. Had there been any truth in this contention, definitely in instances (ii) and (iii) no reference would have been made to the petitioner. Even assuming that there is substance in Mr. Mohapatra's contention, the position does not improve inasmuch as the general observation in paragraph (1) is itself vague and does not give any details regarding the place, the time, and the nature of the efforts made by the petitioner. We are therefore, satisfied that the incidents (i) and (iv) to (vii) are wholly vague, irrelevant and foreign. The general observation made in paragraph (1) is also vague.

On the aforesaid analysis, we are clearly of opinion that the detention order is bad and must be quashed. We accordingly issue a writ of certiorari directing that the impugned order be quashed and that the petitioner be released forthwith.

4. S. K. RAY, J.:— I agree.

Writ issued.

AIR 1970 ORISSA 164 (V. 57 C 55)

R. N. MISRA, J.

Ramachandra Gochhikar and others, Petitioners v. Ramachandra Biswal and others, Opposite Parties.

Civil Revn. No. 405 of 1968; D/ 11-11-1969, from order of Sub: J., Puri, D/- 28-8-1968.

(A) Civil P. C. (1908), O. 38, R. 11 and O. 21, R. 57 — Attachment before judgment — Duration — Even after suit is decreed such attachment enures for all successive execution applications made within limitation till the decree is either satisfied or discharged — O. 21, R. 57 does not apply.

Where an attachment before judgment is made by the plaintiff and his suit is decreed, such attachment enures for all successive execution applications. It survives and is available to the decree-holder at all stages within limitation until the

decree is satisfied or discharged. O. 21, R. 57 does not operate in the case of an attachment before judgment. AIR 1952 Orissa 182, Foll; (1912) 16 Cal LJ 86 & AIR 1962 Bom 236 & AIR 1968 Punj and Haryana 461, Rel. on. (Para 9)

(B) Civil P. C. (1908), S. 64 and O. 38, R. 11 — Waiver of attachment before judgment — Waiver must be proved by clear-cut intention — Property under attachment before judgment sold after suit was decreed — One of the decree-holders endorsing the sale deed — Absence of evidence to show that the consideration was either paid to decree-holders or deposited in Court for payment to decree-holders — Inference of waiver cannot be made — There cannot be partial raising of attachment by consent of parties outside Court — Release of attachment is illegal. AIR 1928 Bom 444 & AIR 1927 Mad 648, Rel. on. (Para 5)

(C) Civil P. C. (1908), S. 64, O. 21, R. 59 and 58 (Pat.) — Attachment before judgment — Only such persons who had interest on the date on which either the attachment was effected or the decree was passed can object — Attachment made prior to 8-3-1957, the date of passing of decree — Sale in 1962 — Purchasers being neither in possession on date of attachment or of decree cannot initiate proceedings under O. 21, R. 58. AIR 1934 Pat 511, Rel. on. (Para 6)

Cases Referred: Chronological Paras

(1968) AIR 1968 Punj. & Har 461	
(V 55) = 70 Pun LR 467, Bhagwan Das v. Santokh Singh	9
(1962) AIR 1962 Bom 236 (V 49) = ILR (1962) Bom 452, Dattatraya v. Rambhabhai	9
(1952) AIR 1952 Orissa 182 (V 39) = ILR (1951) Cut 335, Durga Dei v. Sadananda	8
(1934) AIR 1934 Pat 511 (V 21) = ILR 13 Pat 765, Mukhram Pandey v. Arjun Missir	6
(1928) AIR 1928 Bom 444 (V 15) = 30 Bom LR 1136, Shivilal v. Taniram	5
(1927) AIR 1927 Mad 648 (V 14) = 38 Mad LT 310, Subbayya v. Subba Reddy	5
(1924) AIR 1924 Mad 494 (V 11) = ILR 47 Mad 483 (FB), Meyyappa Chettiyar v. Chidambaram Chettiyar	8
(1912) 16 Cal LJ 86 = 16 Cal WN 1097, Ganesh Chandra v. Banwarilal	8

R. K. Mohapatra, for Petitioners; M. Patra, for Opposite Parties.

ORDER: The decree-holders in a money suit are the petitioners in this revision application. They obtained the decree in question for a total amount of Rupees 3235-3-3 pies on 8-3-57 against judgment-debtors Janmejy Swain and Pata Del.

During the pendency of the suit there was an attachment before judgment against the properties which are involved in the present proceedings. Execution Case No. 50 of 1967 was filed by the decree-holders, as the decree had remained unsatisfied. As there is no objection that Execution Case No. 50 of 1967 was barred by limitation it must be taken as an accepted position that there had been other execution cases intervening as steps in aid.

Mr. Patra for the opposite parties wanted to raise objection on that score mainly on the ground that the decree-holders have not placed materials to prove other steps in aid. For the purposes of the present revision application, I have ruled out such contention on the ground that objection on such score was not taken in the Court below and, therefore, such objection must be taken as barred by constructive res judicata. This revision petition will, therefore, proceed on the basis that there was an attachment before judgment and that Execution Case No. 50 of 1967 was within limitation and maintainable.

2. In this execution case the opposite parties and another applied under O. 21, R. 58, Civil P. C. for release of certain specific items of properties on the allegation that these properties had been purchased by them under different sale deeds (Exts. 1, 3, 4, 7 and 9) between the period 10-5-1962 and 23-5-1962. It is not disputed by the decree-holders that on these registered sale deeds one of the decree-holders on behalf of all gave consent for the sale.

The learned Subordinate Judge as the executing Court went into the matter and came to hold that as one of the decree-holders himself had written the endorsements and had signed them, it must be taken that they had waived their right under attachment and these properties which have now been sold to third parties cannot be proceeded against in the execution case and, therefore, while rejecting the claim of one person who is not a party to this revision application on the ground that consent of the decree-holders had not been proved in that case he directed release of the properties described in schedules Ka, Kha, Ga, Gha and Cha in the execution petition which are covered by the sale deeds Exts. 1, 3, 4, 7 and 9 respectively relating to the opposite parties in this Court.

3. Aggrieved by the said order of release the decree-holders are now the petitioners. Three questions have been raised by Mr. Mohapatra in the revision application. They are:—

(1) The attachment having been made before judgment the relevant provision to apply is O. 38, R. 11, Civil P. C. As attachment subsisted, there could be no sale until the Court lifted the attachment.

(2) Waiver on the part of the decree-holders has not been established and on the materials on record the learned Subordinate Judge was not justified to hold that there was waiver. In any event the consideration money under these sale deeds having not either been paid to the decree-holders or deposited in Court for satisfaction of the execution case the learned Subordinate Judge should not have released the property.

(3) Keeping in view the language of O. 21, R. 59, Civil P. C. it must be held that these claimants were not entitled to maintain the claims in the executing Court.

Mr. Patra, for the opposite parties, raises a contention that in view of the language of O. 21, R. 57, Civil P. C. and on the basis that there must have been intervening execution cases which should also be taken to have been dismissed under some contingency or other, applying O. 21, R. 57(2), Civil P. C., it must be held that attachment, even if made before judgment, had lapsed by the time of the sales in 1962. The submission of Mr. Patra, therefore, would raise a fourth question for examination. Each of these questions requires careful examination as they have substantial bearing on the points in issue.

4. Let me first dispose of the question No. 2 as to whether in the facts and circumstances of the case the learned Subordinate Judge should have held that there was waiver. There has been admittedly no finding by the learned Subordinate Judge in the miscellaneous proceeding that the consideration money has been either paid to the decree-holders or deposited in Court. In the normal course of events no decree-holder would allow release of property already under attachment particularly when it constitutes a substantial portion of the property available to be executed against without securing his own interest. Mr. Patra contended that there was evidence on record to justify a finding that the consideration money under the sale deeds had really been paid to the decree-holders and the learned Subordinate Judge failed to record a finding on such evidence. Though normally it is not a function of this Court sitting in revision to look into the evidence, I wanted to satisfy myself that there was some substance in the contention of Mr. Patra particularly with a view to find out whether if the other contentions of Mr. Mohapatra for the petitioners failed it would make out a case for remand. On a perusal of the evidence I am also satisfied that the evidence is absolutely undependable and on the basis of such evidence a finding is difficult to be recorded that the decree-holders had been paid the consideration money under the sale deeds.

5. The learned Subordinate Judge seems to have taken the view that the conduct of the decree-holders amounted to waiver. To support the contention of Mr. Mohapatra that waiver has not been established and the endorsements on the sale deeds cannot be taken to be waiver he sought to rely on AIR 1928 Bom 444 (Shivlal v. Taniram) where a Division Bench of that Court, on examination of a case almost on all fours on this aspect of the point held,

"Waiver must be properly proved; the ordinary principle is that waiver is an intentional act; and a clear act showing such an intention to waive must be shown."

Ultimately they held that there was no waiver and attachment must be taken to have continued. Another aspect of the matter pertinent to this point is available in AIR 1927 Mad 648 (Subbayya v. Subba Reddy) where Odgers, J. held,

"There cannot be a partial raising of an attachment of property by consent of parties outside Court, Court must raise an attachment unless it becomes inoperative by payment of decree debt and there must be an application therefor and an order of Court."

I think this is a sound rule which should be allowed so that confusion may not arise in judicial proceedings. In the absence of any material of this type in the present case it is difficult to hold that there was either consent leading to waiver or that there is material to hold that the decree-holders are estopped from challenging the claim of the transferees-claimants. On the aforesaid analysis, I must dispose of this question against the claimants and hold that waiver has not been established.

6. Coming to the question as to whether under the provisions of O. 21, R. 59, Civil P. C. the claimants can maintain their application, it is proper to quote the rule to start with. Order 21, Rule 59, Civil P. C., as applicable to the State of Orissa in view of the Patna amendment, is as follows:—

"The claimant or objector must adduce evidence to show that at the date of the decree or of the attachment, as the case may be, he had some interest in, or was possessed of, the property in question."

As has been indicated above, the attachment was sometime prior to the decree and the decree itself is dated 8-3-1957. Admittedly, the sales in favour of the claimants are sometime in 1962. As such the claimants were neither in possession at the time of attachment nor had they anything to do with the property even at the time of the decree. In the circumstances, it is difficult to hold that at the instance of such persons a proceeding under O. 21, R. 58, Civil P. C. could be sustained. Reference may, in this connection, be made to the decision in AIR 1934 Pat 511.

(Mukhram Pandey v. Arjun Missir) where a Division Bench of the Patna High Court, while disposing of this aspect of the matter, stated thus:—

"Order 21, Rule 58 read with R. 59 gives right of claim only to those who had interest in and possession of the property under attachment on the day when the attachment was effected. Rule 58 is no doubt general, but R. 59 makes it clear that the investigation is to be confined to possession on the date of the attachment." This being the legal position, at the instance of the claimants the present enquiry in the Court below was not maintainable. The learned Subordinate Judge in seisin of the execution case had no jurisdiction to go into the claims as the proceeding itself was not sustainable in law. This disposes of one of the contentions of Mr. Mohapatra.

7. What remains for discussion is the first question as indicated above, that is, attachment having been made before judgment under the relevant rule of O. 38, Civil P. C. whether R. 11 of that order is to be enforced or the attachment before judgment lapsed in view of a subsequent execution taken by the decree-holders and its disposal in terms of O. 21, R. 57, Civil P. C. The question raised by Mr. Mohapatra and the submission made by Mr. Patra for the parties as indicated earlier will now be examined as a common question.

8. Order 38, Rule 11, Civil P. C. reads thus:—

"Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a reattachment of the property."

Order 21, Rule 57, Civil P. C. makes the following provision:—

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date.

Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs."

This aspect of the matter seems to be concluded by a series of judicial pronouncements. It is true that there is no consensus, but a view binding on me seems to have been clearly expressed in AIR 1952 Orissa 182 (Durga Dei v. Sadananda). Ray, C. J., on a difference between Jagannathadas and Panigrahi, JJ. (as both of them then were) examined this aspect of the matter. Mr. Justice Panigrahi, in his

judgment, referred to the Madras view as represented in ILR 47 Mad 483 = (AIR 1924 Mad 494 FB) (Meyyappa Chettiyar v. Chidambaram Chettiyar) and a view of the Calcutta High Court in (1912) 16 Cal LJ 86 (Ganesh Chandra v. Banwarilal) and stated,

"The provisions of Rule 57 of Order 21 had no application to a case in which an order for attachment before judgment had been obtained and that the attachment subsists not only for the first application but also for subsequent applications."

Ray, C. J. re-examined this aspect of the matter in his judgment and quoted sumptuously from various authorities placed before him and ultimately held:

"If I am asked to give my opinion with regard to the operation of O. 21, R. 57, I will agree with the view taken in the Calcutta High Court as well as that of the Patna High Court, rather than with the Full Bench decision of the Madras High Court. The simple reason is that on the dismissal of the execution case all orders passed by the executing Court in course of that execution proceeding are 'nullified' while the attachment before judgment is an order passed in the suit. Secondly, it has been said in the Calcutta High Court, in the cases already referred to, that the attachment before judgment enures for all successive execution applications for the first or the second or the third only. Its period of life continues until the decree is either set aside or satisfied and discharged. It becomes an attachment in execution when you execute the decree on the basis thereof, or in other words, to use the words of Sir George Rankin, C. J., which I have just now quoted, when you want to make that the basis of the sale that you are going to hold for the purpose of execution and realisation of the decree."

The portion of the judgment of Chief Justice Rankin, reference to which has been made by Ray, C. J., reads thus:—

"Applications for execution were to be definitely dismissed if they were not adjourned to a future date. The object of the last sentence in Rule 57 is to settle the question as to whether when the application is dismissed, any attachment, made under that application, should fall to the ground or should subsist, and the legislature has provided that it is to fall to the ground. In these circumstances, it seems reasonably clear to me that it is no part of the intention of this rule to say that an attachment before judgment, which existed before any application could be made in execution, and which prima facie would continue to have effect if no application for execution had been made, should fall to the ground merely because a subsequent application for execution has come to nothing."

9. Normally, I should have left the matter here in view of the decision of this Court disposing of the above case. But since Mr. Patra tried to question the propriety of the decision of this Court I have followed up the series of decisions relevant on the point up-to-date and I find that judicial opinion seems to be supporting the view taken by this Court. Reference may be made to AIR 1962 Bom 236 (Dattatraya v. Rambhabhai) where a Division Bench of that Court in a case almost similar to the facts of the present case came to hold:

"It must be held that, in the case of an attachment, before judgment O. 21, R. 57 does not operate and the attachment still continues. If this is so, the conveyances in favour of defendants Nos. 6 and 7 and defendant No. 8 are clearly hit by Section 64 and they are inoperative and void against the purchaser."

A similar view has also been taken in a very recent decision of the Punjab High Court in AIR 1968 Punj and Haryana 461 (Bhagwan Das v. Santokh Singh). His Lordship the Chief Justice, while speaking for the Division Bench stated thus:—

"It is true that where attachment before judgment has been made, no fresh attachment may be made of the same property after the passing of the decree and the same attachment may become an attachment for the purposes of the execution of the decree immediately on the date of the application to execute it. But by no stretch of any reasoning can attachment of the property be treated as an attachment in execution of a decree on a date on which the decree is not in existence." On this state of authorities I am satisfied that the contention of Mr. Mohapatra is correct, namely, that O. 21, R. 57, Civil P. C. has no application and the attachment before judgment made under O. 38, Civil P. C. survives and is available to the decree-holder at all stages within the period of limitation until the decree obtained by him is satisfied or discharged. Applying this legal position to the present case, it must, therefore, be held that there was subsisting attachment on the date when the sales in favour of the opposite parties took place and, therefore, the sales were subject to attachment.

10. On the aforesaid analysis, it must be held that the claimants were not entitled to maintain the claims in the execution proceeding, there was valid attachment subsisting by the time when the purchases were made, the decree-holder had not waived his right under the attachment and as such the miscellaneous proceeding in the Court below was not maintainable.

11. It must necessarily follow that the learned Subordinate Judge has exercised the jurisdiction which was not vested in him in law and went wrong in directing release of the properties in ques-

tion. This revision application is allowed, the impugned order is vacated and the claims made by the opposite parties stand dismissed. The petitioners would be entitled to costs of the proceeding. Hearing fee in this Court is assessed at Rs. 100 (one hundred).

Petition allowed.

AIR 1970 ORISSA 168 (V 57 C 56)

R. N. MISRA, J.

Uday Nath Nanda and others, Petitioners v. Bulei Guru and others, Opposite Parties.

Civil Revn. No. 126 of 1967, D/- 11-11-1969.

Civil P. C. (1908), O. 41, R. 27 — Production of additional evidence at appellate stage — Powers of Court — Appellate Court can direct original Court to take such evidence — It cannot remand case for trial de novo.

An appellate Court cannot allow additional evidence to be received unless one or more of the conditions mentioned in R. 27 are satisfied. AIR 1948 PC 36, Foll. (Para 8)

Normally the additional evidence is possible to be received in the appellate Court and it is also open to the appellate Court to direct the original Court to take evidence and other evidence in rebuttal. The appellate Court should not however, vacate the judgment of the trial Court and remit the entire case. (Para 10)

An "Ekpadia" which does not go to the root of the matter, would be only a piece of evidence in case it is proved and it will be taken into account in assessing its place in the entire case. The document, other evidence in support of the document and the evidence in rebuttal would all taken together constitute one aspect of the case and cannot be said that it is so basic and fundamental to the case that since such a document was to be received by way of additional evidence it was paramount that the decree of the lower Court should be vacated and the case should be remanded to the trial Court. (Para 10)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1008 (V 52) =

1965-1 SCR 542, Municipal Corpn. 6

Bombay v. Pancham 6

(1948) AIR 1948 PC 36 (V 35) =

74 Ind App 285, Mohd. Akbar 8

Khan v. Motai 8

(1931) AIR 1931 PC 143 (V 18) =

58 Ind App 254, Parsotam v. Lal 8

Mohar 8

M. N. Das, for Petitioners; B. Patnaik, for Opposite Parties.

ORDER:— This revision application at the instance of the plaintiffs in a suit is directed against the appellate order of the Additional Subordinate Judge, Cuttack, dated 14-5-1966 passed in Title Appeal

CN/CN/A907/70/MVJ/B

No. 191 of 1965 remanding the suit to the trial Court with a direction to receive an Ekpadia by way of additional evidence under Order 41, Rule 27, Civil P. C.

2. T. S. No. 131 of 1961 was by the petitioners for declaration of their title, possession and for permanent injunction in respect of 9.12 acres of land. The plaintiffs contended that the lands were partly Nijjote and partly Anabadi and belonged to three sets of landlords who initially came from one family. It was contended that the plaintiffs and before them their forefathers were cultivating these lands under the ex-proprietors and ultimately approached them to settle the lands with the plaintiffs. In 1944 the lands were so settled, and rent was received by the ex-proprietors until there was vesting of the estate. Subsequently the plaintiffs applied for mutation and obtained mutation even after contest by the defendants. While the plaintiffs remained in possession of the property the defendants in collusion with the brother of one Sri Sarat Chandra Parija and a set of supporters of the said brother were attempting to disturb the peaceful possession of the plaintiffs. This situation gave rise to the suit.

3. The defendants took the stand that they were in possession of the property after reclaiming the lands with permission of the landlords. They contended that they had taken the leases from the brother of Sri Sarat Chandra Parija and were in possession of specific portions of the disputed property. As the defendants were settled raiyats of the village they have acquired occupancy right upon settlement. They disputed the genuineness of the leases in favour of the plaintiffs.

4. The trial Court after a regular trial by his judgment dated 19-7-1965 decreed the plaintiffs' suit and found that they were in possession. Therefore, it confirmed their possession also. A decree for permanent injunction was also granted as prayed for.

5. Against this judgment an appeal was carried to the District Court which eventually came for disposal before an Additional Subordinate Judge, Cuttack. In appeal by the defendants an application for additional evidence was filed and it was prayed that the Ekpadia which had been submitted subsequent to vesting of the estate under the Orissa Estates Abolition Act and which had been called for in the lower Court and had not been obtained may be received by way of additional evidence under Order 41, Rule 27, Civil P. C. This application was resisted by the plaintiffs on several grounds, such as, the document was not genuine, its existence having been known to the parties adequate steps should have been taken in the trial Court to bring it in evidence and as such it did not come within the scope

of O. 41, R. 27, Civil P. C., lacuna cannot be filled up by way of additional evidence in appeal and the document had no material bearing on the disposal of the litigation. It was also contended that the document being of a spurious character it should not be received by way of additional evidence. The learned Additional Subordinate Judge by the impugned order ruled out the plaintiff's objections and came to hold that the Ekpadia should be received by way of additional evidence. He was of the view that the Ekpadia went to the root of the case and as such it was necessary to set aside the impugned judgment of the trial Court and the suit should be remanded to give opportunity to the appellants to prove the document and a chance to the respondents to rebut the same. It is against this direction of the learned Subordinate Judge that this Civil Revision has been filed.

6. Mr. M. N. Das for the petitioners contends that the effect of the order of the learned Additional Subordinate Judge is to give an opportunity to the defendants to fill up the lacuna in the case. He submits that the direction is not within the four corners of O. 41, R. 27, Civil P. C. Inasmuch as the defendants have failed to establish the circumstances which may permit receipt of additional evidence. The last contention is that the Ekpadia is only a piece of evidence and it is difficult to appreciate the stand taken by the learned Additional Subordinate Judge that it goes to the root of the case and, therefore, the entire case should be sent back to the trial Court. He seeks to place reliance on the decision of the Supreme Court in AIR 1965 SC 1008, *Bombay Corporation v. Pancham*.

7. The provisions of O. 41, R. 27, Civil P. C. are very clear. For convenience the same may be extracted below:—

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the party seeking to adduce additional evidence satisfies the Appellate Court that such evidence notwithstanding the exercise of due diligence was not within his knowledge or could not be produced by him, at the time when the decree or order under appeal was passed or made, or

(c) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined,

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

The stand taken by Mr. Das seems to be that the direction of the learned Additional Subordinate Judge does not show that according to him the case is covered by any of the three provisions referred to above. To the facts of the present case Cl. (a) has no application as this document was not produced in the Court below and yet was kept out of evidence by the trial Court. The Court has not recorded, as Mr. Das submits, that the defendants had no knowledge of the existence of the document nor is it established that notwithstanding the exercise of due diligence the document could not be produced by the defendants in the trial Court when evidence was being taken.

8. The law seems to be clear that it is not open to an Appellate Court to allow additional evidence to be received unless one or more of the aforesaid conditions are satisfied. Speaking for the Law Lords of the Judicial Committee, Sir John Beaumont in AIR 1948 PC 36, *Mohd, Akbar Khan v. Motai* stated thus:—

"The power of an Appellate Court to admit further evidence under O. 41, R. 27 (1) (b) is confined to cases in which the Court requires any document to be produced or any witness to be examined, to enable it to pronounce judgment or for any other substantial cause. As pointed out by this Board in 58 Ind App 254 = (AIR 1931 PC 143), the power only arises where the Court requires further evidence for one of the two causes specified."

The learned Additional Subordinate Judge in the impugned order seems not to have been alive to the requirements of law and has not clearly indicated as to which of the clauses of O. 41, R. 27, according to him, has been satisfied in this case, so as to authorise him to exercise the jurisdiction. In the Supreme Court case referred to above Mr. Justice Mudholkar speaking for their Lordships of the Supreme Court stated,

"No doubt, under Rule 27 the High Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the Appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the Appellate Court is em-

powered to admit additional evidence. The High Court does not say that there is any such lacuna in this case."

The learned Additional Subordinate Judge does not say, as required in the decision of the Supreme Court, that there is any lacuna in this case which creates difficulty for the lower appellate Court to pronounce judgment in the appeal. Therefore, I am satisfied that the facts of this case do not attract application of O. 41, R. 27 (1) (c), Civil P. C. (as amended in this Court). Mr. Patnaik for the opposite parties, however, contended that steps had been taken in the Court below to call for this document, but it could not be obtained within the period when trial was continuing and therefore, the case can be brought within the amended Cl. (b) of O. 41, R. 27(1). The order-sheet of the trial Court was placed before me to justify such a stand.

9. Taking an over-all picture of the matter, as once discretion has been exercised by the lower appellate Court I do not propose to vacate the order for receipt of additional evidence. Because it is quite possible that the said aspect of the matter may have weighed with the lower appellate Court though it has not clearly indicated as to when the application was made and under what circumstances it could not be received in spite of best of attempts of the defendants. The following passage, however, appears in the appellate order:

"When the original document is missing the certified copy becomes admissible, and moreover, the certified copy could be obtained only after the learned Munsif delivered his judgment Its non-production in the lower Court in spite of the best efforts of the appellants has also been proved."

On the aforesaid observation of the lower appellate Court it is quite possible that there may be some force in Mr. Patnaik's statement that steps had been taken to call for the document and it could not be brought within the period when the trial was in progress. Therefore, I maintain the order of the learned Additional Subordinate Judge that the document would be received by way of additional evidence.

10. This, however, does not dispose of the case. I do not understand what is the basis for the learned Additional Subordinate Judge to say that the Ekpada goes to the root of the matter. It would after all be a piece of evidence in case it is proved and as any other piece of evidence it will be taken into account in assessing its place in the fabrics of the entire case. The document, other evidence in support of the document and the evidence in rebuttal would all taken together constitute one aspect of the case and cannot be said that it is so basic and fundamental to the case that since such a document was to be received by way of additional evidence

it was paramount that the decree of the lower Court should be vacated and the case should be remanded to the trial Court.

Normally the additional evidence is possible to be received even in the appellate Court. Courts, however, have taken the view that it is open to the appellate Court to direct the original Court to take the evidence and other evidence in rebuttal. The lower appellate Court had, therefore, no business in this case to vacate the judgment of the trial Court and remit the entire case. That direction of the learned Additional Subordinate Judge must be vacated. The appeal must be maintained on his file, and a chance would be given to the defendants to prove the Ekpada as additional evidence and to the plaintiffs to lead evidence in rebuttal, and the trial Court should be called upon to return the records with the additional evidence within a time to be fixed, whereafter the appeal must be disposed of taking into account the evidence already on record and the additional evidence now to be received.

I would, therefore, substitute the direction of the lower appellate Court by giving a fresh direction to the following effect. Title Appeal No. 191 of 1965 would be maintained on the file of the learned Additional Subordinate Judge. The records should be returned for receiving the Ekpada by way of additional evidence and evidence of rebuttal to be led by the plaintiffs. The trial Court would receive the additional evidence and return the records of the case to the lower appellate Court within three months from the date of receipt of the records by it, whereafter the appeal would be disposed of by the lower appellate Court within a further period of two months. The Title Appeal is a very old one and would be 5 years old by the time it can get disposed of. The direction in relation to the time element must, therefore, be strictly followed. The contention of Mr. Das that the document is a forged one and should not be relied upon in evidence is a matter left to be decided by the lower appellate Court after the document is received by way of additional evidence.

In the circumstances, I modify the directions and this Civil Revision is disposed of accordingly. Parties will bear their own costs of this revision. But the direction given by the lower appellate Court that costs of that appeal would abide the result in the lower Court can no more stand. Since the defendant's application for additional evidence was being allowed at the appellate stage and the case was being remitted back for receiving additional evidence and thereby the plaintiffs were being called to discharge additional responsibilities in respect of the litigation,

It is proper that the order for receiving additional evidence should be allowed on terms of payment of costs. The plaintiffs should be entitled to receive a consolidated cost of Rs. 100 to be paid by the defendants within a month hence in the lower appellate Court. If the amount is neither paid into Court nor certified to have been paid to the counsel for the plaintiffs within the said period, the order for admitting additional evidence would not operate and the appeal would be disposed of as it is by the lower appellate Court. If the amount is paid, the records should be transmitted to the learned Munsif for recording additional evidence keeping in view the direction given above.

Order accordingly.

AIR 1970 ORISSA 171 (V 57 C 57)

B. K. PATRA, J:

State, Petitioner v. Prakash Chandra Agarwalla, Opposite Party.

Criminal Revn. No. 320 of 1967, D/-3-12-1969, from order of Magistrate 1st Class, Bolangir, D/-26-4-1967.

-(A) Criminal P. C. (1898), S. 251-A (2) — Discharge — Accused discharged on ground of non-supply of papers under Section 173 to him — Order must be construed as order of discharge passed in warrant case — Order cannot operate as one of acquittal. (Para 3)

(B) Criminal P. C. (1898), S. 369 — Order of discharge, whether judgment — Accused discharged because of non-supply of documents to him referred to in Section 173—Such order is not a judgment—Magistrate is not debarred from exercising any of powers. AIR 1950 Bom 10, Rel. on; AIR 1953 Orissa 281, Distinguished; AIR 1965 Assam 9, Dissented from. (Para 6)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Assam 9 (V 52) = 7
1965 (1) Cri LJ 144, State v. Ganga Ram Kalita
- (1963) AIR 1963 Madh Pra 125 (V 50) = 1963 (1) Cri LJ 442 (2), State of Madhya Pradesh v. Abdul Kadir Khan 4
- (1962) AIR 1962 Raj 1 (V 49) = 4
1962 (1) Cri LJ 80, State of Rajasthan v. Mahmood Ghazi Musalman
- (1956) AIR 1956 Cal 247 (V 43) = 4
1956 Cri LJ 732, R. N. Ghosh v. State
- (1954) AIR 1954 SC 194 (V 41) = 6
1954 Cri LJ 475, Surendra Singh v. State of Uttar Pradesh
- (1953) AIR 1953 Orissa 281 (V 40) = 6
ILR (1952) Cut 311, Krushna Mohan v. Sudhakar Das

- (1950) AIR 1950 Bom 10 (V 37) = 6
51 Cri LJ 213, In re Wasudeo Narayan Phadnis
- (1906) ILR 29 Mad 126 = 3 Cri LJ 274, Emperor v. Chinna Kaliappa Goundan 6
- (1902) ILR 29 Cal 726 = 6 Cal WN 633 (FB), Mir Ahwad Hussain v. Mohammad Aksari 6
- (1901) ILR 28 Cal 652 = 5 Cal WN 457 (FB), Dwarka Nath Mondul v. Beni Madhab 6
- N. V. Ramdas, for Petitioner; R. C. Das, for Opposite Party.

ORDER:— The opposite party Prakash Chandra Agarwalla holds a licence under the Orissa Foodgrains Dealers' Licensing Order, 1964 (hereinafter referred to as the Order) and was dealing in wheat and wheat-products. The Inspector, Vigilance, Titlagarh inspected his shop on 28-8-1965 and found some irregularities in maintenance of his account books as the books did not show the correct stock of wheat held by him by that day. The opposite party also did not submit fortnightly returns as required under Cl. (4) of the Licence. On the aforesaid allegations, the Inspector, Vigilance submitted a prosecution report against him under Section 7 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act) for contravening the conditions of the licence issued to him. In course of search of the shop of opposite party about 17 quintals and 68 kilograms of wheat were found and seized. The opposite party appeared in Court and filed an application that he is entitled to be supplied with necessary documents under S. 173, Criminal P. C.

This prayer was rejected by the learned Magistrate being of the view that there was no investigation of the case by the Vigilance Inspector and prosecution report was submitted as a Non-F.I.R. case. Another petition filed by the opposite party for release of the wheat to him was also dismissed. As against the two orders passed by the Magistrate, the Sessions Judge was moved in revision and he made a reference to this Court recommending that the two orders might be quashed. In criminal reference No. 6 of 1966, Das, J. ordered that the seized stock of wheat should be released and sold through the opposite party or some other control dealers and the sale proceeds be deposited in Court until disposal of the case against the opposite party.

The question as to whether papers should be supplied to the opposite party under Section 173, Criminal P. C. was not specifically dealt with in the judgment. The order, however, was the reference was accepted. On receipt of this order, the learned Magistrate directed the prosecution to supply necessary papers to the opposite party. The prosecution appears to have taken the stand that there was no

such direction in the order passed by the High Court and that an opportunity might be afforded for hearing of this question and 9-1-1967 was fixed for hearing the objections raised by the prosecution. On 9-1-1967, the learned Magistrate discharged the opposite party under Section 251-A. (2), Criminal P. C. on the ground that despite the orders of the High Court, papers under Section 173, Criminal P. C. had not been supplied to the accused.

On 16-1-1967, the Inspector, Vigilance filed the necessary papers under Sec. 173, Criminal P. C. and also submitted an application stating that he could not do so on the last date of hearing, namely 9-1-1967, as he was absent and prayed that the order dated 9-1-1967 might be recalled. The learned Magistrate allowed the application and recalled the order passed on 9-1-1967. On 4-3-1967, the opposite party filed an application under S. 540-A, Criminal P. C. stating that the order dated 16-1-1967 passed by the learned Magistrate recalling the order dated 9-1-1967 is without jurisdiction, that this being a summons case, the order of discharge recorded on 9-1-1967 amounts to an order of acquittal and that therefore, the learned Magistrate had no power either to recall it or to set it aside.

By order dated 26-4-1967, the learned Magistrate accepted the aforesaid contention of the opposite party and rejected the prayer of the prosecution to restore the case to file. It is against this order dated 26-4-1967 that the present revision application has been filed.

2. Mr. Ramdas appearing for the State puts forth the following contentions in support of the application:—

(1) The opposite party has contravened an order made with reference to clause (d) of sub-section (2) of Section 3 of the Act, the penalty prescribed for which under Section 7 (1) (a) (ii) of the Act is imprisonment for a term which may extend to five years and consequently this is a warrant case and the order dated 9-1-1967 passed by the Magistrate is therefore, an order of discharge and not of acquittal.

(2) As against an order of discharge, a superior Court may no doubt be moved to set it aside. But it is also open to the prosecution to submit a fresh complaint against the accused. In such circumstances, there can be no reason why the Magistrate himself cannot exercise his inherent jurisdiction to review his own order and rehear the case. In this view, the order passed by the Magistrate on 16-1-1967 is legal.

Mr. R. C. Ram, appearing for the opposite party submits—

(1) that the prosecution of the opposite party is for contravention of the order made with reference to clause (i) of sub-section (2) of Section 3 of the Act, the

penalty for which is imprisonment for a term which extends to one year and as such it is a summons case, and an order of discharge passed against an accused in such a case amounts to an order of acquittal which having become final cannot be set aside by the Magistrate by his subsequent order dated 16-1-1967, and

(2) that assuming that it is a warrant case and the order passed on 9-1-1967 is only an order of discharge, the only remedy available to the prosecution is to approach the superior Court for setting aside the order of discharge and the Magistrate has no inherent jurisdiction to set aside that order.

These contentions require careful consideration.

3. To appreciate the contentions of the parties, it is necessary to quote the relevant provisions of Sections 3 and 7 of the Act.

"Section 3— Power to control production, supply, distribution, etc., of essential commodities:

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-s. (1), an order made thereunder may provide—

x x x x
(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption, of any essential commodity;

x x x x
(h) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters;

(i) for requiring persons engaged in the production, supply or distribution of, or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order;

x x x x
"7. Penalties:— (1) If any person contravenes, whether knowingly, intentionally or otherwise, any order made under Section 3—

(a) he shall be punishable—

(i) in the case of an order made with reference to Cl. (h) or Cl. (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which may extend to five years and shall also be liable to fine;

Provided that in the case of a first offence, if the Court is of opinion that a sentence of fine only will meet the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment and in the case of a second or subsequent offence, the Court shall impose a sentence of imprisonment and such imprisonment shall not be less than one month; and

Neither CL (h) nor CL (i) of S. 3 of the Act contemplates prescription of any licence. Such prescription is contained only in CL (d). In exercise of the powers conferred by Section 3 of the Act and with prior concurrence of the Central Government, the State Government had made the Order. Paragraph 3 of the Order requires that no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority. Para. 4 prescribes that every application for a licence or renewal thereof shall be made to the Licensing Authority in Form A, and that every licence issued, reissued or renewed under this order shall be in Form B. The form of the licence is set out in Form B and Cls. 3 and 4 thereof may be quoted.

"FORM B
(See Clause 4 (2))

3. (i) The licensee shall, except when specially exempted by the State Government or by the licensing authority in this behalf, maintain a register of daily accounts for each of the foodgrains mentioned in paragraph 1, showing correctly:

- (a) the opening stock on each day;
- (b) the quantities received on each day, showing the place from where and the source from which received;
- (c) the quantities delivered or otherwise removed on each day showing the places of destination; and
- (d) the closing stock on each day.

(ii) The licensee shall complete his accounts for each day on the day to which they relate, unless prevented by reasonable cause the burden of proving which, shall be upon him.

(iii) A licensee who is a producer himself shall separately show the stocks of his own produce in the daily accounts, if such stocks are stored in his business premises.

4. The licensee shall, except when specially exempted by the State Government or by an officer authorised by the State Government in this behalf submit to the licensing authority receipts and deliveries of each of the foodgrains every

fortnight (1st to 15th and 16th to end of one month), so as to reach him within.... days after the close of the fortnight."

It is thus manifest that the licence, the conditions whereof have been alleged to have been violated by the opposite party, is one prescribed in the Order which has been made in pursuance of Section 3(2) (d) of the Act. I am unable to accept Mr. Ram's contention that the Order is one made in pursuance of the power vested in Government under Section 3(2) (h) or 3(2) (i) of the Act. If the licensing Order is one made with reference to clause (d) of sub-section (2) of Section 3 of the Act, a contravention thereof is punishable under Section 7(1) (a) (i) of the Act which prescribes a penalty of imprisonment which may extend to five years and also fine.

Since "warrant case" as defined in Section 4(1) (w), Cr. P. C. means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year, a case which falls under Section 7(1) (a) (ii) of the Act is a warrant case. In fact, the learned Magistrate dealt with the case as such. The order passed by the Magistrate on 9-1-1967 must therefore be construed as an order of discharge passed in a warrant case by reason of the fact that the prosecution was absent in Court on that day and he failed to file in Court the papers referred to in Section 173, Cr. P. C.

4. Even assuming that Mr. Ram is correct in his submission that this is a summons case, still the order passed by the Magistrate on 9-1-67 cannot be said to operate as an order of acquittal. The procedure for the trial of a summons case is prescribed in Chapter XX of the Code of Criminal Procedure. There are only two sections in the Chapter, namely, Sections 247 and 249 which deal with consequences that would ensue where the complainant fails to appear in Court. It is clear from a reading of the two sections that Section 247 applies to a case where summons has been issued on complainant and on the date for appearance of the accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear and it provides that in such an event the Court may acquit the accused.

Section 249, on the other hand, applies to a case instituted otherwise than upon a complaint in which case, a Magistrate, 1st class, may for reasons to be recorded by him, stop proceedings at any stage without pronouncing a judgment either of acquittal or conviction and thereupon may release the accused. It is now well settled that where a report is submitted by a Police Officer in the capacity of his being an officer of the Police, such report cannot be considered anything other than

a Police report though it may pertain to a non-cognizable offence. Such police reports cannot be regarded as complaints within the meaning of Section 4(1) (h), Cr. P. C. and to a case registered on such a police report, the provisions of Section 247 are not attracted and it is not competent to a Magistrate to dismiss the case and acquit the accused merely because the prosecuting officer makes default in his appearance. See *R. N. Ghosh v. The State*, AIR 1956 Cal 247; *State of Rajasthan v. Mahmood Ghazi Musalman*, AIR 1962 Raj 1 and *State of Madhya Pradesh v. Abdul Kadir Khan*, AIR 1963 Madh Pra 125.

This being the position in law, the order passed by the learned Magistrate on 9-1-1967 cannot be treated as one of acquittal passed under Section 247, Cr. P. C. but the order must be deemed to be one passed under Section 249, Cr. P. C. The Magistrate who makes an order staying proceedings under Section 249, Cr. P. C. undoubtedly possesses sufficient powers to remove the order of stay and proceed further. It can never be argued that an order stopping the proceedings under Section 249, Cr. P. C. can ever operate as an acquittal and in this view it cannot be said that the Magistrate purporting to act under Section 249 of the Code has no power to revive the proceedings.

5. If Mr. Ram's contention that is a summons case is accepted, it must follow that the order passed by the learned Magistrate on 9-1-67 would only amount to an order passed under Section 249 of the Code stopping further proceedings and the one passed by him on 16-1-1967 is an order reviving the proceedings which he was perfectly competent to do and consequently the impugned order passed by him on 26-4-1967 would not be legal and has to be set aside.

6. In view however of my finding that the present case is a warrant case, the order passed by the learned Magistrate on 9-1-67 is one of discharge, the question arises whether the subsequent order passed by him on 16-1-1967 recalling the order of discharge is valid. It is argued on behalf of the opposite party that when the Magistrate passed the order of discharge he became *functus officio* and that therefore he had no power to rehear the case. A reference in this connection was made to Section 369, Cr. P. C. which provides that no Court, when it has signed its judgment, shall alter or review the same, except a clerical error, and it is contended that the order of discharge is a judgment and therefore the Magistrate could not revive the proceedings of his own accord because it would tantamount to reviving his own order which is prohibited under Section 369, Cr. P. C.

I am unable to accept this contention. An examination of the various provisions of the Code will show that every order passed by a Magistrate under the Code is not a judgment within the meaning of Section 369, Cr. P. C. In order to constitute a 'judgment', there must be an investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the entire evidence, as in the case of the order of discharge passed in this case, it will not obviously amount to a judgment. In *Dwarakanath Mondul v. Beni Madhab*, (1901) ILR 28 Cal 652 (FB), a Presidency Magistrate in Calcutta dismissed the complaint as the complainant was absent. Subsequently on the application of the complainant, he revived the case and issued a summons. The accused applied to the High Court to have the order of revival set aside.

The case first came up for hearing before a Division Bench. In view of the conflict of authority on the question of competence of a Magistrate, to revive a warrant case in which he had made an order of discharge, the matter was referred to a Full Bench of seven Judges. The question referred to the Full Bench was:

"Whether a Presidency Magistrate is competent to revive a warrant case, triable under Chapter XXI of the Code of Criminal Procedure, in which he had discharged the accused person."

Six out of the seven Judges who constituted the Bench answered the question in the affirmative, Ghose, J., who delivered a dissenting judgment, was not prepared to go so far as the other judges and held that every order of discharge could be reviewed by the Magistrate who had passed it. In his opinion, a Magistrate is competent to review an order of discharge, if it is passed without investigation into the merits of the complaint. This Full Bench decision was followed by another Full Bench of the Calcutta High Court in *Mir Ahwad Hossein v. Mohammad Askari*, ILR 29 Cal 726 (FB).

That was a case in respect of a complaint filed before a Magistrate in the *mofussil*, and the question referred to the Full Bench was:

"Whether a Magistrate in a warrant case having passed an order of discharge is competent to take fresh proceedings and issue process against the accused in respect of the same offence, unless an order for further enquiry shall have been passed under Section 437, Criminal Procedure Code, having the effect of setting aside such order of discharge."

Four out of the five Judges who constituted the Full Bench answered this question in the affirmative. Ghose, J., who dissented from the majority of the Judges, answered the general question

referred to the Full Bench in the negative. But in doing so, he referred to the observations made by him in (1901) ILR 28 Cal 652 (FB) and stated:

"I feel, however, bound to say, at the same time, that the order of discharge made by the Magistrate in the present case does not amount to a judgment within the meaning of Section 369 or Section 367, Criminal Procedure Code. There was no judicial investigation by the Magistrate of the merits of the complaint, and therefore, as explained in my judgment in the case of (1901) ILR 28 Cal 652 (FB), the order of discharge would be no bar to the revival of the same complaint."

These decisions of the Calcutta High Court were approved and followed by a Full Bench of the Madras High Court in *Emperor v. Chinna Kaliappa Goundan*, (1903) ILR 29 Mad 126 in which it was held that the dismissal of a complaint under Section 203, Criminal Procedure Code does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such an order of discharge has not been set aside by a competent authority. It may be stated here that the majority of Judges who decided (1901) ILR 28 Cal 652 (FB) were of opinion that the judgment referred to in Sections 367 and 369, Cr. P. C. is only a judgment of conviction or acquittal and this is apparent from what Princep, J. observed at page 660:—

"But it has been argued that an order dismissing a complaint or discharging an accused person in a judgment within the terms of Chapter XXVI, Criminal Procedure Code, and that by reason of Section 364 the Court, which passed the judgment, is unable to alter or review it. Now, here I would state that in my opinion such an order is not a judgment within the terms of Chapter XXVI. Section 367 explains what constitutes a judgment and it clearly indicates to my mind that a judgment within that Chapter is only a judgment of acquittal or of conviction. In the case of an order of discharge, or in the case of an order dismissing a complaint, it is expressly required by the law that the Magistrate shall state his reasons, and I therefore take it that, if it had not been so required, it would have been unnecessary for a Magistrate to state any reasons for his order. Consequently in this point of view, the order would not constitute a judgment. And it seems to me, also, that the expression "judgment" itself indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal."

In *Surendra Singh v State of Uttar Pradesh*, AIR 1954 SC 194, their Lordships of the Supreme Court after referring to Section 369, Cr. P. C. observed:—

"In our opinion, a judgment within the meaning of this section is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "delivery" in open court. It is a judicial act which must be performed in a judicial way."

In order to constitute a judgment, therefore, the decision of the Criminal Court must be final. The order of discharge cannot be regarded as the final pronouncement of the Magistrate, because, as laid down by authorities, a fresh complaint may be made on the same facts, notwithstanding the order of discharge. A final judgment in a criminal proceeding must necessarily be a judgment of either acquittal or conviction, because till then there is no final order, and the defence of *autrefois acquit* has no application. Section 403 of the Code provides that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been under Section 236, or for which he might have been convicted under Section 237.

The Explanation to that section states that the dismissal of a complaint, the stopping of proceedings under Sec. 249, the discharge of accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section. Under this section, therefore, a judgment which bars a second trial must be the final order in a trial terminating either in the conviction or acquittal of the accused. It is therefore clear from what has been stated above that unless the order is final it is not a judgment in the true sense of the term, and it is plain that the order of discharge is not a final order, since accused may be prosecuted subsequently on the same facts and for the same offence, and therefore, clearly enough the order of discharge is not a judgment and does not come within the mischief of Section 369, Cr. P. C.

It is therefore possible to argue that as a Magistrate has jurisdiction to take cognizance of the same offence again, when a fresh complaint is brought on the same facts, he is not deprived of his jurisdiction when, instead of filing a new complaint, the complainant makes an application to him to revive the original complaint and that the Magistrate is competent to rehear the case by reviving the original complaint. Orders of discharge can however be divided into two categories, namely, cases in which the order of discharge is passed after appreciation

of the evidence with a view to determine the guilt or innocence of the accused and those in which the proceedings are terminated merely for some technical reason, such as the absence of the complainant. The present case is one which falls in the latter category.

This is not a case where the learned Magistrate has applied his mind to the allegations made against the accused and had found that there is no prima facie case against him. He discharged the accused merely because the prosecuting officer was not present in Court and did not supply to the accused the documents referred to in Section 173, Cr. P. C. An order of discharge passed in such circumstances is not a decision given on merits and cannot be called a judgment. Consequently, the Magistrate is not debarred from reviewing it, setting it aside and reviving the old complaint. This view receives support from a decision of the Bombay High Court in *In Re Wasudeo Narayan Phadnis*, AIR 1950 Bom 10. My attention was drawn to a Bench decision of our Court in *Krushna Mohan v. Sudhakar Das*, AIR 1953 Orissa 281.

That was a case under Section 145, Cr. P. C. and their Lordships held that a Magistrate cannot invoke his inherent jurisdiction to revive his orders under Section 145(6) Cr. P. C. because sub-section (6) of Section 145 in express terms confers finality on that order. Their Lordships, however, added that where, however, an order under Section 145(6), Cr. P. C. is itself a nullity due to the failure to serve the required preliminary notices under sub-section (1) of Section 145 on all the parties, the Magistrate may invoke his inherent powers and ignore the same. That case is, therefore clearly distinguishable.

7. It is finally argued that where an accused is discharged by a Magistrate, the Code provides a remedy and enables the prosecution to approach superior Court to set aside the order of discharge and that when there is such specific provision in the Code, it was not open to the Magistrate at a later stage to review his own order and revive the proceedings. In support of this contention, reliance is placed on a decision of the Assam High Court reported in *State v. Ganga Ram Kalita*, AIR 1965 Assam 9 where the learned Chief Justice held that where a discharge order has been passed, the Magistrate becomes functus officio so far as the case is concerned, and unless there is a fresh complaint or a fresh charge-sheet, no action in the matter can be taken by the Magistrate, and that in the absence of any complaint, any attempt to go back on the order of discharge passed by him and to revive the case would amount in law to a review of

the judgment of the Magistrate which is not permissible having regard to Section 369, Cr. P. C.

The learned Chief Justice, therefore, held that the order of the Magistrate suo motu reviving the case and proceeding with the trial of the same on its merits is clearly devoid of jurisdiction and illegal. With great respect, I am unable to share this view which appears to be opposed to the consensus decisions already referred to. I do not think, that in substance, with reference to the question of jurisdiction, any distinction can be drawn between entertaining a fresh complaint and the rehearing of the original complaint. The argument that the Magistrate having made the order of dismissal is functus officio applies equally to both cases and the formality of putting a fresh complaint cannot be said to create a jurisdiction which without such formality a Magistrate would not have passed.

The remedy provided in Sections 436 and 437, Cr. P. C. are only enabling provisions and do not take away the jurisdiction vested in a Magistrate to rehear the complaint. The fact that the complainant has this remedy available to him would not be a sufficient ground for holding that the Magistrate is not competent to revive the order of discharge passed by him, based on a technical reason such as absence of the complainant.

8. In the result, I would hold that the order passed by the learned Magistrate on 16-1-1967 reviving the case against the accused was perfectly a legal order and the subsequent order passed by him on 26-4-1967 is illegal. I would accordingly allow this application, set aside the order dated 26-4-1967 passed by the learned Magistrate and order that the case be sent down to the learned Magistrate for disposal according to law.

Revision allowed.

AIR 1970 ORISSA 176 (V 57 C 58)

G. K. MISRA, C. J. AND S. K. RAY, J.
Santosh Kumar Mohapatra and another, Petitioners v. State of Orissa and another, Opposite Party.

O. J. C. Nos. 1006 and 1007 of 1969, D/- 24-12-1969.

Public Safety — Preventive Detention Act (1950), S. 3 — Activities prejudicial to maintenance of public order — Connotation and test of.

An order under Section 3 can be passed to prevent a person acting in any manner prejudicial to maintenance of public order. Public order is the even tempo of the life of a community in various systems of life. When the activities of a

CN/FN/C402/70/HGP/C

via Daltonganj and Relha. The petitioner, respondent nos. 4 and 5 and some others filed applications for the grant of the said permit. On the 27th of August, 1966, the R. T. A., considered the applications and the applicants present before the R. T. A. were heard, and their claims were recorded. The claims of the petitioner and respondent no. 4 Messrs. Ganga Motor Service were recorded as follows:

"45. Sri Sarju Prasad Singh, Aurangabad, Gaya—Experience of 20 years. Offers to place latest model bus. Running inter-State service also. Has got night-service between Ranchi and Garhwa. This service should go to fleet owner."

"18. M/S. Ganga Motor Service, Cart Road, Ranchi—Experience of 35 years. Displaced operator. Lost 17000 miles both-ways. Compensated with 500 miles. Has produced no objection certificate from the Additional Superintendent, Commercial Taxes, Ranchi Circle. Has workshop and Garage. Offers to place 1966 model bus." The claim of respondent no. 5 was also recorded but the present application was not resisted by respondent no. 5 nor any argument was advanced on behalf of respondent no. 5, hence it is not necessary to quote the claim of respondent no. 5. After consideration of their claims respondent no. 1 granted permanent permit to respondent no. 4 by resolution dated 27th of August 1966 (Annexure B). The petitioner and four others appealed against the aforesaid resolution before the Appeal Board of the State Transport Authority, Bihar (respondent no. 2). The appeal was heard by the Board on the 23rd of January, 1967 and was rejected by order contained in Annexure C. Aggrieved by the said decision of the Appeal Board, the petitioner filed a representation under S. 64A (Bihar Amendment) of the Act before the then Minister of Transport which was rejected by order dated 15-6-67 (Annexure D).

3. Mr. Lal Narayan Sinha, learned counsel appearing on behalf of the petitioner, submitted that the petitioner maintained night service between Ranchi and Garhwa, which is substantial portion of the route advertised, and was in a position to give better facilities to the public, but in spite of that respondent no. 1 (R. T. A.) granted permit to respondent no. 4, on extraneous consideration that the proprietor of M/S. Ganga Motor Service (respondent no. 4) was a displaced operator. On appeal also, the Appeal Board without applying its mind to the claims of the petitioner vis-a-vis respondent no. 4, rejected the appeal, without giving reasons as to why his application was being rejected. He has drawn our attention to the last paragraph of the order of the Appeal Board, the relevant portion of which reads:

"The Appeal Board has to see, whether the R. T. A. had exercised its discretion improperly or illegally. . . I do not think there is scope for interference with the R. T. A.'s decision. . ."

Learned counsel submitted that by these two sentences it can hardly be inferred that the Appeal Board applied its mind to the claim of the petitioner. The Appeal Board did not at all discuss petitioner's claims; nor gave any reason as to why it rejected the appeal. In another portion of the judgment it simply narrated the grounds of appeal of the petitioner, without any discussion.

In my opinion, the contention of learned counsel is well founded. It is not at all speaking order; nor any reason has been given by the Appeal Board as to why the claims of the petitioner were rejected in comparison with the claims of respondent no. 4.

4. Mr. Basudeva Prasad, learned counsel appearing on behalf of the respondent no. 4, fairly conceded that the Appeal Board has not applied its mind, but he submitted that so far the order of the Minister contained in Annexure D is concerned, it is a reasoned order and should not be interfered with by this Court under its writ jurisdiction.

On the other hand, learned counsel appearing on behalf of the petitioner submitted that even the order of the Minister suffers from the same defect. He also has not given reasons for discarding the claims of the petitioner. He has drawn our attention to the impugned order of the Minister, and submitted that more or less the Minister also followed the same pattern in disposing of the representation of the petitioner. In paragraphs 1 to 4 he recited the contention of both the parties, and in paragraph 5 he simply mentioned that after hearing the parties and after perusing the records filed by them he did not find any substance in the representation of the petitioner (Sarju Prasad Singh), whereas respondent no. 4 (M/s. Ganga Motor Service) owned a garage as well as a workshop at Ranchi; it was running a service between Ranchi and Sabbalpur, and it had sufficient experience of that locality. Besides, its proprietor was also a displaced operator. Therefore, he ordered that it was better to grant permit to respondent no. 4.

Learned counsel submitted that even the petitioner had workshop and had to his credit an experience of 20 years. Besides, he had also night service between Ranchi and Garhwa which was a substantial portion of the route advertised. According to him the Minister ought to have given reasons as to why his claims were without substance. He ought to have compared the claims of the petitioner vis-a-

vis respondent no. 4, before coming to the conclusion; so that the petitioner could easily know what were the reasons for discarding his claims. He further urged that taking into consideration the fact that respondent no. 4 was a displaced operator was an extraneous consideration and should not have weighed with the Minister. He has drawn our attention to section 47 (1) (a) and (d) of the Act, which provides that a Regional Transport Authority shall, in considering an application for a stage carriage permit, have regard to the following matters, namely:

"(a) the interests of the public generally;

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(d) the benefit to any particular locality or localities likely to be afforded by the service;"

According to him, those were the main considerations for deciding the issue. He has also referred to section 43A of the Bihar Amendment which reads:

"The State Government may issue such orders and directions as it may consider necessary, in respect of any matter relating to road transport, to the State Transport Authority or Regional Transport Authority; and such Transport Authority shall give effect to all such orders and directions."

According to him, the provision contained in section 43A should not be interpreted as authorising the Government to issue orders and directions to the authorities exercising quasi-judicial powers. Therefore, he submitted that even if the State Government acting under S. 43A had issued any executive direction regarding consideration of displaced operator it should not have weighed with the decision of the R. T. A., Appeal Board, and the Minister, while disposing of the claims of the petitioner vis-a-vis respondent no. 4. In order to support his contention he relied on a decision of the Supreme Court in *B. Rajagopala Naidu v. State Transport Appellate Tribunal, Madras* AIR 1964 SC 1573 where their Lordships at page 1580 observed:

"(20) There is another consideration which is also important. If S. 43A authorises the State Government to issue directions or orders in that wide sense, S. 68 would become redundant and safeguards so elaborately provided by S. 133 while the State Government purports to exercise its authority under S. 68, would be meaningless. If orders and directions can be issued by the State Government which are not distinguishable from statutory rules, it is difficult to see why section 68 would have dealt with that topic separately and should have provided safeguards controlling the exercise of that power by S. 133.

(21) It is likewise significant that directions and orders issued under S. 43A are not required to be published nor are they required to be communicated to the parties whose claims are affected by them. Proceedings before the Tribunals which deal with the applications for permits are in the nature of quasi-judicial proceedings and it would indeed be very strange if the Tribunals are required to act upon executive orders or directions issued under S. 43A without conferring on the citizens a right to know what those orders are and to see that they are properly enforced. The very fact that these orders and directions have been consistently considered by judicial decisions as administrative or executive orders which do not confer any right on the citizens emphatically brings out the true position that these orders and directions are not statutory rules and cannot therefore seek to fetter the exercise of quasi-judicial powers conferred on the Tribunals which deals with applications for permits and other cognate matters."

He contended that the Minister ought to have given reasons for discarding the claims of the petitioner as he was exercising quasi-judicial power and he relied on a decision of the Supreme Court in *Bhagat Raja v. Union of India*, AIR 1967 SC 1606 where their Lordships at p. 1610 in paragraph 9 observed:

"(9) Let us now examine the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review. It was argued that the very exercise of judicial or quasi-judicial powers in the case of a tribunal entailed upon it an obligation to give reasons for arriving at a decision for or against a party. The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Art. 227 of the Constitution and of appellate powers of this Court under Art. 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word 'rejected', or, 'dismissed'. In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing, come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the others, as it must, and the Central Government adopts the reasoning of the State Government, this Court may proceed to examine whether the reasons given are sufficient for the

purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this Court, in appeal may have to examine the case de novo without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this Court, in appeal, may find it difficult to ascertain which are the grounds which weigh with the Central Government in upholding the order of the State Government. In such circumstances, what is known as a 'speaking order' is called for."

5. Learned counsel basing his contention on the above observations emphasized that it was incumbent upon the Minister to have indicated in his order as to what was the reason which impelled him to decide against the petitioner. Even assuming that the Minister was not in favour of encouraging monopoly as hinted by learned counsel for the petitioner, it was necessary for him to say so, so that this Court may examine under the supervisory power as to whether he had given valid reasons or not or whether he applied his mind in the interest of the public, as provided under section 47 of the Act.

6. On the other hand, Mr. Prasad, appearing on behalf of respondent no. 4, contended that the order of the Minister was valid and needed no interference by this Court under writ jurisdiction. The permit was granted to the respondent no. 4 not solely on the ground of being a displaced operator. Apart from experience, this was considered as an additional ground. He contended that the principles laid down in AIR 1964 SC 1573 (supra), which has been relied by the petitioner, are not applicable to the instant case. He has drawn our attention to paragraph 24 of the judgment. In that case, according to him, the R. T. A. was solely guided by the direction given by the State Government under section 43A of the Act, but in the instant case no such direction was given to the R. T. A. Neither the R. T. A. nor the Appeal Board nor the Minister has considered the same as per direction by the State. He further submitted that none of them can be said to have been influenced by such a direction. In the present case the fact that the proprietor of M/s. Ganga Motor Service was a displaced operator was taken as an additional ground for granting the permit, and it

was not taken as the sole ground therefor. He referred to an unreported judgment of this Court in M. J. C. No. 276 of 1962, D/- 10-12-1965 (Pat) where their Lordships were considering a similar point as to whether the Minister was influenced by the direction given by the State Government under section 43A of the Act. There also AIR 1964 SC 1573 (supra) was relied and referred to by the petitioner of that case. Their Lordships observed that the argument of the petitioner could not be sustained. Their Lordships held that if the sole ground for preferring a person was that he was displaced operator, there might have been some force in the contention, but if the Minister thought that a person who was experienced and who was also a displaced operator should be given preference, he committed no error of law apparent on the face of the record. Their Lordships also made it clear in the said judgment that by giving preference to displaced operators the tendency for monopolistic control may be very much checked as pointed out by their Lordships of the Supreme Court in Sri Rama Vilas Service (P) Ltd. v. C. Chandrasekharan. AIR 1965 SC 107.

7. In my judgment, this contention of learned counsel for the respondents is well grounded. In the instant case also, the R. T. A. or the Minister has not granted the permit on the sole consideration that the proprietor of respondent no. 4 was a displaced operator. Therefore, clearly the principles laid down in AIR 1964 SC 1573 (supra) are not applicable to the present case.

In my opinion, the crucial question to be decided in the instant case is whether the Minister while passing the order has given reasons for rejecting the representation of the petitioner. Mr. Prasad, appearing for the respondent, submitted that the order of the Minister is speaking order. He has drawn our attention to paragraph 3 of the order wherein the Minister referred in detail to the claims of petitioner regarding his experience in the line because he was plying several buses on the route Ranchi-Daltonganj and he owned garage also. According to him, this shows that he definitely had in his mind the claims of the petitioner and in paragraph 5 he clearly mentioned that after hearing the parties and after perusing the records, he found that the representation filed by the petitioner had no substance. Thereafter he observed that M/s. Ganga Motor Service had garage and workshop at Ranchi and was running service from Ranchi to Sabbalpur and had also sufficient experience of service. He further added that the proprietor of M/s. Ganga Motor Service was also a dis-

placed operator. Therefore, he ordered that it was valid and proper to grant permit to M/s. Ganga Motor Service. Learned counsel urged that nothing else was needed. He considered the claims of both the parties and then came to a definite conclusion. In order to support his contention he relied on a decision in *P. I. Scaria v. P. K. Krishnan Nair* AIR 1957 Trav-Co. 254 where their Lordships observed that where reasons were given by the Road Traffic Board in the order refusing an application for permit, the fact that the order could with advantage have been written in a more detailed and elaborate fashion, was no reason to hold that it did not comply with the provisions of sub-section (7) of section 57 of the Act. Learned counsel further urged that the Minister by giving permit to respondent no. 4 was also controlling monopolistic tendency as the petitioner was already running the bus on the major portion of the route and relied on the decision of the Supreme Court in AIR 1965 SC 107, referred to above.

8. I am not impressed with this contention of learned counsel for the respondent. If the Minister did not grant permit to the petitioner in order to avoid monopoly, he ought to have said so clearly in the order. The Minister in his order has not given reasons as to why he did not find any substance in the representation filed by the petitioner. A litigant is expected to know the reasons for dismissal of his application so that he may, if advised, take necessary step against the said order. It is well established that the order of the Minister is subject to the supervisory powers of the High Court under Article 227 of the Constitution. If reasons are not given in the order this Court also is placed under a great disadvantage. In such circumstances what is known as "speaking order" is called for. What will be a "speaking order", it is apparent, depends upon the facts and circumstances of each case. In my view, in the instant case the Minister has not given reasons for rejecting the representation of the petitioner. It is true that he enumerated the contentions and the claims of both the parties; it is also true that he stated in his order that after hearing the parties, and perusing the records, he did not find any substance in the representation of the petitioner, but in my judgment, that is not enough. He ought to have compared the claims of both the parties, and then ought to have stated as to why he thought the claims of M/s. Ganga Motor Service superior to those of the petitioner. Even while enumerating the claims of the petitioner, it seems that he omitted to consider the petitioner's claim regarding the night service. According to me, the

decision in AIR 1957 Trav-Co. 254 (supra), which has been relied by learned counsel for the respondent, is not applicable in the instant case. In that case, as it appears from paragraph 4 at page 255, reasons were given both in Ext. A, the order of the Road Traffic Board, and in Ext. B, whereas the order of C. R. T. B. was merely confirming the order of the Road Traffic Board. In those circumstances, it was considered that it was not necessary to give reasons in the terms of section 57, clause (7) of the Act. In the instant case, it is admitted case of the parties that the order of the Appeal Board is not at all "speaking order". In that view of the matter, when the representation was made by the petitioner against that order, it was incumbent upon the Minister, if he wanted to reject the representation, to give sufficient reasons to enable this Court to judge whether the reasons for rejection were valid. The words "as it thinks fit" appearing in section 64A of the Act (Bihar Amendment) cannot be equated with the words "to its own satisfaction". A Minister may be empowered to confirm or refuse a permit. In making his decision he is entitled to exercise a very wide discretion, but he is under a legal duty to give reasons; the repository of a discretion is under a legal duty to observe certain requirements that condition the manner in which its discretion may be exercised. In *Padfield v. Minister of Agriculture, Fisheries and Food*, (1968) 1 All LR 694 it was observed that where a statute conferring a discretion on a Minister to exercise or not to exercise a power did not expressly limit or define the extent of his discretion and did not require him to give reasons for declining to exercise the power, his discretion might nevertheless be limited to the extent that it must not be so used, whether by reason of misconstruction of the statute or other reason, as to frustrate the objects of the statute which conferred it. It can hardly be disputed that while granting a permit under the Act, the interest of the public generally, and the benefit to any particular locality or localities likely to be affected by the service are of paramount importance. A Minister is a public Officer appointed to discharge a public discretion affecting members of the public; if he does not give any reason for his decision it may be, if the circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and directing him by a prerogative writ to reconsider it. The authority must genuinely address itself to the matter before it. It must have regard to all relevant considerations and must not seek to promote purposes alien to the letter or to the spirit of the legis-

lation that gives it power to act and must not act arbitrarily. It is desirable that the authority should openly state any general principle by which it intends to be guided in exercise of its discretion. I am convinced that in the instant case, the Minister has not discussed the claims of the respective parties and has not given reasons for rejecting the representation of the petitioner. It is not a "speaking order". Therefore, it cannot be sustained. It has got to be quashed and the case remitted back for a fresh hearing and decision of the petitioner's representation in the light of observations made above and in accordance with law. The State of Bihar is at present under President's Rule, hence instead of the case being transmitted to the Minister of Transport, let it be transmitted to the Adviser to the Governor of Bihar (in charge of Transport Portfolio) for disposal.

9. In the result, the application is allowed, but in the circumstances there will be no order as to costs. It will however, be open to the respondent no. 4 to move the Adviser concerned to allow him to ply the service pending the final disposal of the representation of the petitioner.

10. A. B. N. SINHA, J.: I agree.

Petition allowed.

AIR 1970 PATNA 293 (V 57 C 47)

SHAMBHU PRASAD SINGH, J.

Purshottam Ram Agarwal and others,
Petitioners v. State, Opposite Party.

Criminal Revn. Nos. 39 and 43 of 1969,
D/- 26-8-1969, against order of Sub.
Divnl. Magistrate, Muzaffarpur, D/- 9-10-1968.

(A) Criminal P. C. (1898), S. 117 (1) and (3) and S. 107 — No action under sub-s. (3) before enquiry under sub-s. (1) — Effect.

No action under section 117 (3) can be taken before an enquiry under sub-s. (1) of that Section has started and such an enquiry cannot start unless the persons against whom a proceeding under S. 107 has been drawn up have appeared before the Court. (Para 3)

(B) Criminal P. C. (1898), S. 117 (3) — Initial order itself illegal — Order under sub-s. (3) must also be set aside.

(Para 3)

(C) Criminal P. C. (1898), S. 107 — Petitioners opening daily market near Government market — Interference by Thikedars of Govt. with free choice of shop-keepers — Magistrate should have drawn proceeding under S. 107 against Thikedars rather than against petitioners.

(Para 4)

J. N. Verma, Dindayal Sinha and Suresh Chandra Pd. Sinha, for Petitioners; Chhatrapati Kumar Sinha, for State.

ORDER: These two applications in revision arise out of the same proceeding under Section 107 of the Code of Criminal Procedure (hereafter to be referred as 'the Code' hence they have been heard together and are being disposed of by a common judgment. Criminal Revision No. 43 of 1969 is by twelve members of the second party to the proceeding and is directed against an order dated the 8th October 1968. Criminal Revision No. 39 of 1969 is by four other members of the second party to the same proceeding and is directed against an order dated the 9th October 1968.

2. It appears that the Circle Officer, Sahebganj Achal in the district of Muzaffarpur sent to the Sub-Divisional Magistrate, Sadar Muzaffarpur a letter dated the 30th September, 1968, stating that petitioners 1 and 2 of Criminal Revision No. 34 of 1969, and their father, Shankar Prasad Agarwal were going to open a daily market with effect from the 1st of October 1968, at a distance of hardly 1/4th of a furlong from the Hawalganj Nawanagar Kothia Bazar of the Government and that if they were allowed to open a daily market, the Government market would be totally finished resulting in a loss of five to six thousand rupees per annum to the Government. The Circle Officer, accordingly, requested the Sub-divisional Magistrate to take immediate necessary action so that the Government market may not be hampered, and to issue direction to the Officer-in-charge Sahebganj Police Station to stop the opening of the said market from the 1st of October, 1968 till the final decision (of the Sub-divisional Magistrate). The Sub-divisional Magistrate was also requested to take immediate action under section 107/144 of the Code.

On receipt of this letter, which has been made Annexure '1' to the petition the Sub-divisional Magistrate registered case no. 866 of 1968, under section 144 of the Code and directed the police to take action under section 151/107 of the Code. That order is not before me but the substance of it has been mentioned in the impugned order dated the 8th October, 1968. It is not quite clear that when a proceeding was drawn up under S. 144 and not under section 107 of the Code, how could the Sub-divisional Magistrate ask the police to take action under section 107 of the Code. On the 5th of October, 1968, the Circle Officer, Sahebganj, sent a letter (Annexure '2' to the petition) to the Officer-in-charge Sahebganj Police Station stating therein that in spite of imposition of an order under section 144 of the Code, the market has

been started on the 1st of October 1968, and that the party concerned were ready to take law into their own hands forcibly against the Government employees. He requested the Officer-in-charge to make over to him a copy of the report which was going to be submitted to the Subdivisional Magistrate. It was also pointed out in the letter that the incident created by the party by holding a parallel market against the open defiance of the Government orders proved that there was no law and order in the Sahebganj Market. He also forwarded a copy of this letter to the Subdivisional Magistrate.

On the 8th October, 1968, the Subdivisional Magistrate drew up a proceeding under section 107 of the Code against the petitioners of Criminal revision no. 43 of 1969. Perhaps it was drawn on the basis of Annexure '2' to the petition, but there is nothing in the order itself to indicate what materials other than the letter of the Circle Inspector dated the 30th September, 1968, he had before him to justify starting of a proceeding under S. 107 of the Code. By the same order he also issued notices to the petitioners of Criminal Revision No. 43 of 1969 calling upon them to show cause as to why they should not be ordered to execute ad interim bonds of Rs. 2000/- with two sureties of like amount each under section 117 (3) of the Code. On the 9th of October, 1968, he received a report of the Officer-in-charge Sahebganj Police Station and drew up a proceeding under section 107 of the Code against the petitioners of Criminal Revision no. 39 of 1969. He also sent notices to them under section 116 (3) of the Code. In the police report it is stated that the Thikedars of the Government market were requesting the Shopkeepers not to go to the newly started market of petitioners 1 and 2 of Criminal Revision No. 43 of 1969, on which some of the petitioners retorted them and became prepared even to assault them. After this the situation became tense and there was likelihood of a breach of the peace.

3. Mr. J. N. Verma for the petitioners has contended that unless the petitioners had appeared in an enquiry as contemplated under section 117 (1) of the Code, the Subdivisional Magistrate could not have issued notices under section 117 (3) of the Code. It is now well established that no action under section 117 (3) of the Code can be taken before an enquiry under sub-section (1) of that Section has started and that such an enquiry cannot start unless the persons against whom a proceeding under section 107 of the Code has been drawn up have appeared before the Court. Mr. C. K. Sinha appearing on behalf of the State has frankly conceded that this part of the order of the Magis-

trate was wrong, but has contended that the Magistrate has also passed another order for execution of bonds under section 117 (3) of the Code on the 2nd of November, 1968, after the petitioners appeared before him and they have executed the bonds. In the circumstances he has submitted that even if the issue of show cause notices for action under section 117 (3) of the Code by orders dated the 8th and 9th of October, 1968, be wrong, they should not be set aside by this court in exercise of revisional powers. It is not, however, necessary to decide this question as Mr. Verma has also attacked the drawing up of the proceeding itself and is going to succeed on that point. If the initial order itself is illegal, the order under section 117 (3) of the Code must also be set aside.

4. The contention of Mr. Verma is that the materials before the Subdivisional Magistrate did not justify drawing up a proceeding under section 107 of the Code. He has submitted that every citizen of the country has got fundamental right as guaranteed by Article 19 of the Constitution of India to carry on any trade and business and neither the Circle Officer was right in asking the Subdivisional Magistrate not to allow some of the petitioners to open a market of their own near the Government market as that would diminish the income of the Government, nor the Subdivisional Magistrate was right in starting a proceeding under S. 144 or under section 107 of the Code against the petitioners on that basis. There is nothing in the letter of the Circle Officer dated the 30th September, 1968, that the petitioners were likely to break the peace. Even in his letter dated the 5th October, 1968, to the Officer-in-charge Sahebganj Police Station he did not allege that the petitioners had really committed any act likely to cause a breach of the peace. He merely stated that it was reported to him that they were ready to take law into their own hands forcibly against the Government employees.

In the police report also there is nothing to indicate that the petitioners took the initiative and on that account there was an apprehension of a breach of the peace. Only when the Thikedars of the Government market started interfering with the free choice of the shopkeepers either to go to the newly established market of some of the petitioners or to the Government market, the trouble started. Mr. Sinha has urged that the Thikedars had every right to request the shopkeepers peacefully not to go to the newly started market, but to the Government market. That may be so, but the police report read as a whole indicates

that the Thikedars of the Government market went near the newly started market and started canvassing to the shopkeepers not to go to the new market, but to the Government market. In the circumstances, if some of the petitioners abused them, it cannot be said that they were responsible for a breach of the peace. Really it was the Thikedars of the Government market whose action was responsible.

In the circumstances, the Subdivisional Magistrate rather should have drawn up a proceeding under section 107 of the Code against the Thikedars of the Government market and those Government employees who were supporting them and thus interfering with the exercise of the fundamental right of the petitioners of carrying on trade and business. The two impugned orders of the Sub-divisional Magistrate drawing up of the proceedings under section 107 of the Code against the petitioners as well as the consequential order for execution of interim bonds by the petitioners under section 117 (3) of the Code have to be quashed.

5. Before closing the judgment, I would like to observe that this case provides an instance justifying that sooner, the executive and judicial powers even in respect of preventive matters, such as proceedings under Ss. 144, 107 and 145 of the Code are completely separated, the better. Really the Subdivisional Magistrates are not to be blamed because in the changed circumstances they have to look after the rights of State in the Government property, and at the same time carry out judicial functions and there is bound to be conflict between the two. It is really the system which is to be blamed. However so long separation does not take place, they have to act in such a way that their judicial orders are not called improper.

6. In the result the applications are allowed and the orders dated the 8th and the 9th of October 1968, are quashed. If there be an apprehension of a breach of the peace in future, it will be open to the Subdivisional Magistrate to start a fresh proceeding under section 107 of the Code, but not in such a manner as to interfere with the fundamental rights of the petitioners. Before starting proceeding he should satisfy himself as to who is really at fault; whether the petitioners or the Government Thikedars and employees.

Applications allowed.

AIR 1970 PATNA 295 (V 57 C 48)

N. L. UNTWALIA AND
KANHAIAJJI, JJ.

Management of Rodio Foundation Engineering Ltd. and another, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurisdn. Cases Nos. 3, 123 and 124 of 1969, D/- 15-4-1969.

(A) Industrial Disputes Act (1947), Section 10 — Tribunal's power to make interim orders — Question of bonus under reference — Interim order directing deposit of two months' wages for payment to workmen if they succeeded — Case for such an interim order not made out — Order, held, beyond the competence of the Tribunal. (Para 6)

(B) Industrial Disputes Act (1947), Section 2(j) and (s) — Government undertaking construction of a dam — Person or firm associated with the work as independent contractor or otherwise would also be 'industry' — Labourers employed by such person or firm would be 'workmen'.

Although the construction of the Tenughat Dam as a unit may be an industry carried on by the Bihar Government, its different operations carried on by independent contractors (firm of manufacturers or businessmen) would also be different industries within the meaning of the Act and the labourers employed by such different industries will be workmen within the meaning of the Act.

(Para 9)

(C) Industrial Disputes Act (1947), Section 2(s) — Workers and Independent labour contractors — Payment on daily rates or employment on temporary basis themselves not decisive.

The mere fact that workers are paid on daily rates or have been employed on temporary basis will not make them independent labour contractors. AIR 1958 SC 388, Foll.

(Para 10)

(D) Industrial Disputes Act (1947), Section 2(s) — Master and servant relationship — Existence of, a pure question of fact — Right to control and supervise the work is an important test.

The question if the relationship between parties is one as between master and servant is a pure question of fact, the important test for determination being the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant has to do but also the manner in which he shall do his work. AIR 1957 SC 264 & AIR 1958 SC 388, Foll.

(Para 10)

(E) Industrial Disputes Act (1947), Sections 2(k) and 10 — Industrial Dispute — Power of Government to make reference — Existence of dispute decided with re-

ference to facts of each case — A demand and a refusal of it are not always necessary.

Dispute about the reason for stoppage of work is an industrial dispute within the meaning of Section 2(k). In such cases no specific demand by the workmen was necessary to bring into existence an industrial dispute. Exercise of the powers under Section 10 of the Act would not depend upon the relief asked for by the workmen. The sine qua non of the exercise of the power is that in the opinion of the appropriate Government some industrial dispute must exist or there must be an apprehension in regard to that. A dispute need not necessarily be preceded by a demand and a refusal in express terms by the parties concerned. AIR 1952 Pat 210 & AIR 1968 SC 529, Dist.

(Paras 15 and 16)

(F) Industrial Disputes Act (1947), Sections 10, 2(l) and 25-FFF—Reference concerning an alleged lock-out — Employer denying lock-out — Case of closure of business not pleaded — Question if there was lock-out, held, could not be decided as a preliminary issue. AIR 1969 SC 90, Dist.; AIR 1963 SC 569, Ref.

(Paras 18 and 19)

(G) Industrial Disputes Act (1947), Section 25-FFF — Closure — Expression means factual closure of business and not its pretension merely closing of place of business. AIR 1969 SC 90, Foll.

(Para 19)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 90 (V 56) =

(1968) 34 FJR 393, Kalinga Tubes Ltd. v. Their Workmen 19

(1968) AIR 1968 SC 529 (V 55) =

(1968) 1 SCR 515, Sindhu Re Settlement Corporation v. Industrial Tribunal Gujrat 15, 16

(1963) AIR 1963 SC 569 (V 50) =

(1963) 3 SCR 548, Management of Express Newspapers (Pvt.) Ltd. v. Workers 19

(1958) AIR 1958 SC 388 (V 45) =

1958 Cri LJ 803 (2), Chintaman Rao v. State of Madhya Pradesh 10

(1957) AIR 1957 SC 264 (V 44) =

1957 SCR 152, D. C. Works Ltd. v. State of Saurashtra 10

(1952) AIR 1952 Pat 210 (V 39),

Members of Sasamusa Workers Union v. State of Bihar 15, 16

B. C. Ghose, Purnendu Narayan, S. K. Chatopadhyaya, for Petitioners; Tarakant Jha, Karuna Nidhan Keshava, for Respondents.

UNTWALIA, J.:— These three writ applications, filed by the Management of the Rodio Foundation Engineering Limited and Hazarat and Company, Tenughat Dam Site, arising out of two reference cases under the Industrial Disputes Act, 1947 (Central Act 14 of 1947—hereinafter called the Act), have been heard together and

this judgment will dispose them of.

2. The petitioner's case in all these three cases is that the petitioner company was formed in India out of collaboration of the Rodio Foundation Engineering Limited of Switzerland and Hazarat and Company of Bombay. The company formed on collaboration is a firm of contractors for special foundation under various Government schemes. It obtained two contracts from the Government of Bihar in connection with the Bihar Government's Tenu Ghat Dam Project one in 1966 for concrete diaphragm, and the other in 1967 for drilling and grouting of foundation. The company started work at the site in 1967 and its establishment at the project site was established some time in or about April, 1967.

In the 7th and 8th paragraphs of the writ applications in C. W. J. C. 123 and 124 of 1969, both filed on the 31st January, 1969, the statement is that the work under the company's contract relating to concrete diaphragm was almost complete and the services of the bulk of the daily rated temporary workmen, who were employed in connection with such operations, had been terminated when such workmen became surplus to the company's requirements. But, in so far as the company's contract relating to drilling and grouting of foundation of the Tenughat Dam Project was concerned, its operations were stated to be nearing completion on the date of the filing of the two applications. The company entered into an agreement with the Bihar Rajya Nadighati Evam Sinchai Karamchhari Sangh (hereinafter called the Sangh) on the 30th August, 1967. A copy of this agreement is Annexure 'A' to the counter affidavit filed on behalf of the Sangh.

3. The petitioner's case further is that while the agreement aforesaid was in force, in accordance with the provisions of Section 18 of the Act, the labourers again raised a dispute and presented a charter of demands to the petitioner company, wherein various claims were made, including a claim for bonus for the years 1966-67 and 1967-68. The Government of Bihar made a reference of the industrial dispute between the petitioner company and the Sangh, which is Respondent No. 3 in all the three applications, under Section 10(1) (d) of the Act, in respect of the demands made by the labourers in their charter of demands submitted to the management, including the one regarding bonus. This reference is dated the 9th of July, 1968, on the basis of which Reference Case No. 44 of 1968 was started before the Industrial Tribunal, Bihar, at Patna. A copy of this reference is Annexure '2' to the writ application in C. W. J. C. 123 of 1969. The petitioner filed its written statement in this reference case on the 15th October, 1968, a copy of which

is Annexure '4.'

On the 15th October, 1968, the Sangh filed an application before the Industrial Tribunal for interim relief of six month's wages to the workmen concerned and for directing the management not to shift any machinery and plant from the work site during the pendency of the reference. The company filed its objection on the 26th October, 1968. Copies of the application of the Sangh and the objection of the company are, respectively, Annexures '4' and '4/1' in C. W. J. C. No. 3 of 1969. On the 7th November, 1968 the Tribunal made an order, a copy of which is Annexure '5' in C. W. J. C. 3 of 1969, directing the management to deposit two months wages of each workman with the Tribunal to be paid to the workmen, if they succeeded in respect of their claim for bonus. The company, in C. W. J. C. 3 of 1969, challenges the legality and propriety of this order.

4. Now I may state certain facts with reference to what happened on or about the 15th of May, 1968, at the work site. According to the case of the petitioner company in C. W. J. C. 124 of 1969, the workers created various troubles in the work of the company, so much so that, after working until the noon of the 15th May, 1968, they suddenly stopped work without giving any notice and resorted to violence, which necessitated calling for police action. According to the case of the company, it had earlier served notices of termination of services of various workmen because of the completion of a large portion of the work. The extended notice of termination of service was to take effect from the 19th of May, 1968, but, before that the workers themselves stopped work on the 15th May, 1968, as stated in paragraph 15 of the writ application in C. W. J. C. 124 of 1969. According to the case of the Sangh in the counter affidavit filed in that case, while the charter of demands of the workmen was still under conciliation, the company, all of a sudden, closed its work on site and refused to employ the workmen, even without competing the work on the 15th of May, 1968, to put pressure on the workmen to give up their demands. The case of the workmen is that this was a 'lock out' within the meaning of the Act. They had made a grievance of it to the Government in their letter dated the 26th of June, 1968, a copy of which is Annexure '4/A' in C. W. J. C. 124 of 1969.

Upon this the State Government made another reference under Section 10 of the Act on the 24th of September, 1968, a copy of which is Annexure '5', and this gave rise to reference case No. 67 of 1968. A copy of the letter of the Sangh dated the 26th June, 1968, was forwarded to the management by the Government under its covering letter dated the 31st October,

1968, a copy of which is Annexure '4'. In reference case No. 67 of 1968 the Sangh filed its written statement on behalf of the workmen on the 22nd November, 1968, and the company filed its written statement on the 25th November, 1968. In both the reference cases, the company filed applications on the 15th January, 1969, asking the Tribunal to decide the preliminary questions raised in its written statement. In both the cases again on the 16th January, 1969, the company filed additional written statements taking, for the first time, in both the cases two more points:—

- (i) That the company's work is not an industry within the meaning of the Act, and,
- (ii) That the persons who were doing the work at the site were not employed by the company within the meaning of the term 'workman' as defined in the Act.

The Tribunal, by its separate orders passed on the 23rd January, 1969, in both the cases, has decided certain preliminary points against the petitioner company and has postponed the decision of certain points till the final adjudication. The company has filed C. W. J. C. 123 of 1969 against the order of the Tribunal dated the 23rd January, 1969, in Reference Case No. 44 of 1968, and C. W. J. C. 124 of 1969, against its order of the same date in Reference Case No. 67 of 1968.

5. I now proceed to decide the three cases one by one.

Civil Writ Jurisdiction Case No. 3 of 1969

6. Term No. 2 of the agreement entered into between the company and the sangh, a copy of which is Annexure 'A' clearly shows that the former had agreed to pay bonus at the rate of four per cent of the normal earnings of the workmen. According to the case of the petitioner company, it has paid bonus to many workmen, rather majority of them, at that rate, in accordance with the said agreement. Only a few had not turned up to receive the bonus at that rate, although the company has always been ready and willing and is still ready and willing to pay bonus at that rate. This fact is not denied by the Sangh, although it says that the agreement was not binding on the workmen concerned. Be that as it may for the purpose of giving interim relief to the workmen, it was necessary to see as to whether they were entitled to any interim relief as asked for by them. As I have stated above with reference to their application filed on the 15th October, 1968 they had demanded interim relief in a different form. The Tribunal did not consider it fit and proper to give them any interim relief by way of making any interim award. It merely directed the

management to deposit two months wages to be paid to the workmen if they succeeded in the case. Such a direction was in the nature of asking the management to give security in cash in order to enable the workmen to get the money if they ultimately succeeded on the question of their demand of bonus. Although the powers of the industrial tribunals are very wide at the time of making the award or interim awards, no case was brought to our notice, as obviously it could not be, that the Tribunal has got the power to make an interim order of the kind as it made in this case.

Firstly, on the facts stated by the management, no case for any interim relief for payment of bonus was made out. Even assuming that ultimately, when the reference is decided and the question of bonus is adjudicated, the workmen are found entitled to the amount of bonus as claimed by them, there was no justification for asking the management to deposit two month's wages during the pendency of the reference to enable the workmen to realise their claim of bonus as may be adjudicated by Tribunal finally. In my opinion, therefore, the impugned order of the Tribunal dated the 7th of November, 1968, a copy of which is Annexure '5' in this writ application, must be quashed by grant of a writ of certiorari, as being without jurisdiction and illegal on the face of it. I may state that the management asked the Tribunal to review or recall this order by filing an application, which was rejected by its order dated the 9th December, 1968, a copy of which is Annexure '8' in this writ case. I do not think it necessary to expressly quash this order, as it has lost its force when I have quashed the order dated the 7th November, 1968.

Civil Writ Jurisdiction Case No. 123 of 1969.

7. A copy of the impugned order dated the 23rd January, 1969, in this case is Annexure '3'. In the written statement (Annexure '4') filed in Reference Case No. 44 of 1968, on the 15th October, 1968, it was stated in the 5th paragraph:—

"For the successful execution of the contracts the Company set up a site office at Tenughat employed workmen on daily rates and temporary basis having regard to the nature of its operations."

In the sixth paragraph the statement was that the work of the company in so far as it related to concrete diaphragm was almost complete and the services of the bulk of the daily rated temporary workmen, who had been employed in connection with such operations, had been terminated as and when they became surplus to the company's requirements. So far as the other work of drilling and grouting were concerned, its operations had been completed in part and were likely to be

completed in full in a few months. In the application filed on the 15th of January, 1969, a copy of which is Annexure '1' the company wanted the Tribunal to decide the preliminary objections as raised in paragraphs 3 and 6 of the written statement filed earlier. But, in the application filed on the 16th January, 1969, a copy of which is Annexure '1/A', it took, as I have already said, two new stands:

- "(i) The Company being a mere contractor of the Government of Bihar and being engaged in works of construction of the projects of the Government of Bihar, is not an Industry, as defined in Section 2(i) of the Industrial Disputes Act," and
- "(ii) That the daily rated (workers) working in the Project under the management of the aforesaid Company are not 'employed' under the Company and as such are not 'workmen' as defined in the Industrial Disputes Act."

Other questions were also raised in this application dated the 16th January, 1969, by way of preliminary objections. The Tribunal has held by its impugned order that the petitioner's undertaking is covered by the definition of "industry" as given under the Act and that the workmen concerned are employed by the company and are 'workmen' within the meaning of the Act. It has, however, refused to decide as preliminary issues the questions of wage structure, bonus and the work being almost complete there could be no dispute for the future in the industry. The Tribunal being of the view that all these questions will be decided at the final adjudication.

8. In my opinion, the Tribunal has decided the two questions against the petitioners rightly and has also rightly refused to decide the three questions by way of preliminary objections or issues, as they were not so. Deciding those three questions would mean deciding the reference itself more or less and the reference could not be held to be invalid by deciding those questions on merits. If, on final adjudication, it is found that there is substance in the case of the company in regard to any of them, the workmen may not get any relief in the award in respect of them, but, if, on final adjudication, it is found that the workmen's case is sustainable and correct, they may get relief by the award of the Tribunal.

9. The word 'industry' is defined in Cl. (i) of Section 2 of the Act to mean—
"any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft, or industrial occupation or avocation of workmen."
On a plain reading of the definition, it is manifest that the petitioner's establish-

ment, work or undertaking is an 'industry' within the meaning of the Act. The whole of the argument in this regard advanced by Mr. B. C. Ghose, learned Counsel for the petitioner, is that the undertaking to build the Tenughat Dam is that of the Government of Bihar or the State of Bihar. The petitioner company has merely taken contract for doing some work in that project. There cannot be an 'industry' within an 'industry'. Hence the 'industry' being one of construction of Tenughat Dam, a firm of contractors doing any work therein cannot be an 'industry' within the meaning of the Act. The argument, in my opinion, is too obviously wrong to merit any detailed discussion. The Government of Bihar has undertaken the construction of Tenughat Dam. It may be an 'industry' carried on by the State Government. Any person or firm or a company associated with the work of Tenughat Dam Project as an independent contractor or doing any business, trade, or the like, in connection with it, will surely also be an independent 'industry' within the meaning of the Act.

I may illustrate my points by giving two examples. The Bihar Government has undertaken to construct the Tenughat Dam. A company, opening a factory for manufacture of cement to supply it to the Tenughat Dam under the contracts obtained from the Bihar Govt for its supply, undoubtedly will be doing the work of manufacture or business for the supply of cement to the Tenughat Dam, although the whole of the product under the terms of the contract may be meant for the Dam. A particular portion of the work of construction of the Dam itself, as in the instant case, is entrusted to a contractor which engages several workers for completing the work, who are workers engaged by the firm or the contractor, and not by the Government. In such a situation, although the construction of the Tenughat Dam as a unit may be an industry carried on by the State Government, its different operations, carried on by independent contractors, firm of manufacturers or businessmen will surely also be different industries within the meaning of the Act and the labourers employed by such different industries will be workmen within the meaning of the Act.

10. In my opinion, the second question raised by the company in its petition filed on the 16th January, 1969, is against its express stand taken in its first written statement, portions of which I have extracted above. Its clear case was that it had employed workmen on daily rates and on temporary basis. The mere fact that those workers have been paid on daily rates or have been employed on temporary basis will not make them independent labour contractors, as was so in the case of Chintaman Rao v. State of

Madhya Pradesh, AIR 1958 SC 388, which has rightly been distinguished by the Industrial Tribunal in its impugned order. Even agarias employed in the manufacture of salt, in operations which were of seasonal character, by parcelling out the areas into plots, were held to be workmen by the Industrial Tribunal in the case of D. C. Works Ltd. v. State of Saurashtra, AIR 1957 SC 264, which was decided by the Supreme Court. While upholding the view of the Tribunal, the Supreme Court further said that "the question whether the relationship between the parties is one as between employer and employee or between master and servant is a pure question of fact." The important test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work as stated by Bhagwati, J. in the decision aforesaid of the Supreme Court (in paragraph 14 of the judgment). On the facts stated by the petitioner company, I find it not only difficult, but almost impossible, to hold that the test as laid down by the Supreme Court was not satisfied and that there was no relationship of master and servant between the petitioner company and its workmen.

Subba Rao, J. (as he then was) in the case of Chintaman Rao, AIR 1958 SC 388 pointed out (at p. 391):—

"The concept of employment involves three ingredients: (1) employer, (2) employee, and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision." Applying these tests, it was held in that case in respect of a Sattedar manufacturing Biri that he was not working under the contract of employment, but he was an independent contractor. On the facts of the instant case, I fail to understand, how a view is possible in favour of the petitioner company that the labourers employed by it, even though they were paid on daily rate basis, were not employed by it under a contract of employment and that there was no relationship of master and servant between them. Although the question posed by the Tribunal that if they were not the employees of the petitioner company, whose employees they were, may not have been quite accurately posed on the basis of the various written statements or applications filed by the petitioner company, on the facts stated,

there is nothing to suggest that the labourers were employed by the petitioner company on any contract basis in the sense of employing them as independent contractors supplying labour only and not as persons employed by the company to work under its control and supervision. In my opinion, the Tribunal has taken a correct view in this regard and this is apart from the fact, as said by the Supreme Court, that it is a pure question of fact.

11. In the result, Civil writ jurisdiction Case No. 123 of 1969 fails and is dismissed.

**Civil Writ Jurisdiction Case
No. 124 of 1969.**

12. This case arises out of Reference Case No. 67 of 1968. The impugned order dated the 23rd January, 1969, is Annexure '7', which shows that the preliminary objections raised before the Tribunal were:

- (1) That the petitioner's work is not an industry.
- (2) That the labourers are not employed by the petitioner company, so as to make them 'workmen' within the meaning of the Act.
- (3) That there was no dispute raised by the Sangh with the management and hence the State Government had no jurisdiction to refer the alleged dispute of "lock-out" under Section 10 of the Act.
- (4) That, as a matter of fact, there was no lock-out and hence the reference was incompetent.

13. The first two points have been held by the Tribunal against the petitioner company and for the reasons already stated in Civil Writ Jurisdiction Case No. 123 of 1969, I uphold the decision of the Tribunal on those points.

14. In regard to the third point, the decision of the Tribunal is that it is not necessary in law that in every case there must be a demand to the management and refusal of it in order to raise an industrial dispute. What is necessary is that a dispute or difference must first arise in respect of the matters referred to in the Act between the employer and the employees and then the Government gets jurisdiction to make a reference. As respects the fourth objection, the view of the Tribunal is that it has to be determined after evidence of both the parties have been taken and then only this question can be decided and it cannot be decided as a preliminary issue.

15. Learned Counsel for the petitioner strenuously pressed the third point and submitted, on the authority of the decisions in the cases of the Members of Sasamusa Workers Union v. State of Bihar, AIR 1952 Pat 210 and Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal of Gujarat, AIR 1968 SC 529, that in absence of a demand and a refusal it

could not be said that there was in existence any dispute or there was an apprehension of any dispute in regard to the alleged lock-out. In my opinion, there is no force in the argument put forward on behalf of the petitioner company. A charter of demands had been made by the workmen in December, 1967. A conciliation proceeding was going on in regard to them. During the pendency of the conciliation proceeding, admittedly, something happened on or about the 15th of May, 1968, resulting in the stoppage of the work. According to the case of the management, the workers stopped the work, while, according to the case of the latter, the place of employment was closed and there was suspension of the work followed by the refusal by the employer to continue to employ the workmen. The fact that the work was not carried on in the establishment of the petitioner company on the 15th May, 1968, is not in dispute. Naturally then a dispute arose as to what was the reason for the stoppage of the work, and the reason of that stoppage of the work was an industrial dispute within the meaning of the Act, as defined in Cl. (k) of Section 2. It means any dispute or difference between the employer and the workmen. The dispute or difference was, as I have already said, that the workmen stopped the work, according to the employer, while according to the former, they were not allowed to work due to the closing of the place of employment and the suspension of the work. On the facts and in the circumstances of this case, therefore, no specific demand by the workmen was necessary to bring out the existence of an industrial dispute, in the matter of the alleged lock-out.

The workers brought this fact to the notice of the Government in the letter of the Sangh dated the 26th of June, 1968 (Annexure '4/A'). The president of the Sangh wrote to the secretary to the Government of Bihar in the Department of Labour and Employment, that "the management has closed the site since 15-5-1968 unilaterally and the workers are not being allowed, to work, neither they are being paid their wages, over time wages and other dues by the Company." Further grievances were also ventilated and ultimately, a request was made "to take legal action against the management for non-payment of the dues of the workers and also prohibit the management not to shift any machines or tools from the work site as well as not to remove any worker from service." Whatever may be the nature of the relief which the workers wanted from the Government exercise of the powers under Section 10 of the Act does not depend upon the relief asked for by the workmen. The facts stated in Annexure '4/A' clearly show that according to the workmen there was a lock-out.

within the meaning of Cl. (1) of Section 2 of the Act. That being so, the Government was competent to make a reference under Section 10 of the Act in the form as it did. The question referred was, as would appear from Annexure '5':

"Whether the alleged lock-out by the management from the 15th May, 1968, was proper and justified? If not, to what relief and compensation the workmen are entitled."

16. Section 23 of the Act says that no employer, of workmen in any industrial establishment shall declare a lock-out during the pendency of a conciliation proceeding or under certain other conditions enumerated therein. If, therefore, the workmen concerned approached the Government for the redress of their grievances because of the alleged lock-out, by bringing the facts to the notice of the Government, it is difficult to accept the contention put forward on behalf of the petitioner that there was no dispute raised before the management in that regard. The dispute obviously was there which resulted in the stoppage of the work. I may also add that I am inclined to think that the sine qua non of the exercise of the power under Section 10 of the Act is that in the opinion of the appropriate Government any industrial dispute must exist or there must be an apprehension in regard to that. In all cases it is not necessary that the dispute must be preceded by a demand and a refusal in express terms by the parties concerned. If on the evidence adduced before the Tribunal it is found that the industrial dispute did not exist or was not apprehended, the reference may be held to be incompetent. But, at this stage, to say that, merely because in express terms no such dispute was raised before the management by the workmen, there was in fact no dispute and hence the reference is incompetent, will not be correct. The question of the existence of a dispute or an apprehended one has got to be decided with reference to the facts of each case. If merely the workmen make a demand before the Government that they are entitled to get such and such wages or such and such amount of bonus, without making this demand before the management, it can be legitimately said, if I may say so with respect, as was said by a Bench of this Court in the case of the Member of the Sasamusa Workers Union, AIR 1952 Pat 210, that no dispute had actually cropped up, because no demand was made before the management, there was no refusal of the demand and hence there was no dispute.

It may also well be that if a different kind of demand is made before the management and the reference is of a different kind, then also the reference is incompetent; as was the case before the Supreme Court in AIR 1968 SC 529. The

claim put forward before the management was for payment of retrenchment compensation and not for reinstatement, but the demand put forward before the Government was for a reinstatement also. In that situation, it has been said by Bhargava, J.:

"An industrial dispute, as defined, must be a dispute between employers and employers, employers and workmen, and workmen and workmen. A mere demand to a Government, without a dispute being raised by the workmen with their employer, cannot become an industrial dispute."

In the facts of the instant case, the demand, as the case of the workmen is, put forward before the management on the 15th May, 1968, was to allow them to work. The management would not allow them to work. The resultant of this dispute was an industrial dispute as to the alleged lock-out. No further demand in respect of that dispute was necessary and when a grievance was made before the State Government by the workmen concerned, the Government was competent to make a reference under S. 10 of the Act for adjudication of the dispute.

- 17. In my opinion, the reference as made on the 24th of September, 1968, necessarily involves determination of three questions:

- (i) Whether there was a lock-out by the management on the 15th of May, 1968?
- (ii) If so, whether it was proper and justified?
- (iii) If not, to what relief and compensation the workmen are entitled?

The use of the word "alleged" before the words "lockout" by necessary implication brings about determination of the question as to whether in fact there was a lockout or not within the meaning of Cl. (1) of Section 2 of the Act. The Tribunal has rightly said, while deciding the fourth objection raised on behalf of the management, that it will decide this question after taking evidence and not as a preliminary issue. If the Tribunal comes to the conclusion that, in fact there was no lockout, neither of the other two questions will fall for decision. If, on the other hand, this question is decided in favour of the workmen, the second question will have to be decided and, thereafter, if necessary, the third question.

18. While pressing the fourth point of the preliminary objection in this Court, Mr. Ghose strenuously argued that, according to the case of the management, it was a case of closure of the business or the undertaking and not a case of lock-out. The Tribunal has failed to decide this preliminary question, which was necessary to be decided before the reference could proceed further. I have no hesitation in rejecting this point on the

simple ground that the case of closure was not pleaded, as I shall presently show, in any of the written statements filed by the management nor was it raised before the Tribunal, nor has it been pleaded specifically in the writ applications filed in this Court. I have referred to some of the statements in the written statement as also the statements made in this Court to show that, according to the case of the management, the entire work had not finished, a major portion of it was completed and a portion of the work was going on and was likely to be completed, as stated even in the writ applications filed on the 31st January, 1969, in this Court. That being so, I fail to understand, how it is possible to entertain the point raised on behalf of the petitioner that the undertaking of the petitioner was closed down within the meaning of Sec. 25-FFF of the Act. The establishment was there, the work was going on and a portion of the work had remained incomplete. Therefore, the expression used on behalf of the workmen that there was closure of the site or the Dam site must mean, if the facts stated are correct, closing of the place of employment and not the closing of the business or the undertaking. As in the other case, in this case also, in the application filed on the 15th January, 1969, a copy of which is Annexure '1', the company asked the Tribunal to decide the preliminary objections raised in paragraphs 1, 3, 4, 5, 6 and 18 of the written statement filed on the 25th November, 1968. Undoubtedly, the case of the management was that there was no lock-out but that is very much different from saying that it was a case of closure. It may be a case of lock-out, it may not be a case of lock-out, that is a matter which has still to be decided by the Tribunal, but it is impossible to throw the reference on the ground that it was a case of closure, not pleaded by the company, in my opinion, at any stage. Here I shall refer to paragraph 3(x) of the supplementary objection filed on the 16th January, 1969 (Annexure '1/A') to which our attention was drawn by learned Counsel for the petitioner. The said paragraph reads as follows:—

"That closure of work for want of contract by a contractor could not be lock-out."

I am definitely of the view that the expression "closure of work" used in this paragraph means closing the particular item of the work because there was no further work to be proceeded with. The pleading, therefore, even in this paragraph of the management was that it was not a case of lock-out. Nowhere it pleaded, as I have said above, that it was a closure of the business or the undertaking, rather the facts stated contradict this stand in express terms.

19. Learned Counsel for the petitioner, in support of his case of closure, placed reliance upon two decisions of the Supreme Court in the cases of the Management of Express Newspapers (Private) Ltd. v. Workers, AIR 1963 SC 569 and Kalinga Tubes Ltd. v. Their Workmen, (1968) 34 FJR 393 = (AIR 1969 SC 90). It may well be, as pointed out by the Supreme Court, that if a case of closure is pleaded, this has got to be decided as a jurisdictional fact, because the jurisdiction of the Tribunal to adjudicate the points of reference will depend upon the decision of this jurisdictional fact. On the finding the Industrial Tribunal may record on the preliminary issue, it may decide whether it has jurisdiction to deal with the merits of the dispute or not. But, if such a case has not been made out by the management, the Tribunal is under no obligation to decide this as a preliminary issue. In one sense, even the decision of the question as to whether there was a lockout or not may be called to be a decision on the preliminary issue, but, on the facts of the instant case, as I have said above, the Tribunal has rightly deferred the decision of this issue until evidence is adduced.

In the case of Kalinga Tubes Ltd., (1968) 34 FJR 393 = (AIR 1969 SC 90) what has been laid down is as to what is meant by "closure." Grover, J. has pointed out at page 400 (of FJR) = (at p. 95 of AIR) that it is not correct to say that there can be a closure of an undertaking only when there are financial difficulties and the undertaking becomes a losing concern. But what the cases have laid down is that in a case of closure the employer does not merely close down the place of business, but it closes the business itself, finally and irrevocably and the closure is genuine and bona fide in the sense that it is a closure in fact and not a mere pretence of closure. The facts stated by the petitioner company, both before the Tribunal as also in this Court, instead of lending any support to the argument put forward on behalf of the petitioner in regard to the point of closure, are rather, in my opinion, very much against it.

20. In the result, Civil Writ Jurisdiction Case No. 124 of 1969 also fails and is dismissed.

21. I will make no order as to cost in Civil Writ Jurisdiction Case No. 3 of 1969. But the Sangh, Respondent No. 3, will have its cost in Civil Writ Jurisdiction Cases 123 and 124 of 1969. One consolidated hearing fee of rupees one hundred only will be awarded in both the cases.

22. KANHAIYAJI, J.:— I agree.

Petitions dismissed.

AIR 1970 PATNA 303 (V 57 C 49)

R. J. BAHADUR AND B. P. SINHA, JJ.

Sohan Manjhi, Appellant v. State, Respondent.

Criminal Appeal No. 281 of 1967, D/- 22-5-1969.

(A) Penal Code (1860), S. 85 — Intoxication when no excuse — Absence of any material to show that accused was under influence of liquor at the time he committed murder — Section 85 will not protect him. (Para 14)

(B) Penal Code (1860), S. 300 (thirdly), — Intention to murder when can be inferred — Assault with dunda breaking ribs of both sides, perforating pleura and lacerating lung of deceased — These injuries are sufficient in ordinary course of nature to cause death — Intention to cause death could be inferred — Offence fell under S. 300 (thirdly). (Para 15)

Rajeshwar Yajnik, (Amicus Curiae), for Appellant; Brishketu Sharan Sinha, for State.

B. P. SINHA, J.:— Appellant Sohan Manjhi stands convicted and sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code for causing the death of Kutlu Sikalkar. He was a snake-charmer by profession.

2. The prosecution case was that Kutlu Sikalkar along with his wife Surpi Sikalkar (P. W. 8) and three small children had come to village Heven, Police Station Nimdih in the district of Singhbhum on a Thursday before the date of occurrence for the purpose of begging by showing snake charming performance. On 11-5-1965, which was a Tuesday, in the morning, Sohan Manjhi took Kutlu Sikalkar, his wife and children to his house and gave them 'Handia' (liquor) to drink. While they were drinking 'Handia', Sohan Manjhi proposed that one daughter of the victim should cultivate friendship with his daughter. He further proposed that he would keep the wife of the victim with himself. Kutlu Sikalkar told his wife Surpi Sikalkar (P. W. 8), "Sohan Manjhi wants to keep you." On this, Surpi Sikalkar replied that Sohan Manjhi was neither his casteman nor relation and, as such, who he was to keep her. After taking 'Handia', Kutlu Sikalkar along with his family members came back to the mango tree where they were living. Sohan Manjhi also came following them with a small dunda about two cubits in length. Without speaking anything, Sohan Manjhi gave dunda blows to Kutlu Sikalkar which hit him on the right side of the head and other parts of the body. Hulla was raised. Several persons arrived and witnessed the occurrence. As a result of the injuries received, Kutlu Sikalkar

died at the spot. Surpi Sikalkar informed the Mukhia and the Chaukidar who came and saw the dead body. Mukhia Madan Manjhi (P. W. 9) sent Surpi Sikalkar along with the Chaukidar to Nimdih Police Station, where her fardbeyan was recorded that very day at about 4 p. m. by the Officer-in-charge Bharat Dasandhi (P. W. 11). On the basis of that fardbeyan, formal F. I. R. was drawn up at Chandil Police station. The Officer-in-charge (P. W. 11) started for the place of occurrence reaching there at 8-30 p. m. He held inquest on the dead body and sent it for post-mortem examination. He examined witnesses and after completing investigation, submitted chargesheet against this appellant who was put on trial.

3. The defence was that the accused did not commit any offence and that he was falsely implicated at the instance of other persons.

4. The learned Additional Sessions Judge found the prosecution case well proved and, consequently, convicted and sentenced the accused, as mentioned above.

5. This appeal has been filed from Jail and Mr. Rajeshwar Yajnik has appeared as Amicus Curiae.

6. The fact that Kutlu Sikalkar died as a result of the injuries sustained by him on 11-5-1965 in the morning in village Heven has not been challenged and it is proved by the testimony of the witnesses who have figured as eye witnesses to the occurrence. The Officer-in-charge (P. W. 11) on reaching the place of occurrence saw the dead body of Kutlu Sikalkar with injuries thereon. On post-mortem examination, the doctor Debendra Jha (P. W. 2) on dissection found ante mortem wounds on the dead body. There were fractures of the ribs on both sides. Pleura was perforated by the ribs and the lung was lacerated. The doctor opined that the death was caused by the fracture of the ribs which was sufficient in the ordinary course of nature to cause death. He was further of the opinion that the injuries could be caused by lathi. As the body was in a state of decomposition, the doctor could not detect marks of other injuries on the skin. He has stated that the death took place within 48 hours of the time of post-mortem examination which fits in with the time of occurrence, as stated by the witnesses for the prosecution. Thus, there cannot be any doubt that Kutlu Sikalkar was assaulted on 11-5-1965 in village Heven with the blunt weapon like lathi as a result of which he died on the spot.

7. The next question that requires consideration is whether the prosecution has succeeded in proving that it was this appellant who was responsible for causing those injuries which resulted in the death

of Kutlu Sikalkar. The prosecution has examined four persons as eye witnesses to the occurrence. They are Sukhu Manjhi (P. W. 1), Debendra Jha (P. W. 2), Parbati Manjhiain (P. W. 3) and Mangli Manjhiain (P. W. 4). All these witnesses have consistently spoken that they saw the appellant assaulting Kutlu Sikalkar with dunta. [After discussing the evidence of prosecution witnesses their Lordships proceeded]

8-13. On a consideration of the entire evidence, I have no doubt in holding that it was this appellant who had assaulted Kutlu Sikalkar on 11-5-1965 in the morning with dunta which resulted in his death at the spot.

14. Learned counsel for the appellant has argued that, at any rate, the appellant is protected by the general exception provided under Sections 85 and 86 of the Indian Penal Code. This argument has been advanced on the ground that the appellant had taken liquor and, therefore, if under the influence of that liquor, he did any act, he is protected by these Sections. There is no force in this contention. There is no material on the record to show that the appellant was under the influence of liquor at the time he committed the offence and no suggestion to this effect was made to any of the witnesses during their cross-examination. The appellant himself has not said anything in this connection in his statement under Section 342 of the Code of Criminal Procedure. Therefore, there is no basis for this submission. This contention is, therefore, rejected.

15. Lastly, it has been submitted that at any rate, the offence committed would come under Section 304 of the Indian Penal Code and not under Section 302. There is no force in this contention as the appellant had assaulted Kutlu Sikalkar with dunta in such a way that the ribs of both sides were broken, as a result of which the pleura was perforated and the lung was lacerated. The doctor has opined that the injuries were sufficient in the ordinary course of nature to cause the death. In view of the evidence on record, it must be held that the appellant intended to cause such bodily injury which was sufficient in the ordinary course of nature to cause death. That being so, the offence is murder under Section 300 (thirdly).

16. The result is that the appeal is dismissed and the conviction and sentence passed on the appellant are affirmed.

17. BAHADUR, J.: I agree.

Appeal dismissed.

AIR 1970 PATNA 304 (V 57 C 50)

ANWAR AHMAD AND

M. P. VARMA, JJ.

Basruddin Khan and another, Appellants v. Gurudarshan Das and others Respondents.

A. F. O. D. No. 476 of 1964, D/- 23-5-1969, from order of 1st Addl. Sub-J. Sasaram, D/- 12-9-1964.

(A) Specific Relief Act (1877), S. 27—Contract of sale of joint family property by member having power of attorney in that behalf — Omission to mention name of a member in power of attorney — Specific performance of contract against that member, when can be granted.

Where an agreement to sale joint family property is entered into by a member of joint family having power of attorney in that behalf the agreement to sell cannot be said to be illegal or void merely because of omission to mention the name of one of the members of the family having an interest in the property in the power of attorney and specific performance of contract even against that member can be granted when he has neither claimed any separate right in property nor has asserted that the executant was not competent to represent his interest. (Para 9)

(B) Specific Relief Act (1877), S. 27(b) — Defendant purchasing property after contract of sale in favour of plaintiff — Burden is on defendant to prove that he is a bona fide purchaser for value without notice of earlier contract — Evidence Act (1872) Ss. 101-104.

The onus is upon the defendant who has taken a registered sale deed executed after the contract for sale in favour of the plaintiff to prove that he is a bona fide purchaser for value without notice of the earlier contract, so as to bring himself within the exception provided by Section 27(b) of the Specific Relief Act. Case law discussed. (Para 12)

Cases Referred: Chronological Paras

(1946) AIR 1946 PC 97 (V 33) = 73

Ind App 98, Shankerlal Narayandas v. New Mofussil Co. Ltd. 12

(1934) AIR 1934 PC 68 (V 21) = 61

Ind App 115, Bhupnarain Singh v. Gokulchand Mahton 12

(1934) AIR 1934 Pat 518 (V 21) = 15

Pat LT 469, Saukhi Sah v. Mahamaya Prasad Singh 12

(1933) AIR 1933 Cal 98 (V 20) = 36

Cal WN 1002, Harendra Chandra Das v. Nanda Lal Roy 12

Rajeshwari Prasad, Md. Mazhar Hussain, Shilesh Chandra Misra, R. M. Mishra, Md. Zahid Hussain and Bhubaneswar Nath, for Appellants; Prem Lal Keshri Singh, Ravinandan Sahay, Rewati

LM/CN/G309/69/GKC/B

Raman Sharan and Rameshwar Prasad No. 2, for Respondents.

M. P. VARMA, J.:— Both the appellants were defendants second party in Title Suit No. 23/2 of 1960/62, which had been brought against them as well as defendants first party by the plaintiff Gurudarshan Das, for specific performance of a contract for sale, and the learned Additional Subordinate Judge of Sasaram has decreed the suit with costs.

2. Briefly stated, the case of the plaintiff was that the defendants first party constituted a joint Hindu family. Father of defendants 1 and 2, Sukhdeo Singh, lived at Bhabua, in the district of Shahabad, and practised there as a Mukhtar. He lived in the houses described in Schedule A to the plaint, namely, Holdings Nos. 3 and 3-A of Ward No. 3, in the town of Bhabua, standing on an area of about one katha and seventeen dhurs of land. After his death, these houses were not required by the family of defendants first party, who are residents of the district of Deoria in Uttar Pradesh, and fell in disrepair. There were other legal necessities to meet, and so defendant No. 1, as Karta of the joint family, contracted with the plaintiff to sell the said houses for a consideration of Rs. 10,500.00, out of which the defendant No. 1 received Rs. 1,855.00 from the plaintiff as earnest money. Defendant No. 1 executed a Moahdanama (agreement for sale) dated the 15th October, 1958, in favour of the plaintiff. It was stipulated in this agreement of sale that, out of the balance of the consideration money, Rs. 2,500.00 would be left in deposit with the plaintiff for payment to the rehandars of the defendants first party, namely, Data Singh and Husnain Mian, and the remaining Rs. 6,145.00 would be paid by the plaintiff to the defendants first party at the time of execution and registration of the sale deed, which was to be executed before the 15th April, 1959. It was also undertaken by defendant No. 1 that he would get the sale deed executed in favour of the plaintiff by all the co-sharers of the property. Plaintiff was always willing to get the sale deed executed, after paying the balance of the consideration money, but till the 15th April, 1959, either defendant No. 1 or defendant No. 2 did not appear at the Bhabua Sub-Registry office to get the sale deed executed and registered. A few days later on the 19th June 1959 both defendants 1 and 2 met the plaintiff at Bhabua and some altercation took place between them because each party was accusing the other for not keeping his part of the promise. On the intervention of some persons present there including defendants second party, it was settled that the sale deed would be executed in favour of the plaintiff on the 22nd June, 1959. Plain-

tiff paid a further sum of Rs. 250.00 to defendants 1 and 2 for the purchase of requisite stamps and to meet other expenses. Defendants 1 and 2, on their part, paid Rs. 220-8-0 to Shri Krishna Singh, a deed writer, for the purchases of stamps. Defendants first party, however, did not turn up at Bhabua on the 22nd June, 1959, for executing the sale deed. Plaintiff, thereafter, came to know that defendants second party obtained a sale deed from defendants first party with respect to the said houses by promising to pay a higher consideration. This sale deed was executed not at Bhabua, but at Arrah on the 26th June, 1959. According to the plaintiff, the whole transaction was a fraudulent and collusive one, because the defendants second party did not pay anything in cash on the date of the execution of the sale deed. Defendants second party had knowledge of the plaintiff's Moahdanama from the very beginning and even when the time for execution of the sale deed was extended, they were present at the spot. In that view of the matter, defendants second party were not bona fide purchasers for value. They paid no consideration for the sale deed which they took with notice of the plaintiff's Moahdanama. Plaintiff, therefore, brought the suit for specific performance of the contract for sale.

3. The suit was contested by defendants first and second parties. Their main allegation was that defendant No. 1 was not the Karta of the family, rather defendant No. 2 was functioning as the Karta. The family of the defendants did not constitute a joint family, rather defendants 1, 2 and 3 formed one joint family and the other defendants of the defendants first party lived separately. They denied the negotiation for the sale of the said houses for a consideration of Rs. 10,500.00, or the receipt of Rs. 1,855.00 from the plaintiff by way of earnest money. According to the defendants first party, the consideration for the houses in question was fixed between the plaintiff and defendant No. 1 at Rs. 14,000.00, but the plaintiff got this sum reduced and fraudulently mentioned in the deed of agreement for sale. Defendant No. 1 did not himself read this deed of agreement and signed the same at the request of the plaintiff in good faith. Plaintiff was never ready with the money to purchase these houses. Defendant No. 1 did not give out that he would get the sale deed executed by all the co-sharers. Defendants 1 and 2 were present at the sub-Registry office at Bhabua on the 15th April and 16th April, 1959 ready to execute the sale deed in favour of the plaintiff, but the plaintiff did not turn up with the money, and the transaction fell through. On the 16th April, 1959, therefore, a notice was served on the plaintiff

by defendant No. 2 intimating that the terms of the Moahdanama had expired. According to the defendants, the story about the extension of the date for execution of the sale deed, at the intervention of some persons, including defendants second party was a concocted one. Plaintiff never paid Rs. 250.00 or any money to defendants 1 and 2 for purchase of stamps. As defendants first party were in urgent need of money, they sold the houses in question to defendants second party for a consideration of Rs. 13,000.00. Out of this consideration, Rs. 2,500.00 was left in deposit with the defendants second party for payment of rehan money to Husnain Mian and Kastura Devi, wife of Data Singh. A further sum of Rs. 2,500.00 was paid by the defendants second party to defendants first party, and the balance of Rs. 8,000.00 was paid before the Sub-Registrar at the time of registration. Defendants second party further asserted that they had no knowledge of any prior contract for sale by defendants first party in favour of the plaintiff.

4. Learned Additional Subordinate Judge, after a consideration of the evidence adduced on behalf of the plaintiff and defendants first and second parties, came to the conclusion that the plaintiff could enforce his claim for specific performance and defendants second party were not bona fide purchasers though for value, but with notice of the plaintiff's Moahdanama. Against this judgment and decree, the present appeal has been filed by defendants second party.

5. Learned counsel for the defendants second party appellants has raised several points in support of the appeal. His first argument is that some members of the defendants first party had executed a registered Mukhtarnama (Special Power of Attorney) in favour of defendant No. 2 (Ext. A-1) on the 2nd June, 1958, for entering into transaction in respect of the sale of the said houses, and he could not delegate his authority in this behalf to defendant No. 1. Defendant No. 1 was not the Karta of the family, and so the entire transaction is vitiated. His second argument is that defendant No. 3, widow of Sukhdeo Singh, did not join in the execution of the power of attorney in favour of defendant No. 2, and so the plaintiff could not enforce his right of specific performance of contract on the basis of this defective power of attorney in favour of defendant No. 2. His third contention was that the appellants had no knowledge of any deed of agreement for sale executed by defendant No. 1 in favour of the plaintiff. It was also contended that, the time being the essence of the contract, the original date for execution of the sale deed—that is, the 15th

April, 1959, could not be extended by verbal agreement, to 22nd June, 1959, when there was supersession of the first contract, a suit could not be brought on the basis of that contract.

6. The question, whether defendant No. 1 or defendant No. 2 was the karta of the family of defendants first party, has been discussed under issue No. 2 of the judgment under appeal. The finding of the learned Additional Subordinate Judge is that the Moahdanama (Ext. 5) was executed bona fide by defendant No. 1 with authority to represent the joint family of the defendants first set. It is argued on behalf of the appellants that Birendra Bahadur Singh (defendant No. 2) is the eldest son of Sukhdeo Singh, and Birpal Singh (defendant No. 1) is younger to Birendra Bahadur Singh, so, generally the senior member of the family is the karta. The agreement for sale was entered into on behalf of the family by a junior member of the family namely defendant No. 1, though the Mukhtarnama (Ext. A-1) was executed in favour of defendant No. 2. In my opinion, there should be no confusion concerning this point. Of course, the seniormost member is to function as the karta of a joint Hindu family, but this is not the universal rule. Even in this family there are many senior members who are uncles of these two defendants, but it is not said that anyone of them ever worked as the karta of the family. So the kartaship does not necessarily go with the seniority of a member in the family. Both these defendants are evidently educated persons. As defendant No. 2 Birendra Bahadur Singh (D.W. 11) has stated, he practised as a lawyer at Banaras and then at Deoria. He joined Government service in September, 1957, and during the relevant period, he was posted at Block Office at Chiraigaon, in the district of Varanasi. He further stated that defendant No. 1 passed his Matriculation examination in 1958 and joined Government service in 1960. So, during the relevant period, defendant No. 1 was not in any service and moved about and worked for the family. Except the statements of a few witnesses, there is nothing on the record to show that defendant No. 2 had ever acted as the karta of the joint family of the defendants first party.

In his evidence, defendant No. 2 stated that he is the karta of the family consisting of defendant No. 1, himself and defendant No. 3, his mother, and the other defendants were separate. This is apparently an interested statement and is falsified by his own action. Admittedly, defendants first party executed the sale deed, dated the 26th June, 1959 (Ext. C-II) in favour of the defendants second party. This sale deed clearly recites that the executants, namely, defendants 1 to 3

were members of the same joint family, and were surviving heirs of that joint family. In view of this clear assertion of jointness, it is now too late for the appellants to contend that defendant No. 2 was the karta of the joint family of defendants 1 to 3 only. It is also in evidence that, except these two defendants, the other members of the defendants first party were residing in a village in the district of Deoria (Uttar Pradesh) and only these two sons of Sukhdeo Singh, who was practising as a Mukhtar at Bhabua, used to come to Bhabua at times. In the Moahdanama (Ext. 5), defendant No. 1 Birpal Singh specifically asserted that he had full authority to execute a sale deed on behalf of the entire family as he was the karta thereof. He further assured the plaintiff that for his (plaintiff's) satisfaction, all his (defendant's) co-sharers will jointly execute the sale deed. It is important to find that defendant No. 1 did not come to pledge his oath one way or the other, and the plaintiff was debarred from the opportunity of putting to him this statement of his, as mentioned in the Moahdanama (Ext. 5) concerning his assurance to the plaintiff to the effect that he was the karta of the joint family of the defendants first party. The evidence shows that both these brothers were working on behalf of the joint family and looking after its affairs. For some time one member of the family may work as the karta, and, if he is incapacitated, another member may take his place.

So, there is no hard and fast rule that a particular member of the family must always be the karta. Secondly, I may point out that by the Mukhtarnama (Ext. A-I), dated the 2nd June, 1958, defendant No. 2 was not given any power to enter into any contract for the sale of the joint family property, but, as he was a lawyer, he was given the power to execute a sale deed in respect of these houses on behalf of the executants of the Mukhtarnama. So, this Mukhtarnama itself shows that defendant No. 2 was not the karta of the family. Moreover, in his own evidence defendant No. 2 clearly stated that about one and a half months after the execution of the Moahdanama by Birpal Singh in favour of the plaintiff, he became aware of the same and he also accepted and acknowledged that Moahdanama. It is, therefore, clear that he ratified the transaction of defendant No. 1 Birpal, and so there was no matter of dispute between either of them concerning this transaction. It is also apparent from the recitals in the Moahdanama that the title deeds and other documents of the family of the defendants first party concerning these houses were in possession of Birpal (defendant No. 1). If he was a junior member of the family, how and why

these documents came into his possession? The possession of the documents with Birpal clearly indicates that, even if he was a junior member of the family, he had been authorised by the other members of the family to negotiate for the sale of the houses in question. It is also in evidence that the earnest money of Rs. 1,855/- was received by defendant No. 1, who also granted a receipt (Ext. 6) for the same. Defendant No. 2 (D.W. 11), in his evidence, does not challenge the receipt of this earnest money by defendant No. 1. On behalf of defendants first party, three witnesses were examined, out of whom only defendant No. 2 asserted that he was the karta of the family. On behalf of defendants second party, eight witnesses had been examined, out of whom only defendant No. 9 stated that defendant No. 2 was the karta of the joint family. Both these persons are interested in the case and their evidence cannot be accepted at its face value. On behalf of the plaintiffs, twelve witnesses have been examined. Out of them, P.W. 3 Rambachan Tiwari clearly stated that defendant No. 1 was functioning as the karta of the family. Of course, the plaintiff and defendant No. 1 told him about the agreement for sale. Parasnath Singh (P.W. 5) a businessman, also stated that defendant No. 1 was working as the karta. P.W. 10 Harbans Pandey, who worked as a peon in the Block Office, and who was formerly working in the Zamindari Department at Bhabua, pledged his oath to say that defendant No. 1 was the karta of the family. Of course, the plaintiff (P.W. 12) also supported this statement. So, in this background and in view of the oral and documentary evidence, it must be held in favour of the plaintiff that defendant No. 1 was working as the karta of the joint family of defendants first party, he represented himself as the karta of the family to the plaintiff, and his action was expressly ratified by defendant No. 2, who now claims to be the karta. The argument of the learned counsel that defendant No. 1 had no authority on behalf of the family to enter into any negotiation for sale cannot be accepted, and the plaintiff's suit does not suffer from any such infirmity.

7. The next contention raised on behalf of the appellants is that in the Mukhtarnama (Ext. A-I), defendant No. 3 had not joined. It is not clear as to how this omission occurred. Defendant No. 3 is the widowed mother of defendants 1 and 2. It is difficult to say whether this omission was deliberate and intentional or accidental. This aspect of the question would have assumed importance if defendant No. 3 had asserted some adverse right against the action of the other members of the family on whose behalf the Mukhtarnama had been executed. Of

course, she is not a coparcener in strict legal sense, but she has got community of interest and unity of possession along with the other members of the coparcenary. This point had not been raised before the Court below, and has been raised for the first time here in appeal. If this point had been raised at the time of the hearing of the suit, perhaps, the plaintiff might have adduced evidence on this point to show that the widow was a consenting party to the Mukhtarnama, though her name does not find place in that document. The subsequent act of the widow (defendant No. 3) also goes to indicate that she was in agreement with the action taken by her sons, defendants 1 and 2. She has filed a joint written statement along with them.

In paragraph 7 of the written statement, which is on her behalf also, it is stated "the truth is that the plaintiff finalised with defendant No. 1 the negotiation for sale of the property mentioned in Schedule A", but this was for a consideration of Rs. 14,000/-; and not for Rs. 10,500/-. So, this lady (defendant No. 3) does not assert any separate title adverse to the interest of the joint family, which was represented in this transaction by defendant No. 1.

8. Learned counsel has further argued that the Court would be reluctant to grant specific performance of the contract in respect of a portion of the property only, because if defendant No. 3 did not join the Mukhtarnama, her interest would not pass to the plaintiff, if a sale deed was to be executed on the basis of that Mukhtarnama. In my opinion, such a situation does not arise in this case. The sale deed has not been executed in favour of the plaintiff, though, of course, it can be said that defendant No. 3 had not given authority to defendant No. 2 to execute the sale deed. Defendant No. 3 was not examined either in Court or on commission to say one way or the other.

The old Specific Relief Act of 1877 was repealed and replaced by the Specific Relief Act of 1963, which came into force from the 1st March, 1964. Under the old Act, which would be applicable to this case, Sections 14 to 17 dealt with claims for specific relief of a part of a contract and Section 13 enshrined a principle generally applicable to cases falling within Sections 14 to 17. All these sections have now been grouped together into present Section 12. Sub-section (1) corresponds to Section 17. Sub-section (2) corresponds to Section 14, and sub-section (3) corresponds to Section 15. But one important change which has been made in sub-section (3) is that when the part which must be left unperformed forms a considerable portion of the whole but admits of compensation in money, the plaintiff is

allowed a proportionate abatement of the consideration when he is to relinquish all claims to further performance or any further compensation for the breach. The previous position was considered to be inequitable in this respect. Sub-section (4) corresponds to Section 16, and the explanation reproduces Section 13 with verbal changes. I would have entered into a detailed discussion about the legal aspect of this matter, but, in the circumstances of this case as well as the facts which are available on the record, it is no use dilating upon this legal aspect. Defendant No. 3, though she did not join in the execution of the Mukhtarnama, does not claim any separate right in the family property and does not say that her sons were not competent to represent her interest in the transaction. The evidence is not clear as to what would be the share of this lady (defendant No. 3) in the suit houses. From the recitals in the sale deed (Ext. C-II), it appears that executants 5 to 8 were representing one branch and Deoki Singh and Sukhdeo Singh represented two other branches. Deoki Singh died issueless in a state of jointness with others and thereafter Sukhdeo Singh, father of Executants 1, 2 and 4 and husband of executant No. 3, died in a state of jointness, leaving the executants as his heirs. If this recital is taken to be correct, then the interest of defendant No. 3 would be 1/8th in the family properties. When the plaintiff was being examined, no question was put to him whether he was willing to purchase the suit houses on the basis of the Moahdanama to which defendant No. 3 was not a party. The plaintiff himself could not say anything about this because this plea was not then taken. To another question, he replied that he would not have obtained the sale deed if it was executed by Birpal alone. It is to be noted that this answer is significant, because the plaintiff had entered into the agreement only with Birpal Singh, but thereafter the differences arose, and the question of kartaship or jointness in the family began to crop up. In such circumstances, the plaintiff must have become nervous and so in Court he could not but have said that he was not ready to take a sale deed from Birpal alone. When defendant No. 3 herself does not come forward and raise any objection to the claim of the plaintiff by pledging her oath, strangers to the family should not be allowed to raise such subtle points.

9. When the case was being argued before us, it was submitted on behalf of the plaintiff that he was ready to take the sale deed in accordance with the deed of agreement for sale. In my opinion, therefore, the omission of the name of defendant No. 3 from the Mukhtarnama would not make the contract for sale

made on behalf of the defendants first party illegal, inoperative or void. Plaintiff would still be entitled to enforce the specific performance of the contract which defendant No. 1 made on behalf of the entire joint family of the defendants first party.

10. The next point urged on behalf of the appellants is that defendants second party are bona fide purchasers for value without notice. The learned Additional Subordinate Judge has found that the defendants first party were in need of money and so they must not have executed the sale deed Ext. C-II without consideration. Apparently, they got some higher price than what was being offered by the plaintiff and so they duped the plaintiff and executed a sale deed in favour of the defendants second party. He further held that the defendants second party were not bona fide purchasers and that they had taken their sale deed with due notice of the plaintiff's previous contract.

11. It is interesting to note that at the time the sale deed (Ext. C-II) was presented for registration, the Sub-Registrar made an endorsement to the effect that the entire consideration of Rs. 13,000/- had been paid in his presence. This endorsement is admittedly incorrect, because it is clear from the evidence on record as well as from the evidence of Bafruddin (defendant No. 9) that defendants first party received only Rs. 8,000/- at the time of the registration of the sale deed, inasmuch as they had received a sum of Rs. 2,500/- as earnest money as well as Rs. 300/- for purchase of stamps etc. A further sum of Rs. 2,500/- was left in deposit with the defendants second party to redeem the two rehan bonds in respect of the suit property. D. W. 2 Usman Ghani is son of the rehandar Husnain Mian, who was examined as D. W. 5. Both of them have stated that their rehan bond was redeemed by defendants 9 and 10. D. W. 6 Nijamuddin has spoken about the redemption of the rehan bond standing in favour of Choudhary Dataram's wife. So, apparently there is some 'golmal' in the endorsement made by the Sub-Registrar on the back of Ext. C-II.

12. It has been held in a series of decisions that the onus is upon the defendant who has taken a registered sale deed executed after the contract for sale in favour of the plaintiff to prove that he is a bona fide purchaser for value without notice of the earlier contract, so as to bring himself within the exception provided by Section 27(b) of the Specific Relief Act. I may refer to some of these cases, and they are: Bhupnarain Singh v. Gokulchand Mahton, reported in 61 Ind App 115 = (AIR 1934 PC 68); Shankerlal Narayandas Mundade v. New Mofussil Co. Ltd., AIR 1946 PC 97. In

this case it was further held that by the law of India an oral contract is valid and enforceable, but in such a case it is a question of construction whether the execution of the further written contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. *Harendra Chandra Das v. Nanda Lal Roy*, AIR 1933 Cal 98. In this case a Division Bench of the Calcutta High Court held that, when a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character. If he was aware when he purchased the property that negotiations for the sale of the property were already in progress between his vendors and the plaintiff, and purchases the property without making necessary enquiries as to whether any agreement to sell the property had been definitely concluded between his vendors and the plaintiff, he cannot claim to be a transferee without notice. A similar view was expressed in *Saukhi Sah v. Mahamaya Prasad Singh*, AIR 1934 Pat 518. "Bona fide" means proper enquiry.

13. In the present case, the plaintiff has given reliable evidence that both the defendants 9 and 10 had knowledge of his agreement for sale with the family of the defendants first party. P.W. 4 Shyama Prasad stated that two days before Ramnavami, he met the plaintiff in the Court premises at Bhabua and he told him that he had with him money for the sale deed, but defendant No. 1 did not come to Court on that date. The occasion for this talk arose because Shyama Prasad wanted some loan from the plaintiff and as the plaintiff had to pay the money to defendants 1 and 2, he could not spare any money to Shyama Prasad. P.W. 5 Parasnath Singh stated that on the 19th June, 1959, he witnessed some altercation between the plaintiff and defendants 1 and 2 and at that time defendant No. 9 also was present there. He intervened in the matter and got it settled. The date for execution of the sale deed by defendants first party was extended to 22nd June, 1959. He further stated that the plaintiff paid Rs. 250/- to defendant No. 2 who paid the same to Shri Krishna Singh, a deed writer. The stamp papers (Exts. 4 to 4/b) indicate that Shri Krishna Singh had actually purchased the stamp papers for the sale deed. Of course, the plaintiff also has stated in his evidence that, on the 19th June, 1969, defendants 1 and 2 were in the company of defendant No. 9 when the altercation took place. He further stated that, on the 22nd June, 1959, defendant No. 10 was also present when he met Parasnath and Rambilas and complained to them that, in spite of

the assurance given by defendants 1 and 2, the sale deed had not been executed. As against this positive evidence about the knowledge of defendants 9 and 10 about the previous contract for sale in favour of the plaintiff, the evidence adduced on behalf of defendants second party is very unreliable. Though the onus was both on defendants 9 and 10 to establish the fact that they were bona fide purchasers without notice of the previous contract, defendant No. 10 did not examine himself at all. So the evidence of the plaintiff is rather ex parte against him. I also find that D.W. 10 Bholi Ram, while stating that he had met defendant No. 2 on the 15th and 16th April, 1959 in Court premises, also stated that he met Badruddin (Defendant No. 9), who enquired from him on those dates if he had seen Birendra Singh. This clearly indicates that Badruddin was fully aware of the earlier contract for sale which defendants first party had made in favour of the plaintiff. If Badruddin had no concern with Birendra on the 15th/16th April, 1959, he must not have made any enquiry about Birendra from D.W. 10.

14. D.W. 11 Birendra Bahadur Singh has further stated that he had come on the 14th and both he and defendant No. 1 had put up in the suit houses on that occasion. This evidence was given in order to show that he was willing to perform his part of the contract but the plaintiff himself was not ready to fulfil his part of the contract. But this statement is very significant. If these two defendants really put up in the suit houses on the 14th April, 1959, they must have seen the plaintiff on the subsequent dates, because admittedly the plaintiff lives adjacent east of the suit houses, intervened by a narrow lane. The normal course of events would have been to meet the plaintiff, who was their neighbour, in his own house, and not to wander for him in Court premises. Further, defendant No. 2 did not produce any extract from the Casual Leave Register to show that he had taken casual leave to come to Bhabua on the 14th, 15th and 16th April, 1959. It cannot be denied that defendants 1 and 2 had full knowledge about the contract which they had made to the plaintiff concerning the sale of these houses. So it must be further said that they deliberately and intentionally deceived the plaintiff, and sold the house to defendants second party when they got some more consideration for the houses in question.

15. In this connection, I may dispose of another argument advanced on behalf of the appellants. The learned Additional Subordinate Judge has referred to Ext. 1, which is a complaint petition filed by Badruddin, to show that he had prior

knowledge of the contract for sale between the plaintiff and the defendants first party. This petition is dated the 1st July, 1959. Badruddin had brought a criminal case against the plaintiff and two other females for their eviction from one of the suit rooms. It is stated in the complaint petition that the reason for commission of this offence by the accused was that accused No. 1 (the plaintiff herein) also wanted to purchase that house which the complainant had purchased after paying a greater price, and this extremely offended the accused and so he committed this illegal act. Though it may be said that this statement of Badruddin was admissible in evidence against him, I do not want to place any reliance on this document, because it can be very well argued that Badruddin came to know of the prior Moahdanama of the plaintiff after his own purchase and when he went to occupy the suit houses. This complaint petition does not clearly state that Badruddin had prior knowledge of the Moahdanama before he took his own sale deed from the defendants first party. I may further add that defendants 1 and 2 came to Court with a false case altogether. They contested the claim of the plaintiff by saying in the written statement as well as in evidence that the original Moahdanama was for Rs. 14,000/-, but through the collusion of the scribe the figure mentioned therein was Rs. 10,500/-. If this had been a fact defendants 1 and 2 must not have sold the suit houses for Rs. 13,000/- only to defendants second party. Furthermore, the receipt (Ext. 6) which was granted by defendant No. 1 in favour of the plaintiff clearly recites that the amount of consideration fixed was Rs. 10,500/- only. In view of the fact that defendants 9 and 10 failed to discharge the onus concerning notice and bona fide nature of the transaction in their favour by defendants first party. I must, in full agreement with the finding of the learned Additional Subordinate Judge, hold that the stand taken by the appellants on this point must be negatived. The result is that the plaintiff is entitled to enforce the specific performance of this contract with defendants first party.

16. It was further argued before us that a second contract came into effect on the 19th June, 1959, the time for the execution of the sale deed was extended to the 22nd June, 1959, and so a novation of contract took place, but the plaintiff has based his claim on the original contract which required the sale deed to be executed by the 15th April, 1959. As the evidence shows, it is not a novation of contract. Only the date of the execution of the sale deed was extended and that also in an awkward situation in which defendants 1 and 2 found themselves in

the morning of the 19th June, 1959. Parasnath and Rambilas had to intervene in the altercation between defendants 1 and 2 and the plaintiff. In that sense, the time given in the deed of Moahdanna cannot be said to be the essence of the contract. If the sale deed was not executed by the 15th April 1959, the plaintiff was given the right to enforce the contract through Court and get a sale deed executed. In such a situation, the sale deed must have been executed after the 15th April, 1959.

17. It was argued on behalf of the appellants that in an action for specific performance, it is necessary for the plaintiff to prove the existence of a concluded contract between himself and the defendant and that he was ready and willing at all material dates to perform his part of the contract. On this point also the plaintiff's evidence must be accepted. In his own evidence he has clearly stated that he was still prepared to pay the balance of the consideration to the defendants first set and obtain sale deed from them. His conduct also supports his intention to be ready to purchase the suit houses. Three houses, as already stated, are contiguous west of the house of the plaintiff intervened by a narrow lane. So, he must be very much willing to purchase the same. Secondly, he showed his readiness on the 19th June, 1959 in this direction by advancing Rs. 250/- to defendants 1 and 2 for purchase of stamps. It is said that the deed writer Shri Krishna Singh (P.W. 8) was a man of the plaintiff and so he purchased the stamps in collusion with him. The learned Additional Subordinate Judge, while considering this part of the evidence came to the conclusion that the deed writer was not a man of the camp of the plaintiff (vide paragraph 20 of the judgment under appeal). The redemption of the rehan bond of Husnain Mian took place at the residence of this Shri Krishna Singh and he, as a matter of fact, is a witness to the redemption as per Exhibit 8/e. It is, therefore, clear that Shri Krishna Singh could not be a creature of the plaintiff, because even long after the purchase of the stamp papers Shri Krishna Singh enjoyed the confidence of Badruddin. The statement made by P.W. 5, Parasnath, who was a colleague of the father of defendants 1 and 2, could not be discarded. So in my opinion, the learned Additional Subordinate Judge came to a right conclusion in holding that the plaintiff was always ready to perform his part of the contract.

18. Another argument which was put forth on behalf of the appellants was that Ext. 5 shows that it was a contingent contract inasmuch as it was recited by Birpal that he would get the sale deed executed and registered by all the co-sharers.

This was an uncertain future event and so in such circumstances the contract cannot be enforced. In my opinion, this argument cannot prevail. By entering into a contract for sale Birpal, defendant No. 1, had the requisite authority to enter into the transaction on behalf of all the co-sharers. So on one side there was the plaintiff representing his entire family, of four brothers, and, on the other, there was Birpal representing his family. So, if Birpal gave assurance that he would get the other members of his family also execute the sale deed, it cannot be said that it was an uncertain future event or that the contract was a contingent one. This point had been raised also in the court below and the learned Additional Subordinate Judge did not accept this argument advanced on behalf of the appellants.

19. In the end, I hold that the claim of the plaintiff for specific performance of contract must be allowed, as has been done by the learned Additional Subordinate Judge.

20. In a suit for specific performance of contract principles of equity apply in spite of the fact that in India relief by way of specific performance is the creature of statute. The rule is that equity does not regard the terms of the contract, but its substance is to be applied to see as to which of the parties is entitled to have equitable consideration. Defendant No. 1 is an educated man and by that time he had passed his Matriculation examination. Defendant No. 2 was already practising as a lawyer and had accepted Government job in 1957. So they were in a better position than the plaintiff to know as to how to proceed in the matter. From whatever aspect the case may be looked at, I think the claim of the plaintiff must stand. The time for deposit of the balance of the consideration money, as directed by the Court below, is extended by three months from today, if not already deposited.

21. In the result, I do not find any merit in this appeal. It is, accordingly, dismissed with costs.

22. ANWAR AHMAD, J.: I agree.
Appeal dismissed.

AIR 1970 PATNA 311 (V 57 C 51)

M. P. VARMA, J.

Nageshwar Pd., Petitioner v. State of Bihar, Respondent.

Criminal Revn. No. 757 of 1968, D/- 15-5-1969, against order of 2nd Addl. S. J. Patna, D/- 11-9-1967.

(A) Penal Code (1860), S. 467 — Failure of prosecution to establish that accused made forgery or interpolations in Tax

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receipts — No adverse inference to impute motive to commit offence under S. 409 can be drawn, against him. (Para 2)

(B) Penal Code (1860), S. 409 — Criminal breach of trust — Criminal or dishonest misappropriation is essential — Mere retention of money not enough. AIR 1953 SC 478; AIR 1933 Cal 800; 1961 (1) Cri LJ 654 (Guj), Rel. on. (Para 3)

(C) Penal Code (1860), S. 409 — Dishonest intention — No rule regarding depositing collections within specified period — Accused retaining money for 15 days and depositing at once when demanded — Accused's security deposit with office more than amount misappropriated — Enmity between accused and his officers — Case held of carelessness and not dishonest intention. (Paras 3 to 6)

Cases Referred: Chronological Paras
(1961) 1961 (1) Cri LJ 654 (Guj).

Desai Champaklal Nemchand v.
The State

(1953) AIR 1953 SC 478 (V 40) =
1954 Cri LJ 102, Chelloor Manknal
Narayan Ittirvi Nambudiri v. State
of Travancore Cochin

(1933) AIR 1933 Cal 800 (V 20) =
35 Cri LJ 156, Major Robert
Stuart Wauchopé v. Emperor

S. N. Mishra, Kamta Pd. & P. K. Joshi,
for Petitioner; Manindra Nath Varma,
for State.

ORDER:— The sole petitioner of this case has been guilty for an offence under Section 409 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three months. He was also charged under Section 467 of the Code but was acquitted of that charge.

2. The following few facts may be briefly stated in order to appreciate the point, which has been argued before me. The petitioner was working as an office clerk in the Dinapore Nizamat Municipality and during the absence of a tax Daroga he did his work also in addition to his own duties. The prosecution case is that he collected Rs. 123.58 paise during the period from 11-6-62 to 3-7-62, which was further extended upto 20-7-1962. The tax collected by the petitioner was not deposited with the cashier of the municipality but he kept amount as well as counter foil receipt books, under which the collection was made, at his house. The Municipal Chairman asked him on 20-7-1962 as to where the counter foils of the receipts were. The petitioner informed him that they were at his house. He ordered him to bring them and the petitioner brought them. Then he was further asked as to where the amount was which he had collected under those eight receipts. The petitioner gave out that the amount was at his house and he would go and fetch the same. This he did on that very day and

the money was deposited in the account of the municipality. Later on 24-7-1962 another Assistant Tax Daroga made a report (Ext. 7) about the interpolation in the receipts, which had been issued by this petitioner. The matter was enquired into and the Chairman of the Municipality lodged F. I. R. in this case on 30-7-1962. There was enquiry by the police and charge sheet was submitted against this petitioner. He was first tried, after commitment, by the 1st Assistant Sessions Judge of Patna, who convicted him and sentenced him to three months' rigorous imprisonment under Section 409, Penal Code. Against this order of conviction there was an appeal which was heard by the learned 2nd Additional Sessions Judge of Patna, who confirmed the order of conviction and sentence. This revision is against the order of the learned Additional Sessions Judge.

3. Learned counsel for the petitioner, Mr. S. N. Mishra, has raised only legal points before me. His first contention is that the learned Court was not justified, after giving a finding of acquittal under the charge of forgery, to raise a presumption against the petitioner for his conviction under Section 409, Penal Code, relying on some interpolations in the receipts. In my opinion, this argument is well founded, when the prosecution failed to establish that the petitioner had made forgery or interpolations in those receipts, even after the examination of a handwriting expert. I do not think that any such adverse inference should have been drawn by the learned Judge so as to impute a motive to the petitioner for committing an offence under Section 409, Penal Code. Any way, this remark of the Court below would not weigh much because I find that the second point, raised by learned counsel, would secure acquittal of his client. He has argued that accepting the facts of the case at their face value no offence under Section 409, I. P. C., had been made out. For a criminal breach of trust by a public servant it is necessary that the public servant should commit criminal misappropriation or dishonest misappropriation because in the definition of criminal breach of trust, which is contained in Section 405 of the Code, it is given out that whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property etc. etc. shall be said to commit criminal breach of trust. In this case the evidence shows that the collected money had not been misappropriated or converted to the use of the petitioner. He was ready with the money when he was asked about it.

4. It has been held in several cases that mere retention of a property is not enough to show that the person, who had

retained the same, had committed criminal breach of trust or criminal misappropriation. In the case of Chelloor Manknal Narayan Ittirvi Nambudiri v. State of Travancore-Cochin, AIR 1953 SC 478 their Lordships observed while dealing with a case of like nature that the prosecution has to establish first of all that the accused was entrusted with some property and it has to be established further that in respect of that property so entrusted there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract. A similar case came up before the Gujarat High Court — vide the case of Desai Champaklal Nemchand v. State, 1961 (1) Cri LJ 654 (Guj) where it was observed that temporary retention of money does not by itself amount to criminal breach of trust. It amounts to that offence only if from the fact of retention of property entrusted, the ingredient of dishonest misappropriation or conversion etc. can be correctly inferred. Hence even if a person is required under rules to deposit the amount entrusted in the Treasury within a few days, the failure to do so will not by itself amount to the offence of criminal breach of trust unless it is proved that there was dishonest misappropriation. In an earlier case of Calcutta High Court a similar view was taken in the case of Major Robert Stuart Wauchope v. Emperor, AIR 1933 Cal 800. It was observed therein that in cases of criminal misappropriation, the prosecution must always prove misappropriation. It is not enough if it proves that the accused had received the money. The onus of proof never shifts from prosecution.

5. In the instant case there is no dispute over the fact that the tax had been collected by the petitioner from eight persons under receipts and the collected money was at once given to the Chairman when demanded. His only offence, if I am permitted to say so, lies in the fact that he did not deposit this money at once in the municipal account but he kept it at his house for some days, may be 10 to 15 days. The only rule, which requires immediate deposit of the collected money produced by the prosecution, is Ext. 10/1. In fact, it is not a municipal rule but an order passed by the Vice-Chairman of the Dinapore Nizamat Municipality on the joint petition filed by the tax collectors of the municipality to extend the time of their attendance to the municipal office from 2-30 p. m. to 4 p. m. The order of the vice-chairman dated 19-9-1959 is to the following effect:—

"Perused the petition. The T. Cs. may be informed to attend office daily for depositing collection money at 4 p. m. instead of 2-30 p. m."

A copy of this order was forwarded to all the tax collectors and tax Darogas of the Municipality. It is said on behalf of the petitioner that this order was issued in September, 1959, and he had joined the service in 1961 and this order was never brought to his notice. So clearly, it is not a rule that the collected money on a particular date should be deposited by the end of that very day. This order is vague to that extent. The tax Darogas had made a grievance that they should be allowed to come to office by 4 p. m. and deposit the collected money and this prayer was allowed. So, this order does not necessarily mean that the amount collected on a particular day had to be deposited by the end of that day. This document, in my opinion, has been misconstrued by the Courts below.

6. It was further pointed out to me that Kamta Pd. (P. W. 9) who was in charge of collection of mutation fee, deposed to the effect that in some cases he deposited collected money after a lapse of 41 days. So, I do not find that this petitioner has violated any rule of law or any legal contract. On his behalf it is further stated that he had some enmity with the Assistant Tax Daroga, who made the report (Ext. 7) and also with the Chairman of the Municipality. Any way, this aspect of the matter need not be further discussed because after all the prosecution has to prove the ingredients of the offence beyond any reasonable doubt. It was further pointed out to me that when this petitioner joined municipal service in 1961, he deposited a cash security of Rs. 300/-. In view of this deposit it would have been sheer foolishness on his part to have dishonestly retained this lesser amount of Rs. 123.58 which amount could have been easily deducted from his security money. In my opinion, it is not a case of dishonest intention but a case of carelessness or at best neglect of duty on the part of the petitioner. It has been observed in many cases that suspicion, however, great, cannot take the place of legal evidence and a conviction cannot be based when the evidence is 'may be true' but only when the evidence is 'must be true'. So, when all these legal points and the evidence and the circumstances are taken into consideration, I do not think that the conviction of the petitioner is justified under Section 409, Indian Penal Code.

7. The result is that this revision succeeds and the order of conviction and the sentence passed against the petitioner is set aside.

Revision allowed.

AIR 1970 PATNA 314 (V 57 C 52)

U. N. SINHA AND KANHAIYAJI, JJ.

Parshava Properties Ltd., Petitioners v. Workmen represented by Rohtas Quarries Mazdoor Sangh, Dalmianagar and another, Respondents.

Civil Writ Jurisdiction Case No. 58 of 1969, D/-4-7-1969.

Mines Act (1952), S. 52 — Leave with wages — Employer agreeing to give fifteen days leave annually in place of seven days — It means one day's leave for nineteen days work and not for sixteen days' work.

Although under Section 52(2) (b) a person is said to have completed a calendar year service if he puts in 240 days' attendance in one calendar year, yet where the employer agrees to give fifteen days privilege leave in place of seven days under Section 51 (before amendment), it means only one day's leave for nineteen days' work and not one day's leave for sixteen days' work. Agreement cannot be interpreted on the basis of Section 52 (as amended in 1958). (Para 5)

Lal Narain Sinha (Advocate General), R. P. Katriar and Satish Kumar Katriar, for Petitioners; Tarakant Jha and Radha Raman, for Respondents.

U. N. SINHA, J.:— This writ application under Arts. 226 and 227 of the Constitution of India has been filed by the petitioners, who are Parshva Properties Limited. (The petitioners will henceforth be described as the management). The prayer in this writ application is that an award given by an arbitrator, a copy of which has been annexed as Annexure 1, may be quashed. In paragraph 3 of the application it has been mentioned that the award had been given by opposite party No. 2 on the 7th September, 1968 and it had been published in the Bihar Gazette on the 24th September, 1968.

2. The relevant facts stated in the application are as follows: It is mentioned that on the 25th March, 1958 an agreement had been entered into between the management and the workers represented by Rohtas Quarries Majdoor Sangh, Dalmianagar, of which item No. 6 runs as follows:—

"The management agrees to give only Privilege Leave of 15 days, with full wages to all Quarry workers other than permanent employees in place of 7 days in accordance with Section 51 of Mines Act, 1952."

A dispute regarding Interpretation of this item arose and the matter was referred for arbitration under Section 10-A of the Industrial Disputes Act. The reference was in the following terms:—

"Interpretation of Item No. 6 of the agreement dated the 25th March, 1958 as

agreed in the memorandum of settlement dated the 4th February, 1966."

On this reference, the arbitrator, Sri I. Prasad heard the contending parties and the award under consideration was given:

3. The learned arbitrator has come to the conclusion that his interpretation of Item No. 6, quoted above, is that the workers are entitled to get one day's leave for every 15 (16?) days' attendance.

4. Before I refer to the reasons given by the learned arbitrator, the relevant provisions of law may be quoted. In the year 1958 the relevant provision of law was Section 51 of the Mines Act, 1952 (Central Act No. 35 of 1952). As admitted by the parties, the portions of Section 51 which governed the case then, were in these words:—

"51. Annual leave with wages.— (1) Every person employed in a mine who has completed a period of twelve months' continuous service therein shall be allowed, during the subsequent period of twelve months, leave with full pay or wages based on the average pay or wages for the twelve months immediately preceding the leave, as provided in Section 52, and such leave shall be calculated at the rate of

(i)

(ii) if he is an employee paid by the week, or a loader, or other person employed below ground on a piece rate basis, seven days for such period of twelve months."

(2) The twelve months' continuous service referred to in sub-section (1) shall be deemed to have been completed—

(a)

(b) in the case of a person employed above ground on a piece rate basis or in the case of any other person who is paid by the month, week or day, if he has during the said period of twelve months put in not less than two hundred and sixty-five attendances at the mine."

This Mines Act of the year 1952, as it was in existence in 1958, underwent substantial change and the relevant provision is incorporated now in Section 52. As admitted by the learned counsel for the parties, the provisions of Section 52 which have been taken into consideration by the learned arbitrator, read as follows:—

"52 (1) Every person employed in a mine who has completed a calendar year's service therein shall be allowed, during the subsequent calendar year, leave with wages, calculated.—

(a)

(b) in any other case at the rate of one day for every twenty days of work performed by him.

(2) A calendar year's service referred to in sub-section (1) shall be deemed to have been completed.—

(a)

(b) in the case of any other person if he has during the calendar year put in not less than two hundred and forty attendances at the mine."

Now I refer to the mistake of calculation made by the learned arbitrator. He has stated in the award that in accordance with Section 51 of the original Mines Act of 1952, the workers were entitled to only seven days' leave in a year. That is to say, the workers used to get seven days' leave if they completed two hundred sixty-five days of attendance in a year. Then the learned arbitrator says that "this was calculated at the rate of one day leave for every 38 days attendance put in by the worker." Then the learned arbitrator has stated that since the agreement had increased the leave to 15 days, it must be deemed that the workers used to get one day's leave on the basis of 19 days' attendance put in by them. Then the learned arbitrator has proceeded under Section 52 of the Act, after amendment, and has stated that the workers are deemed to have completed one calendar year if they have put in not less than 240 days' attendance, and "in view of the above said agreement if a worker has put in 240 days' attendance in a year, he will be entitled to get 15 days' leave". That is to say, according to the learned arbitrator, workers would get one day's leave for every 16 days' attendance. It is on this basis that the learned arbitrator has given his award which has been challenged in this Court.

5. According to the learned Advocate-General appearing for the management, the learned arbitrator has intermixed the agreement with the provisions of S. 52, as it now stands, which he should not have done. It has been argued that the learned arbitrator has erroneously stated that when the management had agreed to give fifteen days' leave in place of seven days' leave, in the year 1958, the arrangement was on the footing that the workers would put one day's leave for every 19 days' attendance. Learned Counsel for the workers has argued, on the other hand, that, the interpretation put upon the agreement in question by the learned arbitrator is correct and that is why the management had followed this calculation in the years 1960 and 1961. Having heard the learned counsel for the parties, I am of the opinion that the contention put forward on behalf of the management is valid and the conclusion of the learned arbitrator is erroneous in law. It is not possible to hold that when the agreement was entered into it was on the footing that the workers became entitled to one day's leave for every 19 days of attendance. No material has been placed before us for arriving at such a conclusion. As the Act stood in 1958, these workers were entitled to seven days' leave if they had put in not less than 265 days' attendance in the last

twelve months. Only this number of days was increased to fifteen days for the application of Section 51 of the Mines Act. It is not possible to hold that the parties had contemplated that the workers would get one day's leave for every 19 days of attendance instead of one day's leave for every 38 days' attendance, when the agreement was made. No doubt, Section 52 of the Act, as it now stands, has made substantial change in the relevant provision of law, but the learned arbitrator was wrong in making his calculation on the basis that because now the workers are entitled to get one day's leave for every 20 days of work performed by them, 15 days of leave, agreed upon by the parties in 1958, can be altered on the footing that at that time the management had agreed to grant one day's leave for every 19 days of attendance. It is not possible to accept the learned arbitrator's reasoning, that, in 1958, the workers were entitled under the law to one day's leave for every 38 days' attendance. At that time, the workers were entitled to 7 days' leave at the most. By the agreement in question this period was increased to 15 days. Nothing more can be deduced from the agreement. The learned Advocate-General has drawn our attention to Section 49 of the Act, as it now stands, and has argued that it is open to the workers either to keep the agreement alive or to give a go-by to it and be governed by the Act as it now stands. However, this aspect of the matter does not call for a decision, as the question before this Court is whether the learned arbitrator has interpreted Item No. 6 of the agreement in accordance with law or not. What the management may have done in the years 1960 and 1961 can hardly be relevant for the interpretation of the agreement in question, as the learned arbitrator had not been asked to interpret item No. 6 of the agreement, on the basis of the conduct of the parties. In my opinion, the only interpretation that can be put upon the agreement in question is that the workers will be entitled to 15 days' leave and no more, if they have worked for not less than 240 days in the previous calendar year, as in the case made out by the management in paragraph 11 of this writ application.

6. For the reasons given above, the award given by the arbitrator must be quashed by a writ of certiorari. The application is thus allowed, but in the circumstances of the case, the parties are directed to bear their own costs of this Court.

7. KANHAIYAJI, J.:— I agree.

Petition allowed.

for joint possession over the house in question and as such, it is governed by Section 7(iv) (c) of the Court-fees Act. In fact, ad valorem court-fee was demanded under Section 7(iv) (c) of the Court-fees Act on the valuation of Rs. 2000/- given in the plaint and the petitioner accepted the position and complied with the orders. Learned counsel for the petitioner contended that when the plaintiff has brought the suit to avoid the effect of the deed of gift and as the deed of gift was valued at Rs. 2000/- the plaintiff has rightly valued it accordingly under Section 7(iv) (c) of the Court-fees Act. It was further contended that when the suit is brought for declaration and consequential relief, it is for the plaintiff to put his own valuation, and the suit was valued on the basis as given in the deed of gift itself. He further contended for the purposes of jurisdiction in a suit, governed by Section 7(iv) (c) of the Court-fees Act, the valuation given by the plaintiff will be the valuation for jurisdiction under Section 8 of the Suits Valuation Act (hereinafter referred to as the 'Act'). The Munsif had accepted the valuation of Rs. 2000/- as given in the plaint as the valuation of the suit and this valuation under Section 12 of the Court-fees Act became final and cannot be challenged by the defendant. So long this valuation for payment of court-fees stands, the Munsif has jurisdiction to try this suit. In support of his contention, he relied on a decision of the Bombay High Court in Burjor Pestonji Sethna v. Nariman Minoo Todiwalla, AIR 1953 Bom 382.

5. Section 8 of the Suits Valuation Act provides as follows:—

"Where in suits other than those referred to in the Court-fees Act, 1870, Section 7, paragraphs (v), (vi) and (ix) and paragraph (x), CL (d), court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same."

As ad valorem court-fee has got to be paid under Section 7(iv) (c) of the Court-fees Act in this case, the valuation for the purposes of both court-fees jurisdiction would be the same. This position is not disputed by learned counsel appearing for the parties. Section 3 of the Act gives the State Government powers to make rules for determining the value of the land for the purposes of jurisdiction in the suits mentioned in the Court-fees Act, 1870, Section 7, paragraphs (v) and (vi) and paragraph (x) (d). Section 4 lays down as follows:—

"Where a suit mentioned in the Court-fees Act, 1870, Section 7, paragraph (iv) or Schedule II, Art. 17, relates to land or an interest in land of which the value has been determined by rules under the last

foregoing section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by those rules."

Section 4 puts the maximum limit to the valuation of a suit for the purpose of jurisdiction in which the relief sought relates to land or an interest in the land. So far Bihar is concerned, the State Government has not framed any rule under Section 3 of the Act. Learned counsel for the opposite party, therefore, contended that the market value of the property in suit will be the value for the purposes of jurisdiction. In support of his contention, he relied on a decision of this Court in Jadunandan Gope v. Syed Najmuzzaman, AIR 1957 Pat 560 wherein it was pointed out that "suits relating to lands coming under the scope of Section 7(iv) (c) of the Court-fees Act are governed by Section 4 of the Suits Valuation Act, and, if no rules have been made under Sections 3 and 4 of the Suits Valuation Act in the State of Bihar for the valuation of an interest in land which is the subject-matter of suit under Section 7(iv) (c) of the Court-fees Act, the market value of the subject-matter has always been taken for the purposes of court-fees and jurisdiction." Therefore, learned counsel submitted that the learned Munsif has rightly held that the value of the house in question exceeded the pecuniary jurisdiction of the Court.

6. Learned counsel for the petitioner relied on Section 12(i) of the Court-fees Act which runs as follows:—

"12(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed; and such decision shall be final as between the parties, to the suit."

The contention of learned counsel, therefore, was that the valuation of Rs. 2000/- given in the plaint has been accepted by the Court and, therefore, this decision has become final and the defendant cannot be allowed to challenge this valuation. It is difficult for me to accept this contention. The Court had not previously decided the question of valuation in the suit. When the Court demanded ad valorem court-fee, it only decided the category to which the suit fell and demanded ad valorem court-fee under Section 7(iv) (c) of the Court-fees Act on the valuation of Rs. 2000/- as given in the plaint overruling the contention of the petitioner that the suit was only a declaratory suit. The Court proceeded on the valuation given in the plaint and there was no judicial decision by Court regarding the quantum of valuation. Moreover, the order passed by the learn-

ed Munsif was ex parte in absence of the defendant who had every right to object to the order passed by the Court before he appeared in the suit. Therefore, Section 12 of the Court-fees Act has no application to the facts of this case.

7. Learned counsel for the petitioner further contended that the plaintiff in a suit under Section 7(iv) (c) of the Court-fees Act is entitled to put his own valuation and, therefore, so long the valuation stands, that valuation will be the valuation for the purposes of jurisdiction under Section 8 of the Act. In support of his contention he relied on a decision of the Bombay High Court in AIR 1953 Bom 382 wherein it was held that "a plaintiff is entitled to put his own valuation upon the relief which he seeks in the suit if the suit falls under Section 7(iv) of the Court-fees Act, and if he has put a valuation, then that valuation is conclusive for the purpose of Section 8 of the Suits Valuation Act and the jurisdiction of the Court must be determined according to the valuation so put by the plaintiff. It is not open to the Court to go behind that valuation and to consider whether the valuation is a proper valuation or not." The decision proceeds on the view that the valuation put by the plaintiff in a suit under Section 7(iv) (c) of the Court-fees Act cannot be questioned whether it is proper valuation or not. This is not the view so far this Court is concerned. No doubt it is true that the plaintiff is entitled to put his own valuation in a suit for declaration and consequential relief but where the valuation given by the plaintiff is not reasonable or arbitrary, the Court has power to revise that valuation and to find out the real value of the property (See ILR 11 Pat 161 = (AIR 1932 Pat 9); AIR 1944 Pat 17 (FB); 1953 BLJR 100; 1954 BLJR 360 and AIR 1957 Pat 560). Therefore, it is not possible for me to accept the contention of learned counsel for the petitioner that the valuation given by the petitioner in the suit is final and cannot be altered by the Court below and that valuation will be the valuation for the purposes of jurisdiction on the basis of the view taken by the Bombay High Court in the case referred to above. It is true that the Court has not determined the valuation for the purposes of court-fee under Section 7(iv) (c) which valuation would have been the basis for the purposes of jurisdiction, but apparently on the basis of the monthly income the learned Munsif has rightly held that the valuation of the suit is beyond the pecuniary jurisdiction of this Court without determining the exact valuation of the suit property. The defendant has raised a plea in the written statement that the valuation of the property in suit is more than Rs. 50,000/- and, as such, it is beyond the pecuniary jurisdiction of the Court

and unless court-fee is paid on that amount, the suit cannot proceed. As was held in Jadunandan Gope's case, referred to above, market value of the property will be the valuation both for the purposes of jurisdiction and court-fee in this case which the Court has to determine as the valuation given is too low. No useful purpose in such circumstances would have been served by determining the actual valuation of the suit property for the purposes of court-fee which would be the valuation for the purposes of jurisdiction also when on the face of the admitted monthly income of the property, the valuation was beyond the pecuniary jurisdiction of the Court. Therefore, in my opinion, the learned Munsif has not committed any error of law or procedure and hence his order does not call for any interference by this Court.

8. For the reasons stated above, the application fails and is, accordingly, dismissed. In the circumstances of the case, there will be no order as to costs.

Petition dismissed.

AIR 1970 PATNA 319 (V 57 C 55)

R. J. BAHADUR, J.

Gaya Datt Patha and another, Petitioners v. Narabdeswar Dubey, Opposite Party.

Criminal Revn. No. 160 of 1969, D/- 22-7-1969, from order of Magistrate, 1st Class, Sasaram, D/- 6-11-1968.

Criminal P. C. (1898), S. 139-A — Procedure of enquiry where public right is denied — Provisions are mandatory — Ignoring earlier cause shown in denial of public right and relying on its not being shown again during later site inspection is illegal and vitiates consequential order for removal of alleged encroachment.

(Paras 3, 4)

Kumar Brajendra Nath, for Petitioners.

ORDER:— This application in revision arises out of proceedings under Section 133 of the Code of Criminal Procedure.

2. It appears that on 8-10-1966, the Subdivisional Magistrate, Sasaram, on perusal of a report submitted by the Sub-inspector of Police, Dawath Police Station, was of the view that there was an apprehension of breach of the peace between the parties, namely, Narabdeswar Dubey on the one hand (who is the opposite party here) and Gaya Pathak and others, on the other, (the petitioners here), in respect of Khata No. 457, Plot No. 1921 of village Jogani. He ordered that proceedings be drawn up under Section 144 of the Code against both the parties and they were restrained from going to the land. It was further ordered to the par-

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ties to show cause by a certain date. It appears that after the matter was taken up on various dates, the proceeding was converted into S. 133 of the Code of Criminal Procedure on 5-12-1966. Later, on the same date he drew up a proceeding under Section 133 of the Code against the members of the opposite party, namely, the present petitioners and required them to show cause by 27-12-1966 as to why the encroachment should not be removed. It appears that after a number of dates on 23-11-1967 the petitioners filed their show cause and the case was transferred to a Magistrate, First Class, for disposal. After the case was taken up and adjourned on various dates, ultimately on 6-11-1968 the Magistrate having held local inspection in presence of both the parties and their lawyers, ordered the second party, namely, the petitioners to remove the encroachment and further directed them to widen the existing road over the plot in question.

3. It is urged by learned counsel, appearing on behalf of the petitioners, that they had not only filed the show cause before the learned Magistrate, but had also filed various papers in assertion of their claim, namely, the denial of the existence of the public rights and any encroachment, as alleged, but the learned Magistrate did not proceed in accordance with the mandatory provisions as laid down in Section 139-A of the Code of Criminal Procedure. It has been pointed out that in the impugned order the learned Magistrate had observed that no evidence had been adduced by either of the parties which means at the time the learned Magistrate had held the local inspection. It is contended that even if no evidence had been led by either of the parties the Magistrate was clearly in error in not proceeding in accordance with law, as laid down under Section 139-A of the Code.

4. This application is not opposed on behalf of the opposite party. I have perused the entire order sheet of the learned Magistrate besides the impugned order. I am satisfied that the learned Magistrate was in error and has committed illegality which requires interference by this Court, though normally this Court is reluctant to interfere in a matter like this. It is not only a question of an irregularity of procedure, but the order is manifestly illegal and, therefore, cannot be sustained.

5. Accordingly, the order of the learned Magistrate dated 6-11-1968 is set aside and the application is allowed.

Application allowed.

AIR 1970 PATNA 320 (V 57 C 56)

N. L. UNTWALIA, J.

Bhola Mahton, Petitioner v. Bhattu Baitha, Opposite Party.

Criminal Ref. No. 8 of 1969, D/- 23-7-1969, against order of 4th Addl. S. J., Monghyr, D/- 5-3-1969.

Criminal P. C. (1898), S. 147(2) Proviso — Dispute concerning right to flow water — Recording of finding about period of exercise is mandatory only when Magistrate first finds that such right exists — Party found exercising right to flow of eaves water on adjoining house for too short a period — Magistrate, therefore, holding that right was not established and passing order prohibiting party from exercising right — Order held was within jurisdiction. Case law ref.

(Paras 3, 4, 5)

Cases Referred: Chronological Paras

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| (1961) AIR 1961 Pat 374 (V 48) = | |
| 1961 (2) Cri LJ 522, Chaturgun | |
| Turha v. Jamadar Mian | 4 |
| (1960) 1960 BLJR 84 = (1960) 2 | |
| All LR (Cri) 127, Bhagwati | |
| Prasad v. L. N. Keshri | 5 |
| (1955) AIR 1955 Pat 265 (V 42) = | |
| 1955 Cri LJ 977, Trijogi Narain | |
| Singh v. Kamta Prasad | 4 |
| (1930) AIR 1930 Mad 865 (V 17) = | |
| 32 Cri LJ 215, Kanta Venkanna | |
| v. Inuganti Venkata Surya Nilladri Rao | 5 |
| (1924) AIR 1924 Pat 784 (V 11) = | |
| 25 Cri LJ 996, Sirkawal Singh v. | |
| Bhuja Singh | 4 |
| (1921) AIR 1921 Pat 486 (V 8) = | |
| 22 Cri LJ 463, Grant v. Padarath | |
| Jha | 4 |
| (1909) 10 Cri LJ 292 = 13 Cal WN | |
| 859, Srimanta Bera v. Indra | |
| Narayan Prodhan | 5 |
| Prem Shankar Sahay and Rudradeo | |
| Prasad Sinha, for Petitioner; Pramod | |
| Singh, for Respondent. | |

ORDER:— This is a reference under Section 438 of the Code of Criminal Procedure (hereinafter called 'the Code') by the 4th Additional Sessions Judge of Monghyr. It appears that under a misconception of law the learned Additional Sessions Judge has made this reference.

2. Bhola Mahton, on whose behalf Mr. Prem Shankar Sahay has appeared in support of the reference, was the second party in a dispute under Sec. 147 of the Code. Bhattu Baitha alias Malhu Baitha, on whose behalf the reference has been opposed, was the first party. The eastern half of plot No. 99, khata No. 30, tauzi No. 4900 of village Lagun, P. S. Muffassil, in the district of Monghyr, is the land of the first party on which stands his house. The western half was purchased by the second party by a

kebala executed on the 22nd of June, 1957. The dispute relates to the flow and falling of water of the olti of the house of the second party on to the Chhapar of the first party. According to the case of the former, the eaves water of his house have been falling towards the east since long, even since before his purchase and he acquired a right in the nature of easement for the flow of the water on and through the chhapar of the first party. The case of the first party has been that after his purchase Bhola Mahton has reconstructed the old existing room which existed on the eastern side of his house, made it double storeyed, raised and extended the chhapar and then the water started falling on the chhapar of the first party. The second party did it against the assurance given by him to the first party when he was reconstructing his house and making it double storeyed. The learned Magistrate on a consideration of the evidence of both sides held that Bhola Mahton after purchasing the house reconstructed it in mud a Do-Manjila and due to this new construction the water of the eaves of his chhapar began to fall on chhapar and wall of the house of the first party. The Magistrate, therefore, held that the second party has or had no right to flow his eaves water on the chhapar and wall of the first party and that his claim of right of easement is not established. The order of the learned Magistrate, therefore, is in accordance with sub-section (3) of Section 147 of the Code.

3. The learned Additional Sessions Judge seems to have overlooked that a finding in accordance with the proviso to sub-section (2) of Section 147 of the Code is necessary to be recorded only when in the first instance it is found by the Magistrate that a right as contemplated under sub-section (1) of Section 147 exists and he has to make an order prohibiting an interference with the exercise of such right. Thinking that without a finding one way or the other about the period specified in the proviso the order passed by the Magistrate becomes without jurisdiction, the learned Additional Sessions Judge has made the reference for setting aside the order of the Magistrate.

4. It is well settled so far this court is concerned that the requirement of the proviso to sub-section (2) of Section 147 of the Code is mandatory provided a declaration as to the existence of the right claimed by a party is made by the Magistrate: Vide Grant v. Padarath Jha, AIR 1921 Pat 486, Sirkawal Singh v. Bhuja Singh, AIR 1924 Pat 784, Trijogi Narain Singh v. Kamta Prasad, AIR 1955 Pat 265 and Chaturgun Turha v. Jamadar Mian, AIR 1961 Pat 374.

5. But there is no question of recording a finding in accordance with the pro-

viso to sub-section (2) of Section 147 of the Code if the Magistrate be of the view that the right claimed by a party does not exist and then the Magistrate proceeds to make an order prohibiting an exercise of the alleged right. On the findings recorded by the Magistrate in this case, it is clear that the span of the period during which the eaves water from the chhapar of the second party fell on the wall and the chhapar of the first party was too short to enable the Magistrate to declare the existence of such a right as claimed by the second party in his favour. He had purchased the house in the year 1957. The finding of the Magistrate was that after his purchase he reconstructed the house Do-Manjila and thereafter the eaves water of the chhapar started falling on the wall and chhapar of the house of the first party. The learned Magistrate seems to have believed the evidence of Ghughu Baitha in cross-examination when he said that Bhola demolished the entire old house and had constructed the pucca double storeyed building about 1½ years ago. Although it may not be necessary to establish the existence of the right claimed by a party under Section 147 of the Code for the entire requisite period of 20 years or more as observed by the Calcutta High Court in Srimanta Bera v. Indra Narayan Prodhan, (1909) 10 Cri LJ 292, it is clear that exercise of such a right for a short period is not sufficient to enable the Magistrate to make an order in accordance with sub-section (2) of Section 147 of the Code. In the cases referred to above, it would be found that the right was claimed or found to have been exercised for a long period or from time immemorial. That the period of exercise of such right must be long will appear from some of the observations made by a learned Single Judge of the Madras High Court in Kanta Venkanna v. Inuganti Venkata Surya Neeladri Rao, AIR 1930 Mad 865 and by a Bench of this Court of which I was a member in Bhagwati Prasad v. L. N. Keshri, 1960 BLJR 84. In Bhagwati Prasad's case, 1960 BLJR 84, Sahai, J. said at p. 87, column 1—

"..... It seems to me that the right referred to in that section is a legal right and not just bona fide claim of right. If the Magistrate finds, upon evidence adduced before him, that a party claiming the right has been exercising it for a long time — not permissively or otherwise but on assertion of the right of user — the Magistrate may, for the purpose of a proceeding under this section, presume, in the absence of anything to the contrary, that the party has a legal right to the user. He cannot raise any such presumption merely on the basis of circum-

stances which suggest the existence of a right; there must be positive evidence to show long user."

The passage extracted above does lend support to the view I have taken that the right claimed must be shown to have been exercised for a long time and not for a few years as has been found in this case by the learned Magistrate.

6. In the result, the reference is rejected and the rule is discharged.

Reference rejected.

AIR 1970 PATNA 322 (V 57 C 57)

N. L. UNTWALIA, J.

Chaurasi Manjhi and another, Petitioners v. State of Bihar, Opposite Party.

Criminal Revn. No. 97 of 1969, D/- 11-8-1969, against decision of Addl. S. J. Hind Court, Bhagalpur, D/- 28-11-1968.

Penal Code (1860), Ss. 324 and 326 — Instrument for cutting — Tooth is instrument for cutting and serves as weapon of offence and defence — Injury by tooth-bite is offence under Section 324 or 326 depending upon whether injury is simple or grievous. (Para 3)

Shilesh Chandra Misra and Amar Singh, for Petitioners; G. P. Jaiswal, for State.

ORDER:— The prosecution case is that on the 30th August, 1965, at about 8 A.M. when Dasrath Manjhi (P.W. 1) was returning to his house from village Ramchandrapur, near a well of Aman Mandal in his village Sonudih Gangati, petitioner Jagdish Manjhi dealt a lathi blow on his left hand, injuring his left ring finger from behind, and petitioner Chaurasi Manjhi dealt two lathi blows on each of his thighs, whereupon petitioner Jagdish Manjhi gave a lathi blow on the root of his neck. P.W. 1 fell down. Petitioner Jagdish Manjhi rode on his chest and bit his lower lip with teeth, causing bleeding injury. A first information report was lodged, but the Police submitted a final report, saying that it was a case under Section 323, Indian Penal Code which was non-cognisable. The case proceeded on trial upon a complaint filed by P.W. 1. The defence was that the prosecution case was not true. Both the Courts, believing the prosecution evidence, have found the petitioners guilty. Petitioner Chaurasi Manjhi has been convicted under Section 323 of the Penal Code and sentenced to undergo rigorous imprisonment for two months. Petitioner Jagdish Manjhi has been convicted under Section 324 of the Penal Code and has been sentenced to undergo rigorous imprisonment for six months.

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2. The only point which could be urged, and has been urged, in support of this application in revision is that for a tooth-bite conviction of petitioner Jagdish Manjhi under Section 324 of the Penal Code is not legal. It has also been urged that the sentence imposed upon the petitioners is excessive.

2-A. The relevant words in Sec. 324 of the Penal Code are:—

"Whoever voluntarily causes hurt by means of any instrument for cutting shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both."

The question is whether tooth is an instrument for cutting within the meaning of Section 324 of the Penal Code. There is no authority on the point either way. Some indication of it is to be found in an unreported decision of the Bombay High Court given by Beaumont, C. J. and Sen, J., in the book of Ratanlal and Dhirajlal "Law of Crimes", under Section 326 of the Penal Code. The case noticed there is that where a mistress refused to accompany her paramour, who got enraged and bit off the tip of her nose and dislocated one of her teeth, a sentence of two months' rigorous imprisonment was enhanced to one of fourteen months. It is, of course, not very clear from this line alone as to whether the biting on the tip of the nose was considered as a grievous injury caused by teeth or whether the dislocation of one of her teeth was caused by some other instrument. I cannot, therefore, be sure upon that line mentioned in the annotation of the book referred to above.

3. Considering the question, however, myself with reference to the meaning of the words "instrument" and "tooth" in Webster's Third New International Dictionary, I have come to the conclusion that tooth will be an instrument for cutting. According to the said dictionary, "instrument" means "a means whereby something is achieved, performed, or furthered". Although tooth is a part of the body, but there is no difficulty in taking the view that it is a means whereby something is achieved, performed or furthered, and, therefore, it can be characterised as an instrument within the meaning of Section 324 of the Penal Code as also under Section 326, if grievous injury is caused by tooth. According to the same dictionary "tooth" means "one of the hard bony appendages that are borne on the jaws or in many of the lower vertebrates on other bones in the walls of the mouth or pharynx and serve esp. for the prehension and mastication of food and as weapons of offence and defence" (the underlining (here in ' ') is mine). Reading the dictionary meaning of the words "instrument" and "tooth"

therefore, I have unhesitatingly come to the conclusion that for simple injury caused by tooth bite, the offender will be guilty under Section 324 of the Penal Code. If grievous injury is caused by such bite, he will be guilty under Section 326 of the Penal Code. In my opinion, therefore, petitioner Jagdish Manjhi has rightly been convicted under Section 324 of the Penal Code. It may also be added that according to the finding, he has caused simple injury by lathi blow to Dasrath Manjhi. There would have been no difficulty, therefore, in convicting him under Section 323 of the Penal Code.

4. Having considered the facts, the circumstances and the nature of the injury caused to Dasrath Manjhi (P. W. 1) I think, it will be no use sending petitioner Chaurasi Manjhi to jail again. It is said that he has been in jail for about a week. While maintaining his conviction under Section 323 of the Penal Code, I reduce his sentence of imprisonment to the period already undergone. Petitioner, Jagdish Manjhi was the greater aggressor out of the two. He deserves more severe sentence than the one which stands after my modification of petitioner Chaurasi Manjhi. Jagdish Manjhi's case also deserves some concession in regard to the period of sentence. I, therefore, while maintaining his conviction under Section 324 of the Penal Code, reduce his sentence of imprisonment from six months to three months rigorous imprisonment.

5. Subject to the above modification in the sentences of the two petitioners, this application in revision is dismissed.

Revision dismissed.

AIR 1970 PATNA 323 (V 57 C 58)

UNTWALIA AND K. K. DUTTA, JJ.

M/s. Vishnu Sugar Mills Ltd., Appellant v. M/s. Rameshwar Jute Mills Ltd., Respondent.

A. F. A. D. No. 13 of 1966, D/- 6-9-1969, from decision of Sub-J., Samastipur, D/- 23-9-1965.

(A) Sale of Goods Act (1930), S. 38 — Instalment deliveries — Delivery by stated instalments — Defective delivery in first instalment — Whether buyer can treat it as repudiation of whole contract, or only of that defective delivery depends upon term of contract.

(Para 11)

(B) Civil P. C. (1908), S. 34 — Interest — Interest as damages — Breach of contract — Plaintiff is entitled to recover damages only and not any amount of interest thereon either up to the date of the suit or interest pendente lite or future.

CN/DN/B330/70/MVJ/B

AIR 1938 PC 67 & AIR 1963 SC 1685, Rel. on. (Para 12)

(C) Civil P. C. (1908), S. 21 — Objection to jurisdiction — Objection rejected by trial Court and lower Appellate Court — Held, it was necessary for appellant raising objection in second appeal to show that prejudice had been caused.

(Para 3)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1685 (V 50),	
Union of India v. A. L. Rallia Ram	12
(1938) AIR 1938 PC 67 (V 25) = 65	
Ind App 66, Bengal-Nagpur Railway Co. Ltd. v. Ruttanji Ramji	12
(1934) (1934) 1 KB 148, Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.	10
(1930) (1930) 2 KB 312, Robert A. Munro and Company Ltd. v. Meyer	7. 10
(1908) 100 LT 128, Millar's Karri and Jarrah Co. v. Weddel & Co.	10

J. C. Sinha and Nagendra Prasad Singh, for Appellant; Chandra Bhusan Sahay and Uma Shankar Singh, for Respondent.

UNTWALIA, J.:— The Rameshwar Jute Mills Limited, the plaintiff respondent in this Second Appeal, entered into two contracts of sale with the Vishnu Sugar Mills Limited, defendant appellant, through different brokers, for supply of 60,000 gunny bags. The first contract which is Ext. 1/a was entered into on 13-8-1957. It was for supply of 30,000 bags, 10,000 to be supplied and paid for in each of the three months — October, November and December, 1957. The other contract (Ext. 1) was entered into on 28-8-57. It was also for supply of 30,000 bags, 10,000 to be supplied and paid for in each of the three months—October, November and December, 1957. The rate in both the contracts was Rs. 139 per 100 bags. The appellant accepted the contract through its letters (Exts. 2 and 2/a) and thereafter sent despatch instructions to the respondent in its letter dated 22-8-57 (Ext. 2/b) and letter dated 2-9-57 (Ext. 2/c). In pursuance of the despatch instructions, the respondent despatched on 5-10-57 20,000 bags and sent the despatch advice in its letter dated 9-10-57 (Ext. 2/f). The consignment of 20,000 bags was taken delivery of and as the railway receipt had been sent through bank, the payment had also been made by the appellant. A dispute was, however, raised by the appellant in regard to the quality of the bags supplied by the respondent. There was correspondence between the parties and ultimately the appellant refused to accept any supply for the balance of the quantity of bags contracted to be sold by the respondent, i.e., 40,000 bags. The respondent, thereupon, after giving a formal notice to the appellant instituted the present suit giving rise to this Second Appeal

on the 11th of October, 1958 for realisation of Rs. 3,100/- as damages for breach of contract on the basis that the market rate of gunny bags had gone down to Rs. 134-50 in November, 1957 and Rs. 128/- in December, 1957. In other words, a sum of Rs. 900/- by way of damages was claimed at the rate of Rs. 4.50 per 100 bags for the instalment of 20,000 bags, which was to be supplied in November and at the rate of Rs. 11 per 100 for the last instalment of 20,000 bags, which was to be supplied in December, 1957. The respondent also claimed a sum of Rs. 86.81 by way of interest at 12 per cent. per annum on the said amount of Rs. 3,100/- from 4-7-58 to 28-9-58; it also claimed interest pendente lite and future.

2. The learned Munsif who tried the suit held that the appellant had committed breach of the contract and was liable for damages. It decreed the suit of the respondent for the total amount of Rs. 3,186.81. No interest pendente lite or future, however, was either allowed or disallowed by the learned Munsif in express terms. The result was that it must be deemed to have been disallowed. The defendant went up in appeal. The plaintiff did not file any cross-objection for claiming any amount of interest pendente lite or future. The lower appellate court has upheld the decision of the learned Munsif and hence the defendants has preferred this Second Appeal.

3. In order to appreciate and decide the point which has been raised in this appeal, it is necessary to refer to some salient features and facts of the case from the admitted correspondence between the parties. Before I do so, I may dispose of the point of jurisdiction, which had been raised by the appellant in the trial court in that the Samastipur Court had no jurisdiction to try the suit. The trial court held against the appellant; so did the lower appellate court in this regard. The point was mentioned in this Second Appeal but could not be pressed not only because on merits it had no substance but also because it was difficult for the appellant to show any prejudice as it was necessary to be shown under Section 21 of the Code of Civil Procedure.

4. From the contracts (Exts. 1/a and 11) which are in identical terms it is necessary only to refer to the description of the goods agreed to be supplied so far as it relates to weight. Apart from other descriptions in the contract, the weight mentioned of the bags was 2 pounds 10 ounces or 25/8 pounds which is identical. In regard to the delivery, as already stated, a specific stipulation was there in both the contracts that 10,000 bags were to be supplied in October, 10,000 in November and 10,000 in December, 1957. There was another term provided in the contract in bold letters which ran as follows:—

"Each month's delivery to be considered as a distinct and separate contract".

The first letter to which I would now make reference is Ext. 2/g, a letter dated 12-10-57 written by the appellant to the respondent. This letter was written in reply to the respondent's letter dated 9-10-57 (Ext. 2/f), and it appears that Ext. 2/g was written even before the arrival of the goods. Without stating any rhyme or reason the appellant asked the respondent to wait for further instructions regarding the despatch of the bags contracted to be supplied, and it stated further that the previous despatch instructions were to be treated as cancelled. To start with, the letter (Ext. 2/g) by itself makes the conduct of the appellant appear somewhat unfair and suspicious as there is nothing in the record of this case to show as to why it cancelled the despatch instructions which it had given earlier without any rhyme or reason. The respondent gave a reply to Ext. 2/g by its letter dated 17-10-57 (Ext. 2/h) and wanted fresh instruction for November portion of goods before the commencement of the delivery period so that despatches may be made conveniently during the month.

5. It is not known from the materials in the records of this case as to when exactly the consignment of 20,000 bags arrived at Harkhua. The goods were despatched from Muktapur, as stated above, on 5-10-57. Both the railway stations are on the lines of the North-Eastern Railway. It may be presumed, therefore, that in ordinary course the consignment must have arrived sometime in October, 1957. On receipt of the consignment the appellant sent telegram (Ext. 3) on the 2nd of November, 1957 reading as follows:—

"Gunnies very inferior quality weighing 17 chhataks containing heavy moisture, unsuitable for sugar packing. Please settle before further despatch".

The appellant sent a confirmatory letter of the telegram, which is dated 6-11-57 and is Ext. 2/u. The respondent, however, had sent a letter to the appellant on 5-11-57 (Ext. 2/i) in reply to the telegram (Ext. 3) intimating that it was arranging to send its representative to inspect the bags, and as regards further despatch a suggestion was given by the respondent that the appellant Company should send its man to inspect the bags in the godowns and mark the bales for being despatched to it, so that the quality may be inspected before despatch and further troubles may be avoided. In pursuance of the letter (Ext. 2/i) the respondent informed the appellant by another letter dated 11-11-57 (Ext. 2/j) that it was sending its representative Shri. D. N. Choudhry to inspect the bags already supplied, regarding which a complaint had been made by

the appellant. After an inspection report followed the letter (Ext. 2/k) dated 20-11-57 from the respondent to the appellant stating therein that the former's representative had been to the latter to verify the quality of bags and had reported that the bags were found 0.8 per cent. light in weight at an average, which was a negligible percentage. It also informed the appellant that the quality of the bags had been subsequently improved and requested it to permit the respondent to book further consignments; if still it had any doubt, it may send its representative to inspect the bags before they were despatched. In reply to Ext. 2/k the appellant wrote a letter to the respondent on 23-11-57 which is Ext. 2/y.

In this letter it did not dispute the correctness of the report of Shri D. N. Choudhry in regard to the difference in the weight of the bags. It merely intimated that the bags were lying at mill site and were not suitable for sugar bagging and were hence rejected; a refund of the price of 20,000 bags was asked for. The appellant also intimated by this letter that it was not inclined to give any further despatch instructions for the balance of the quantity. In reply to Ext. 2/y, a letter dated 3-12-57 (Ext. A/5) was written by the respondent Company to the appellant Company. It offered to give proportionate rebate for the slightly defective quality of the 20,000 bags supplied and reiterated its suggestion for further supply that it should be made after the representative of the appellant had inspected the bags before despatch. The appellant gave a reply to Ext. A/5 on 5-12-57, which letter is Ext. A/6. It made an enquiry from the respondent as to what amount it offered by way of rebate for the defective 20,000 bags supplied, but it added that it was not in a position to send any responsible representative to the respondent's mill to inspect further supply of goods before the despatch, as its crushing season had already commenced.

The respondent gave a reply to Ext. A/6 by its letter dated 10-12-57 (Ext. 2/n) offering a rebate of Rs. 222 for 20,000 bags on the ground that the shortage in weight worked up in terms of price at Rs. 1.11 per 100 bags. The appellant did not accept this offer and for the first time disputed the quantum of defect in the bags supplied in its letter dated 25-1-58 (Ext. 2/x). Thereafter further correspondence followed between the parties, which has been referred to by the learned Munsif in his judgment elaborately and briefly by the learned Subordinate Judge in his judgment. It's not necessary for me to refer to it. I may only state that the respondent Company insured for the remaining supply to be made and completed. The appellant Company ultimately cancelled the contracts in express terms.

At one stage, the respondent Company had accepted to take back the allegedly defective bags supplied but even they were not returned. Eventually, as stated above, the suit was filed for recovery of the amount of damages to the tune of Rs. 3,100/- besides interest.

6. The courts below have held on the facts and in the circumstances of this case that in the first instance there was no breach of contract committed by the respondent as the defect in the quality of the 20,000 bags was not substantial. The appellant, on the other hand, committed a breach of the contract in refusing to accept delivery of the remaining quantity of the bags. In the alternative, they have taken the view with reference to Section 38 of the Sale of Goods Act, 1930 (hereinafter to be called the Act) that in view of the express term in the contracts each month's delivery was to be considered as a separate contract and, therefore, the appellant could not refuse to accept delivery in regard to the other two instalments of November and December, 1957.

7. Learned counsel for the appellant submitted on the authority of Robert A. Munro and Co., Ltd. v. Meyer, (1930) 2 KB 312 that the view taken by the courts below on the basis of the specific term in the contracts referred to above is erroneous. He seems to be right to this extent. Wright, J. as he then was, has said at page 332 with reference to the identical provision of Section 31 of the English Sale of Goods Act, 1893 that such a clause "cannot be construed so as to defeat the rights of the buyer under Section 31 of the Sale of Goods Act". Section 38 of the Act reads as follows:—

"(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

If the transaction is one which is covered by sub-section (1) of Section 38 of the Act, principle of law engrafted in Section 39 of the Contract Act, 1872 comes into play. In such a situation "when a party to a contract has refused to perform, or disabled himself from perform-

ing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance". But here in specific terms the delivery by instalment was provided namely, under both the contracts 10,000 bags each month. That being so, even though the specific term in the contract was there, namely, each month's delivery to be considered as a separate contract, it cannot have the effect of making one contract three contracts for all purposes. Undoubtedly, however, it will have the effect of bringing the case under second sub-section of Section 38 of the Act.

8. I also do not propose to discuss or affirm the findings of the courts below that the respondent had not committed any breach when it supplied slightly defective bags, as admitted by it, in the first instalment of 20,000 bags. A question in that connection, which could have arisen but has not been canvassed in the courts below, was as to whether the defect noticed in the 20,000 bags was a breach of the condition or a warranty within the meaning of the 12th Section and the sections following that occurring in the Act, which entitled the buyer to put an end to the contract or to claim damages only. That question would have been relevant if the contract would have been one and whole and not a contract for supply of the bags in instalments. I shall assume in favour of the appellant that the respondent had supplied defective goods and had, thereby, committed a breach of the contract, entitling the former to claim damages from the latter in respect of the first instalment.

9. The question, however, which falls for determination in this appeal is whether the breach of contract on the part of the respondent was a repudiation of the whole contract or whether it was a severable breach giving rise to a claim for compensation only but not right to a buyer, namely, the appellant to treat the whole contract as repudiated in accordance with Section 38(2) of the Act. No hard and fast rule has been laid down and can be laid down in this regard as the section itself provides—

"..... it is a question in each case depending on the terms of the contract and the circumstances of the case". But there are certain guiding principles which can be found in some of the cases and some of the standard text books to which I shall presently make a reference.

10. In Halsbury's Laws of England, Third Edition, Volume 34, with reference to a case of *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley) Ltd.*, (1934) 1 KB 148 it has been stated in foot-note (k) at p. 105 that "the main tests for determining as to whether a

breach is vital where it renders the performance of the rest of the contract something substantially different from what the party not in fault contracted for are (1) the quantitative ratio of the faulty instalments to the whole contract, and (2) the degree of probability of a repetition of the breach". It will be advantageous to quote a passage which occurs at page 106. It reads as follows—

"In contracts for the sale of goods where delivery is to be made by instalments to be separately paid for, the consideration is not entire; it has been divided, and consequently a breach as regards one or more instalment of the goods is not necessarily the breach of a condition precedent to the liability of the other party to accept or deliver the remainder. In such a case each delivery is really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract. The party therefore who commits a breach which is merely partial is allowed by law to aver that he is ready and willing to perform the rest of the contract, subject to compensation by the other party for the partial breach."

In the Sale of Goods Act by Pollock and Mulla, Third Edition, with reference to the case of *Millar's Karri and Jarrah Co. v. Weddel and Co.*, (1908) 100 LT 128, the law has been stated thus at p. 159—

"But a breach in respect of one delivery may be evidence from which it can be properly inferred that similar breaches will be committed in relation to subsequent deliveries, so that the contract may be rescinded by the other party."

Even in the case relied on by the appellant — (1930) 2 KB 312 — on the facts, *Wright, J.*, at page 331 had said—

"My conclusion is that in such circumstances the intention of the seller must be judged from his acts and from the deliveries which he in fact makes, and that being so, where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated."

11. Keeping these principles in view, let us see whether on the facts of the present case it is possible to take a view in favour of the appellant that the breach of the contract in regard to the first instalment was tantamount to a repudiation of the whole contract on the part of the seller and entitled the buyer to treat the whole contract as repudiated. The complaint in the telegram (Ext. 3) was that the gunny bags forming part of the consignment of 20,000 bags weighed 17 chha-

taks as against the contract weight of 2 pounds 10 ounces which would roughly correspond to 1 seer $4\frac{1}{2}$ chhataks. The next complaint was that the bags contained heavy moisture making them unsuitable for sugar packing. As against such a serious complaint, the only defect found was that the shortage in weight of the bags was 0.8 per cent., which would be roughly speaking, one-sixth of a chhatak only. No moisture content was found by Shri D. N. Choudhry. His report, as I have stated above, was not disputed in the earlier correspondence and was, for the first time, disputed in January, 1958. But the only witness examined on behalf of the appellant admitted in court that the report of Shri D. N. Choudhry as to the defect in the bags supplied was correct. The courts below have, therefore, proceeded upon the basis that the defect in the bags was slight and negligible. As against the contract weight of 1 seer $4\frac{1}{2}$ chhataks, the bags weighed on average 1 seer $4\frac{1}{3}$ chhataks each.

The complaint of shortage in weight was that it was less by $3\frac{1}{2}$ chhataks. As against it, the shortage found was one-sixth of a chhatak only. If the bags contained heavy moisture, undoubtedly they were unsuitable for sugar packing. But no moisture content was found. This shows that the conduct of the appellant Company or its officers or employees was not business-like in making a case of such serious defect in quality while actually the defect was slight. The reason is not far to seek. As found by the courts below, the market rate of the gunny had fallen in November and December 1957, and that seems to be the reason that the appellant Company wanted to wriggle out of the contract in regard to the supply of the next two instalments on the plea of a serious defect in quality of the bags supplied, which fact was not correct. Furthermore, the respondent Company showed its willingness to despatch the further consignments after the bags had been inspected by a representative of the appellant Company. The respondent, by its conduct, did not leave any scope for the assumption in the mind of the appellant Company's representatives that similar breaches would be committed in relation to subsequent deliveries so that it could rescind the whole contract. On an excuse of the crushing season, the appellant Company refused to send its representative to see the quality of the bags before their despatch. It seems to me that the appellant did so because the market rate of bags was falling at the relevant time as it had fallen by Rs. 4.50 per 100 bags in November and to the extent of Rs. 11 per 100 bags in December, 1957.

On the facts and in the circumstances of this case, therefore, I have unhesitant-

ingly come to the conclusion that the breach of contract on the part of the respondent Company, assuming it was a breach as I have assumed above in regard to the supply of the 20,000 bags, was not a repudiation of the whole contract; it was a severable breach which could have given rise to a claim for compensation only but did not give rise to a right to treat the whole contract as repudiated within the meaning of Section 38(2) of the Act. That being so, the courts below, in my opinion, have rightly held that the appellant did commit breach of contract in respect of the balance of 40,000 bags which were to be supplied in November and December, 1957. The suit for damages to the tune of Rs. 3,100 has rightly been decreed by the courts below. No counter claim on any account has been made by the appellant in regard to the severable breach in relation to the supply of 20,000 bags in the first instalment.

12. On the question of interest up to the date of suit on damages, it is well settled that no interest can be awarded (vide *Bengal Nagpur Railway Co., Ltd. v. Ruttanji Ramji*, AIR 1938 PC 67, and *Union of India v. A. L. Rallia Ram*, AIR 1963 SC 1685). There will be, therefore, a slight modification in the decree passed by the courts below; the respondent will be entitled to recover a sum of Rs. 3,100 only by way of damages from the appellant and not any amount of interest either upto the date of the suit or interest pendente lite or future in regard to which a reason has already been stated in this Judgment.

13. In the result, the appeal is partly allowed to the extent indicated above, but the respondent must have its costs of this appeal on the amount of Rs. 3,100 as in regard to the substantial and main amount the appeal has failed.

14. K. K. DUTTA, J.: I agree.

Appeal dismissed.

AIR 1970 PATNA 327 (V 57 C 59)

S. C. MISRA, C. J. AND
S. WASIUDDIN, J.

Syed Rafiqur Rahman, Petitioner v.
Commissioner of Wealth Tax, Patna,
Opposite Party.

Tax Case No. 5 of 1966, D/- 16-8-1969.

(A) Wealth Tax Act (1957), S. 2(e) — Assets — 'Agricultural land' meaning of — Intention of owner of land not irrelevant but has bearing on its determination — Land situated in heart of residential area, not found cultivated on date of valuation under S. 2(g) is not agricultural land and is an asset for assessment.

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When statutes, such as the Wealth Tax Act and the Constitution do not define agricultural land, then the ordinary meaning of the expression according to English language has to be taken. The word "agriculture" in its primary sense denotes the cultivation of the field and is restricted to cultivation of the land in the strict sense of the term. Though whether a particular land is agricultural land or not will be dependent on the intention of the owner, it cannot depend on his fluctuating or ambulatory intention. The criterion must be something more definite and more objective. The intention of the owner is a factor which would bear on the nature or character of the land dependent on other factors. Land situated in wholly residential area surrounded by buildings and not found under cultivation on the date of valuation under S. 2(g) is not an agricultural land and is liable to be assessed to Wealth Tax. AIR 1949 PC 13 & AIR 1957 SC 768 & AIR 1965 Guj 259, Rel. on; AIR 1967 Andh Pra 189, Ref., AIR 1944 Mad 401 & AIR 1951 Orissa 11 & AIR 1942 Pat 296, Dist. (Para 7)

(B) Wealth Tax Act (1957), S. 2 (m) and (e) — Net wealth — Claim for exemption from assessment on ground that certain land being agricultural land was not an "asset" — Onus of proof is on claimant — Non-assessment in previous years — No inference that land was accepted as agricultural land.

An assessee claiming that the Act would not apply to the land since it was an agricultural land, must prove by cogent and reliable evidence that the land was being actually used as agricultural land at the relevant point of time. AIR 1969 Ker 304, Rel. on. The fact that land was not assessed to Wealth Tax in previous assessments cannot lead to the inference that the land was accepted as agricultural land. (Para 8)

(C) Evidence Act (1872), S. 35 — Municipal Records — Presumption of correctness — Presumption relates only to the period when entries were made.

(Para 7)

Cases Referred: Chronological Paras

(1969) AIR 1969 Ker 304 (V 56) =

(1969) 72 ITR 226, V. Venugopala Varma Rajah v. Controller of Estate Duty, Kerala

(1967) AIR 1967 Andh Pra 189 (V 54) = (1967) 63 ITR 534, Smt. Manyam Meenakshamma v. Commr. of Wealth Tax

(1965) AIR 1965 Guj 259 (V 52) = (1965) 55 ITR 608, Rasiklal Chimanlal Nagri v. Commissioner of Wealth Tax, Gujarat

(1957) AIR 1957 SC 768 (V 44) = (1957) 32 ITR 466, Commissioner of I. T. W. B. v. Raja Benoy Kumar Sahas. Roy

(1951) AIR 1951 Orissa 11 (V 38) =

ILR (1950) Cut 322, Paramananda Das v. Shankar Rath

(1949) AIR 1949 PC 13 (V 36) =

75 Ind App 268, Mustafa Ali Khan v. Commr. of I. T. U. P. Ajmer and Ajmer Merwara

(1944) AIR 1944 Mad 401 (V 31) =

1944-1 Mad LJ 361, T. Sarojini Devi v. T. Sri Krishna

(1942) AIR 1942 Pat 296 (V 29) =

ILR 21 Pat 336, Deen Mohammad Mian v. Hulas Narain Singh

Tarkeshwar Prasad, Shambhu Barmeshwar Prasad, Rameshwar Prasad, Shambhu Sharan and Manindra Nath Verma, for Petitioner; Ugra Singh, for Opposite Party.

WASIUDDIN, J.: This is a reference under Section 27(3) (b) of the Wealth Tax of 1957 (Act 27-of 1957).

2. The relevant facts which have given rise to this present reference may be briefly stated as follows: The assessee was assessed under the Wealth Tax Act for the year 1962-63 for which the relevant date of valuation is 31-3-1962. The assessee filed a return disclosing his net wealth of Rs. 1,07,699. The Wealth Tax Officer determined the total wealth at Rs. 5,91,999. He included in this assessment a sum of Rs. 1,50,000 (One lac fifty thousand) representing the value of a plot of land owned by the assessee bearing survey plot No. 794 and situated at Bhat-tacharjee Road, Patna. The assessee contended that this was agricultural land and, therefore, was not liable to assessment under the Wealth Tax Act. The Wealth Tax Officer overruled this objection and as stated above included the value of this land also. The assessee then preferred an appeal before the Appellate Assistant Commissioner for the Wealth Tax and he dismissed the appeal and confirmed the order of the Wealth Tax Officer. The assessee, therefore, preferred an appeal before the Appellate Tribunal, and there also it was contended that the land in question was agricultural and used for agricultural purposes and as such not liable to assessment. The Appellate Tribunal also dismissed the appeal and thereafter an application was filed before the Appellate Tribunal for referring the case to the High Court and this was also rejected. The assessee then moved the High Court and a Division Bench of this Court on 30-8-1966 directed the Tribunal to state the case for the opinion of the Court under sub-section (3) of Section 27 of the Wealth Tax Act. The question which was formulated by the Court is as follows:—

"Whether on the facts and circumstances of the case the Tribunal was justified in holding that the disputed land was not agricultural land on the relevant date for the purpose of Wealth Tax Act."

3. Before I take up the discussion of the facts and the questions of law which are involved in answering this question, I may first of all refer to the relevant provisions of the Wealth Tax Act (hereinafter called as 'the Act'). The charging section is Section 3 of the Act which lays down as follows:

"Subject to the other provisions contained in this Act, there shall be charged for every financial year commencing on and from the first day of April, 1957, a tax (hereinafter referred to as wealth-tax) in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule."

The tax, is, therefore, payable on the net wealth and so it is necessary to see as to what is the definition of 'net wealth' and 'assets' in the Act. 'Net wealth' is defined in Section 2(m) of the Act which is as follows:—

"'net wealth' means the amount by which the aggregate value computed in accordance with the provision of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date other than..."

There are certain exceptions which do not constitute the net wealth and are given in this section, but it is not necessary to reproduce those here. The word 'assets' has been defined in Section 2(e) of the Act which runs as follows:—

"'assets' include property of every description, movable or immovable, but does not include—

- (i) agricultural land and growing crops, grass or standing trees on such land;
- (ii) any building owned or occupied by a cultivator or receiver of rent or revenue out of agricultural land.

Provided that the building is on or in the immediate vicinity of the land and is a building which the cultivator or the receiver of rent or revenue by reason of his connection with the land requires as a dwelling-house or a store-house or an outhouse;

....."

This clearly shows that agricultural land will not be liable to assessment under this Act, but no definition of 'agricultural land' has been given in the Act. Item No. 86 of List I of the Seventh Schedule of the Constitution of India permits the levy of taxes by the Central Government on the capital value of the assets exclusive of agricultural land, of individuals and companies; but there is no definition of the words "agricultural land" in the Constitution also. In this present case, admittedly

a piece of land measuring 1 bigha 9 kathas 17 dhurs belonged to the assessee and this land was recorded as mango orchard in the survey khatian of the Patna City Municipality which was finally published in 1933.

According to the assessee it was recorded as mango orchard in the municipal survey and that such an entry has got a presumption of correctness and that thereafter rent was also fixed for this land under the Land Reforms Act for which receipts were granted by the Government. This position was also not disputed that this land is situated at Bhattacharjee Road which is in the heart of the town of Patna and the situation of this land is such that it is within a residential area and has got buildings on all sides. It was also admitted that this land was sold in July, 1962 for a consideration of Rs. 1,50,000. It also appears that in the previous assessments no tax was levied in respect of this land and for the first time tax was being levied for this land also in the year 1962-63, and it was also urged on behalf of the petitioner that for the previous years since no assessment was made in respect of this land, so it can be taken that the department accepted the position that it was an agricultural land. According to Section 3 of the Act which I have quoted above, the important date is what has been described there as the valuation date. The words "valuation date" have been defined in Section 2(q) of the Act and according to that definition as also conceded in this case by both the parties, the valuation date in this case is 31-3-1962. It has, therefore, to be seen in the light of the facts and the circumstances, stated above, whether this land on the date of the valuation was or not agricultural land.

4. Since there is no definition of the words "agricultural land" either in the Act or in the Constitution, so the learned counsel for both the parties have relied on several decisions in support of their respective contentions as to what kind of lands should be deemed to be "agricultural land." It may also be mentioned here that the department relied on the inspection report of the Wealth Tax Officer which was in November, 1962. The Wealth Tax Officer in his order (vide page 2 of the paper book) stated as follows:—

".....I have inspected the land personally in November, 1962 and made enquiries from the people of the neighbouring area. It was apparent on inspection that the plot was not used for agricultural purposes. There are, of course, a few palm trees on the fringes but there was no evidence or trace of extensive cultivation on the main plot."

It was contended by the learned counsel for the assessee that this report should not be accepted firstly because such an inspection was held in the absence of the as-

sessee and secondly that his inspection was in November, 1962, that is to say, long time after the valuation date, which as stated above is 31-3-1962. The petitioner had also filed in the case a certificate (vide page 5 of the paper book) granted by Shri B. S. Jain, Branch Manager, Road Transport Corporation. The admitted position is that in July, 1962 the land had been sold to the aforesaid Road Transport Corporation by the assessee. The Branch Manager, therefore, was a very competent person to state as to actually what was the condition of the land at the time of his purchase. The certificate given by him is as follows:—

"Road Transport Corporation
Road Carriers
Exhibition Road, Patna-I.

I, Bhim Sain Jain, Mukhtiar am of Road Transport Corporation Exhibition Road, Patna, hereby certify that we have purchased a piece of land plot No. 794, Holding No. 196, Circle No. 9, Ward No. 2 and Sheet No. 31.

When the negotiation for the bargain was going on the land in question was full of Banana trees, palm trees and other vegetable trees with a pucca well. The sal trees and plant of vegetables have been cut by us for clearing the land for our purpose.

For Road Transport Corporation
Sd. B. S. Jain,
Branch Manager,"

5. One significant feature about this certificate is that there is no date. Shri Jain in his certificate has referred to the time when the negotiation for bargain was going on, and as the sale took place in July, 1962, so the negotiation must have been going on from some time before July, 1962. He has stated that at the time of the negotiation the land was full of banana trees, palm trees and other vegetable trees. It has been urged on behalf of the opposite party, that the existence of the banana trees and palm trees would not show that the land was agricultural land and was being used for agricultural purposes because there was nothing to show that there was any actual cultivation going on and as far as the sal trees are concerned, they must have been on the land without having been planted or the land having been cultivated for the same. It is quite obvious that the Road Transport Corporation purchased the land for putting up structures and buildings and so whatever trees were there must have been cut down and, therefore, the inspection by the Wealth Tax Officer in November, 1962 will show only the state of the land after such clearance had started.

6. The learned counsel for the petitioner has relied on a decision of this Court in the case of Deen Mohammad Mian v. Hulas Narain Singh, AIR 1942 Pat 296.

In that case the question for consideration was as to what would be the meaning of the words "agricultural land" as has been mentioned in Section 5(2) of the Bihar Tenancy Act, and whether a mango orchard planted by an occupancy raiyat was an agricultural land or not. It was held in that case that the primary meaning of agriculture is the cultivation of the ground, and that expression of "agricultural land" in Section 5(2) is not limited to land by which seasonal ploughing and sowing food crops are grown. In view of Section 23-A of the Act it was also held that the occupancy raiyat could also plant trees and that a mango orchard would also be agricultural land. In my opinion, this ruling would not be strictly applicable to the present facts of the case because there the decision was in the light of the provisions of Section 5 and Section 23-A of the Bihar Tenancy Act. And, even if, it be taken that a mango orchard would also be an agricultural land, the assessee cannot take advantage of this fact because from the materials available, it appears that there was no evidence that the land was a mango orchard on the valuation date. As a matter of fact, it appears that apart from the certificate of the Branch Manager of the Road Transport Corporation, the case of the assessee was that he had been planting trees and there were trees in existence on the land. The mere existence of some trees on the land would not make the land agricultural.

The learned counsel has also relied on a decision in the case of T. Sarojini Devi v. T. Sri Krishna, AIR 1944 Mad 401 where it was also held that mango grove is agricultural land. It may be mentioned here that the aforesaid decision was in respect of a case relating to Hindu Women's Right to Property Act, 1937 and the use of the words "agricultural land" in Section 3 of that Act. Reliance has also been placed on behalf of the petitioner on the decision in the case of Paramananda Das v. Sankar Rath, AIR 1951 Orissa 11 where it was held that the expression "agricultural lands" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. This was a case with reference to the Orissa Tenancy Act. These decisions show that a mango orchard can also be regarded as an agricultural land, but in this present case, as I have pointed above, there was no evidence whatsoever to show that there was any mango orchard in the sense that mango trees were actually in existence at the time of the valuation date.

7. I may also refer here in this connection to a decision of the Privy Council in the case of Mustafa Ali Khan v. Commr. of Income-tax, U. P., Ajmer and Ajmer-Merwara, AIR 1949 PC 13. That

was a case under the Income-tax Act and the question was whether the income from the forest was agricultural income and as such liable to exemption under the Income-tax Act. It was held in that case that though it must always be difficult to draw a line, yet, unless there is some measure of cultivation of the land, some expenditure of skill and labour upon it, it cannot be said to be used for agricultural purposes within the meaning of the Income-tax Act. It was also held that income from the sale of forest trees growing on land naturally or without the intervention of human agency, even if the land is assessed to land revenue, is not agricultural income within the meaning of Section 2 (1) (a) of the Income-tax Act. According to this decision there should be some evidence of some measure of cultivation of the land.

The controversy on the question as to what would be deemed to be agricultural land has been set at rest by a decision of the Supreme Court in the case of Commissioner of Income-tax, West Bengal, Calcutta v. Raja Benoy Kumar Sahas Roy, (1957) 32 ITR, 466 = (AIR 1957 SC 768). It may be also mentioned here that in this aforesaid decision of the Supreme Court all the previous decisions of the different High Courts as well as the meaning of the word "agricultural" as given in the different dictionaries were also considered. It was held that the word "agriculture" in its primary sense denotes the cultivation of the field and is restricted to cultivation of the land in the strict sense of the term, meaning thereby tilling of the land, sowing of the seeds, planting and similar operations on the land. These are basic operations which required the expenditure of human skill and labour upon the land itself. It was also pointed out in that decision that besides these other operations which are to be carried on the land and these are subsequent operations and it was held that only if this integrated activity which constitutes agriculture is undertaken and performed in regard to any land then that land can be said to be used for agricultural purpose. The tests therefore, which have been laid down in the aforesaid Supreme Court decision have to be applied to see whether any land is agricultural land or not. It is also clear that when the relevant Statutes, such as the Wealth Tax Act and the Constitution do not define agricultural land, then the ordinary meaning of the expression according to English language has to be taken. In the case of Rasiklal Chimanlal Nagri v. Commr. of Wealth-tax, Gujarat of the Gujrat High Court, 1965 55 ITR 608 = (AIR 1965 Guj 259) which was a case under the Wealth tax Act, the question came up for consideration as to what is the meaning of the expression "agricultural land" as con-

templated in the Wealth-tax Act. It was also considered in that case as to whether a particular land is agricultural land or not will be dependent on the intention of the owner. It is quite obvious that the owner may use a vacant piece of land either for cultivation or as a building site, but naturally the character of the land cannot be solely dependent on his intention to use the land as such. The question whether the land is agricultural land or not cannot depend on the fluctuating or ambulatory intention of the owner of the land. The criterion must be something more definite and more objective, something related to the nature or character of the land and not varying with the intention of the owner as to the use to which he wants to put the land at a particular point of time. The intention of the owner, however, is not altogether irrelevant, but it is a factor which would bear on the nature or character of the land dependent on other factors.

In the Gujarat case referred to above, the plots in dispute about which it was said that these were agricultural lands were situated in a wholly residential area with numerous residential buildings surrounding them and further more these were situated in an area in respect of which a Town Planning Scheme was in force for some years and some of the plots in question were cultivated up to the year 1934-35, but had ceased to be cultivated since then and no agricultural operations were being carried on in those plots since about 21 to 22 years, and the assessee had no special reasons for stopping cultivation on those plots other than the intention to use them for non-agricultural purposes. It was held in those circumstances the plots in question cannot be said to be agricultural lands.

Here in this present case, also as already pointed above, the plot in question is situated in the residential area and there was no doubt the evidence of the entry in the Municipal Survey Khatian in the year 1938 and also assessment and fixation of the rent of this land under the Land Reforms Act, but it appears that there was no evidence oral or documentary adduced on behalf of the assessee to show that the land was actually being cultivated even after 1933. The entry in the Municipal Survey Khatian has no doubt statutory presumption of correctness, but that will be of a time when the entry was made and here in this case we have to see as to what was the character of the land and whether it was the agricultural land or not on the relevant date, that is, on 31-3-1962. In my opinion, for the purposes of determining whether a particular piece of land is agricultural land or not, the tests as laid down in the Privy Council decision of AIR 1949 PC 13 and the Supreme Court decision of (1957) 32 ITR 466 = (AIR 1957

SC 768) have to be applied. Applying these tests it appears that except there was some evidence that there were banana trees and other trees on the land, but there was no evidence of the land having been actually being cultivated at the relevant date and that basic operations and subsequent operations as laid down in the Supreme Court decision were being carried on at the relevant point of time. This fact has also to be seen as to where the land is situated and when a land is situated in the heart of a town surrounded by residential buildings, then it cannot be regarded as agricultural land except on application of the tests which have been laid down it appears that actually the land was an agricultural land. It is also obvious that had it been an agricultural land then it would not have fetched such an enormous price on the sale of the land. I may also refer here in this connection to the decision of the Andhra Pradesh High Court in the case of Smt. Manyam Meenakshamma v. Commr. of Wealth-Tax, A. P., (1967) 63 ITR 534 = (AIR 1967 Andh Pra 189) which was also a case under the Wealth-tax Act. It was held that if a land is ordinarily used for agriculture or for purposes subservient to or allied to agriculture, it would be agricultural land and if it is not so used, it would not be agricultural land and the question how a land is ordinarily used which is one of the facts according to the evidence of each case.

8. It may also be mentioned here that the learned counsel for the petitioner has submitted that since the petitioner assessee was not claiming exemption under the provisions of the Wealth-tax Act, but was claiming immunity from the applicability of the Act to this land, so the onus was on the department and for this reliance has been placed in the case, of V. Venugopala Varma Rajah v. Controller of Estate Duty, Kerala, (1969) 72 ITR 226 = (AIR 1969 Ker 304). It was a case under the Estate Duty Act. It was held there that if what the assessee claims is an exemption from tax liability the burden of proving that he is entitled to the exemption is on the assessee and that what the assessee claims is an immunity from the tax liability on the ground that the subject does not fall within the ambit of the taxing statute, the revenue has to establish that the subject is taxable. True it is that the assessee in this present case was claiming that this Act would not apply to the land since it was an agricultural land, but it would not absolve the assessee from proving by cogent and reliable evidence that the land was being actually used as agricultural land at the relevant point of time. There was no satisfactory evidence on this point and so having regard to all the circumstances, the authorities including the Tribunal were quite

right in holding that this land was not agricultural land. As pointed above, the learned counsel for the petitioner has also submitted that in the previous returns which were accepted this land was not assessed to tax because the position was accepted that it was agricultural land. This position is not disputed that in the previous assessments this land was not included, but it appears that the authorities perhaps did not realize at that time the significance and the importance of the character and location of the land and also the point whether it was actually being used as agricultural land or not, and subsequently when they realised that it was not agricultural land, then they assessed tax on this land also. Regard being had to the different interpretations which have been put to the meaning of the expression "agricultural land", and also other circumstances which I have discussed above, the department cannot be held to have erred in making assessment on this land also when it transpired that this land was also subject to assessment of Wealth-tax.

9. On a consideration of the entire set of circumstances and the legal aspects of the matter, the question which has been referred by the Tribunal is answered in the affirmative to the effect that on the facts and the circumstances of the case, the Tribunal was justified in holding that the disputed land was not agricultural land at the relevant date for the purposes of the Wealth-tax Act. This reference is thus disposed of, but in view of the circumstances of the case, no order for costs is made.

10. MISRA, C. J.:— I agree.

Reference answered.

AIR 1970 PATNA 332 (V 57 C 60)

B. D. SINGH, J.

Mohammad Abbas and another, Petitioners v. Mohammad Mustaqim and others, Opposite Party.

Criminal Revn. No. 2177 of 1968, D/-29-7-1969, from order of Subdivisional Magistrate, Monghyr, D/-23-9-1968.

(A) Criminal P. C. (1898), S. 145 — Dispute regarding land — Apprehension about breach of peace essential to initiate proceeding under — Magistrate's order must show his satisfaction about existence of such apprehension. AIR 1968 SC 1444, Foll. (Paras 7 and 8)

(B) Civil P. C. (1908), S. 115 — Revision — High Court will interfere if order under S. 145, Criminal P. C. does not show existence of apprehension of breach of peace. AIR 1950 Pat 372. Disting. (Para 8)

CN/CN/B362/70/DGB

(C) Criminal P. C. (1898), S. 145 — Dispute about land likely to cause breach of peace — Magistrate's order must show such apprehension — Mere mention in notice to parties is not enough. (Para 8)

Cases Referred: Chronological Paras

[1968] AIR 1968 SC 1444 (V 55) =
1969 Cri LJ 13, R. H. Bhutani v.
Miss Mani J. Desai 7. 8

[1962] AIR 1962 Pat 468 (V 49) =
1962 BLJR 267 = 1962 (2) Cri LJ
770, Shreedhar Thakur v. Kesho
Sao 16

[1950] AIR 1950 Pat 372 (V 37) =
51 Cri LJ 1365, Wazir Mahton v.
Badri Mahton 8

Devendra Narayan. Sinha, for Petitioners; Prem Shankar Sahay, Rudradeo Kumar Sinha and Harendra Prasad, for Opposite Party.

ORDER:— This application in revision has been preferred against the preliminary order of the Subdivisional Magistrate passed in a proceeding under Section 145 of the Code of Criminal Procedure (hereinafter referred to as 'the Code').

2. Petitioner No. 1 is one of the members of the second party and petitioner No. 2 is one of the members of the third party, whereas opposite party Nos. 1 to 3 are the members of the first party and opposite party Nos. 4 to 14 are also members of the second party along with petitioner No. 1. Opposite Party Nos. 15 to 22 are the members of the third party and the remaining opposite party Nos. 23 to 25 are the members of the fourth party in the said proceeding.

3. The dispute related to a land measuring 21 acres 95 decimals in various plots fully described in Schedules 1, 2 and 3 of the petition which has been filed in this Court.

4. In order to appreciate the points involved in this application it will be necessary to state briefly the facts. Opposite Party Nos. 1 to 3 filed a petition on 8-7-1968 in the Court of the Subdivisional Magistrate for drawing up a proceeding under Section 144 of the Code against the petitioners as well as other members of the second, third and fourth parties claiming 1/3rd share in the disputed land. The Subdivisional Magistrate after calling for the report drew up a proceeding under Section 144 of the Code on 29-7-1968. On 23-9-1968 he passed the impugned order under Section 145 of the Code to this effect:—

"After hearing the Lawyers of both the parties and on perusal of their show cause, I am satisfied that there is a bona fide land dispute between the parties. I, therefore, draw up a proceeding under Section 145, Criminal P. C. to decide the factum of possession once for ever. The subject of dispute is attached under Section 145(4)

Criminal P. C. Parties to file written statement by 26-10-1968."

5. Learned counsel appearing on behalf of the petitioners raised the following points for consideration by this Court—

- (i) The order does not mention that there was an apprehension of breach of peace.
- (ii) In the order the entire land has been attached under Section 145(4) of the Code, whereas the subject-matter of dispute is only with respect to 1/3rd share of the land.
- (iii) There was already a proceeding under Section 145 of the Code in respect of the land contained under Schedule 2 of the application which was later compromised between the parties on 29-8-1962 which could not have been agitated in the present proceeding.

6. Learned counsel has drawn my attention to Cl. (1) of Section 145 of the Code and contended that the jurisdiction of the Magistrate to institute proceeding is mainly based on his satisfaction that a dispute is likely to cause breach of peace. When he proceeds under Section 145 of the Code without being satisfied as to the existence of the dispute likely to cause breach of the peace, he acts without jurisdiction. According to the learned Counsel Section 537 of the Code cannot cure the irregularity. He submitted that not only in the impugned order but also in the order under Section 144 of the Code the Magistrate omitted to mention regarding the apprehension of breach of peace. He referred to the order dated 29-7-1968 wherein the Magistrate ordered:—

".....I am satisfied with the police report. Draw up proceeding under Section 144, Criminal P. C. against both the parties....."

7. In order to support his contention learned counsel relied on a decision of the Supreme Court in R. H. Bhutani v. Miss Mani J. Desai, AIR 1968 SC 1444 wherein their Lordships while dealing with Section 145 of the Code observed in paragraph 8 at page 1447:—

"The object of Section 145, no doubt is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the Court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined by a competent Court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the section requires him to pass a preliminary order under sub-section (1) and thereafter to make an enquiry under sub-section (4) and pass a final order under sub-s. (6)....."

In my opinion, the contention of learned counsel is well founded, as Sec. 145 of the Code also clearly indicates that for initiating the proceeding the Magistrate has to be satisfied that a dispute is likely to cause breach of the peace.

8. However, learned counsel appearing on behalf of opposite party Nos. 1 to 3 urged that the said omission in the order is a mere irregularity. He referred to a decision of this Court in Wazir Mahton v. Badri Mahton, AIR 1950 Pat 372. But, in my opinion, this case does not support his contention as his Lordship Das, J. (as he then was) in that case was considering the grounds of satisfaction of the Magistrate while initiating the proceeding under Section 145 of the Code, and observed that mere failure to state the reasons why the Magistrate was satisfied that there was an apprehension of breach of the peace is nothing more than an irregularity. It is true, as also held in AIR 1968 SC 1444 (Supra), that the High Court in exercise of its revisional jurisdiction would not go into the question of sufficiency of material which has satisfied the Magistrate. In the instant case, the Magistrate has not mentioned at all that there was any apprehension of breach of peace, in the order, which, in my opinion, is fatal. If he would have mentioned that, I would not have questioned the grounds of his satisfaction.

Learned counsel for the opposite party further drew my attention to the notice which was sent to the parties in pursuance of the said order. In the notice it is clearly stated that there was apprehension of breach of peace. But, in my opinion, the contents of the notice is the result of a ministerial act, and that will not cure the defect in the order. The order itself must indicate that the Magistrate was satisfied that the dispute was likely to cause a breach of the peace. In that view of the matter the contention of learned counsel for the petitioners raised under point No. (i) has got to be accepted.

9. Now I turn to point No. (ii). Learned counsel for the petitioners contended that it is admitted case of the parties that the dispute related only to the 1/3rd share of the entire land mentioned in Schedules 1, 2 and 3 of the petition referred to above. It is well established that the subject matter of dispute must be ascertained definitely and described clearly in the preliminary order, before the property is attached under the third proviso to sub-clause (4) of Section 145 of the Code. Absence of clear specification of the subject matter of dispute is a vital defect according to learned counsel.

10. On the other hand, learned counsel appearing on behalf of the opposite party Nos. 1 to 3 submitted that from the records of the proceeding, it is manifest

that the subject matter of dispute was only 1/3rd of the share in the entire land, which fact can easily be ascertained by reference to the record and, therefore, there was no uncertainty or vagueness about it. In that view of the matter, according to him, it is not vital and that will not vitiate the proceeding. In this connection reference was made to a Bench decision of this Court in Shreedhar Thakur v. Kesho Sao, 1962 BLJR 267 = (AIR 1962 Pat 468).

11. Since I have held while considering Point No' (i) that the order was bad in the absence of finding by the Magistrate that the dispute was likely to cause a breach of the peace, in my opinion, it is not necessary to adjudicate on Point Nos. (ii) and (iii) raised by learned counsel for the petitioners.

12. In the result, the order of the Sub-divisional Magistrate is quashed and the application is allowed. However, it is made clear that the Subdivisional Magistrate will call for a fresh report from the Police and will also hear the parties. If he feels satisfied that an apprehension of breach of peace still continues, and an action under Section 145 of the Code is necessary, he will draw up a fresh proceeding in accordance with law and in the light of the observations made above.

Application allowed.

AIR 1970 PATNA 334 (V 57 C 61)

FULL BENCH

U. N. SINHA, N. L. UNTWALIA AND
S. N. P. SINGH, JJ.

Md. Anis Khan, Petitioner v. T. L. V. Aiyar and another, Respondents.

Civil Writ Jurisdiction Case No. 106 of 1969, D/-13-8-1969.

(A) Constitution of India, Art. 226 — Writ — Parties to writ proceedings — Inquiry commission refusing to conduct inquiry against number of persons mentioned by petitioner — Writ petition against that order — Before High Court can pass a contrary order, parties benefited by impugned order should be impleaded — During argument on preliminary point of necessary party though it was contended that petitioner may be permitted to implead those persons but no application filed making this prayer and giving names and addresses of those persons — No effective order can be passed for impleading any persons at instance of petitioner.

(Para 4)

(B) Commissions of Inquiry Act (1952), S. 3 — Appointment of Commission — Notification under, by State Government dated 1-10-1967, Para 4(d) (as amended up

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to 26-9-1968) — Interpretation of — Clause (d) may be analysed in light of Section 3(1).

The State Government in exercise of the power conferred under Section 3 of the Commissions of Inquiry Act (1952) issued a notification on 1-10-1967 appointing a commission of Inquiry for inquiring into various matters relating to abusing and exploiting the official positions held by six ministers during certain period and reporting about them. On interpretation of Cl. (d) of Para 4 of the notification which was to the effect that "whether, besides the persons abovenamed, any other persons or person holding official position, either as a member of the Council of Ministers or otherwise, during any of the aforesaid periods, made illegal gains or indulged in corruption, favouritism, abuse of power or other malpractices in like manner as aforesaid."

Held, that Cl. (d) of Para 4 should be analysed in the light of Section 3(1) of the Act which envisages "an inquiry into any definite matter of public importance." Therefore the reasonable interpretation of Cl. (d) of paragraph 4 should be that the Commission of Inquiry was directed to inquire and report about the matters mentioned in Cls. (1), (b) and (c), of paragraph 4, so far as the six persons named in paragraph 1 were concerned, and in that context, it was directed to find out incidentally, what other persons holding official positions were also involved. It could not be said that the commission was to inquire into and report as to all matters of corruption, favouritism, abuse of power etc. of all persons holding official position in the State during the periods mentioned in Para 1 of the notification. (Para 5)

Basudeva Prasad, Ravinandan Sahay and Narendra Prasad and Mrs. Sudha Rani Jaiswal, for Petitioner; K. D. Chatterji and Tara Kant Jha (Standing Counsel No. II), for Respondents.

U. N. SINHA, J.: — The application has been filed by the petitioner under Articles 226 and 227 of the Constitution of India, praying that a direction, order or writ in the nature of a writ of certiorari may issue quashing order No. 69, dated the 16th December, 1968, passed by Sri T. L. Venkatarama Aiyar, constituting a Commission of Inquiry appointed under the Commissions of Inquiry Act, 1952 (Act 60 of 1952) by the State Government. The impugned order arose under the following circumstances: On the 1st October, 1967, the State Government had issued a notification appointing a commission of Inquiry for inquiring into various matters and reporting about them. The first four paragraphs of the notification are relevant and they are quoted below.

1. Whereas allegations have been made that each of the following persons namely:

1. Shri Krishna Ballabha Sahay, who held the office of Minister during the periods from the 16th April, 1946 to the 5th May, 1957, and the 29th June, 1962 to the 2nd October, 1963 (afternoon) and the office of Chief Minister during the period from 2nd October, 1963 (afternoon) to the 5th March, 1967 (afternoon).
2. Shri Mahesh Prasad Sinha, who held the office of Minister during the periods from the 29th April, 1952 to the 5th May, 1957 and the 18th March, 1962 to the 5th March, 1967 (forenoon).
3. Sri Satyendra Narain Sinha, who held the office of Minister during the period from the 18th February, 1961 to the 5th March, 1967 (forenoon).
4. Shri Ram Lakhan Singh Yadav, who held the office of Minister during the period from the 2nd October, 1961 (afternoon) to the 5th March, 1967 (forenoon).
5. Shri Raghavendra Narain Singh, who held the office of Minister of State during the period from the 2nd October, 1963 (afternoon) to the 5th March, 1967 (forenoon) and
6. Shri Ambika Sharan Singh, who held the office of Deputy Minister during the period from the 6th May, 1957 to the 2nd October 1963 (afternoon) and Minister of State during the period from the 2nd October, 1963 (afternoon) to the 5th March, 1967 (forenoon)

by abusing and exploiting the official position or positions held by him as aforesaid, obtained pecuniary and other benefits for himself, either in his own name or benami, and for his family, relatives and other persons in whom he was interested, and allowed them to obtain, or connived at their obtaining, pecuniary and other benefits and thereby he, his family, relatives and other persons in whom he was interested acquired vast properties and made illegal gains;

2. And whereas allegations have also been made that each of the persons abovenamed, during the tenure or tenures of their respective office or offices as aforesaid, otherwise indulged in corruption, favouritism, abuse of power and other malpractices;

3. And whereas the Governor of Bihar is of opinion that it is necessary to appoint a Commission of Inquiry for the purpose of making an inquiry into the definite matters of public importance herein stated;

4. Now, therefore, the Governor of Bihar, in exercise of the powers conferred upon him by Section 3 of the Commissions of Inquiry Act, 1952 (LX of 1952), is hereby pleased to appoint a commission of Inquiry to enquire into and report on the following matters, namely.

- (a) What was the extent of the assets and pecuniary resources owned and possessed by each of the persons abovenamed, his family, relatives and other persons in whom he was interested (i) at the beginning and (ii) at the end of the tenure of office of each of the offices held by him as foresaid;
- (b) Whether, besides the persons abovenamed, during the tenure of office or offices held by him, obtained any assets, pecuniary resources or advantages or other benefits by abusing and exploiting his official position or positions and whether during the said period or periods his family, relatives and other persons in whom he was interested obtained, with his knowledge, consent or connivance, any assets, pecuniary resources, advantages or other benefits;
- (c) Whether, and if so to what extent, each of the persons abovenamed otherwise indulged in corruption, favouritism, abuse of power and other, malpractices and
- (d) Whether, besides the persons abovenamed, any other person or persons or persons holding official position, either as a member of the Council of Ministers or otherwise, during any of the aforesaid periods, made illegal gains or indulged in corruption, favouritism, abuse of power or other malpractices in like manner as aforesaid."

The original notification was amended by omitting paragraph 4(d), by a notification dated the 31st October, 1967. Thereafter, by another notification dated the 14th September, 1968 the second notification was cancelled. The parties have proceeded on the footing, that, original paragraph 4(d) was thereby restored. Thereafter, a notice was published in the Bihar Gazette on the 26th September, 1968, Stating that the Government of Bihar, members of the public and organisations might make their representations as to the matters mentioned in paragraph 4(d). Certain time limit was given, which was subsequently extended. Pursuant to this notice, seventeen members of the public filed fifty one representations on affidavits. The matter was posted for argument on a preliminary question as to the scope of paragraph 4(d) and that is the subject-matter of the order impugned in this case.

2. Two contentions were advanced before Sri Venkatarama Aiyar on the interpretation of paragraph 4(d). The contention put forward on behalf of some of the deponents of the affidavit was that the Commission was to inquire into and report as to all matters of corruption, favouritism, abuse of power etc. of all persons

holding official position in the State during the periods mentioned in paragraph 1 of the notification. As against this, the contention raised on behalf of the State was that, to quote the words of the learned Member, "in the context of the Notification, CL (d) must be construed as applicable only if the charges, besides satisfying the conditions laid down therein, also involve one or more of the six persons mentioned therein and that unless there is such a linking the charge would fall outside the purview of the clause." On the question as to which of the contentions was to be adopted, Sri Venkatarama Aiyar has given his opinion as follows:—

"Clauses (a) and (b) are no doubt concerned with not merely the six persons named but also their relations, friends, and persons in whom they are interested. But those clauses are limited to assets and pecuniary and other benefits and the enquiry is as to the assets as on specified dates and acquisition of assets during the period when they held office. It is only CL (c) that deals generally with charges of corruption and the like, and that takes in only the six persons named. The purpose of CL (d) is to rope in with respect to charges in (c), all persons who were associated with the six persons named. It should also be noted that while (a) and (b) take in relations friends and persons in whom the six persons are interested there may be other persons besides the above who might also be involved in those charges and they will be covered by CL (d).

In the result I am of opinion that in order to invoke CL (d) it is not merely necessary that the charge is made against a person who held a public office and the act charged took place during the periods specified, but that further it is necessary that one or more of the six persons named in para 1 should be involved in that act."

3. It appears from Annexure B of the counter affidavit filed by the State of Bihar, that, thereafter, the affidavits filed under paragraph 4(d) were taken up by Sri Venkatarama Aiyar for consideration on the 8th January, 1969, in the light of the conclusion arrived at by him on the 16th December, 1968. The hearing of affidavit No. 28 was adjourned and all other affidavits, except affidavits Nos. 1, 3 and 5 were rejected, including all the twenty affidavits filed by the petitioner of this case. In the case of affidavits Nos. 1, 3 and 5 orders were reserved.

4. On behalf of the State of Bihar preliminary objection has been raised by Sri K. D. Chatterji. The substance of his contention is that if the petitioner wishes this court to give a wider interpretation of clause (d) of paragraph 4, as was urged before Sri Venkatarama Aiyar,

(v) A limited company cannot buy its own shares.

20. From the above discussion, it is clear that a juristic person cannot be described as a Company unless it is composed of a fluctuating body of persons, which body may conveniently be described as (i) association of individuals, and (ii) its members hold shares in it, which they can freely transfer without consulting the other share-holders. In my opinion, the Corporation does not satisfy any of the two essential ingredients of a company. It has no share-holders. There is no association of individuals, who have subscribed to the capital of the Corporation. The Corporation has been established by the Central Government under Section 3 of the Food Act. The entire capital of the Corporation has been provided by the Central Government. The capital has to be provided after due appropriation made by Parliament by law. The general superintendence, direction and management of the affairs and business of the Corporation vests in a wholly nominated Board of Directors, who are not made independent to act in any manner they like but have to be guided by instructions given by the Central Government on all matters of policy. All the Directors mentioned in Section 7, of the Food Act are officials. Central Government has reserved the right to remove the Managing Director.

The Secretary of the Corporation has also to be appointed under Section 12 of the Food Act by the Central Government. The statutory functions required to be performed by the Corporation under sub-section (2) of Section 13 cannot be undertaken by the Corporation without the previous approval of the Central Government. The statement of programme of its activities as well as the financial estimate in respect thereof has to be submitted by the Corporation to the Central Government at least three months before the commencement of each year as provided in Section 26(2) (a) of the Food Act. The funds of the Corporation cannot be invested except in the securities of the Central Government or any State Government or in such other manner as might be prescribed by rules framed under the Food Act. The balance of the annual net profits of the Corporation are required by Section 33(2) (a) to be paid to the Central Government. Section 43 of the Food Act prohibits the application of any provision of law relating to the winding up of companies or corporations being applied to the Food Corporation of India. Liquidation of the Corporation is permitted only by the order of the Central Government and in such manner as that Government may direct. There is no provision whatsoever for any private

person or any outsider having any interest in the Corporation.

21. Though the question about the Bombay State Road Transport Corporation being or not being a Company within the meaning of that expression as used in clause (e) of Section 3 of the Act did not come up for consideration before the Supreme Court in Valjibhai Muljibhai Soneji's case, AIR 1963 SC 1890, it appears to us that even if the question had to be gone into, the Road Corporation in question would have been held to be covered by that expression. Section 24 of the 1950 Act states that the Road Corporation may, subject to certain conditions, raise additional capital by the issue of new shares after the same has been authorised by the State Government. Sub-section (3) of Section 23 provides for the authorised capital of the Road Corporation being divided into such number of shares as the State Government may determine and further authorises the State Government to fix the number of shares which shall be subscribed by it, by the Central Government or by other parties including private persons whose undertakings might have been acquired by the Corporation. Allotment of shares to such other parties is required to be made by sub-section (4) of Section 23 by the Corporation. There is no restriction on the transferability of the shares of the members subject to compliance with the rules made under the Act, as stated in Section 23(5). Section 23(6) authorises the State Government to redeem the shares issued to the other parties in the prescribed manner.

Section 26 authorises the Corporation to borrow money in the open market for the purpose of raising its working capital. Section 28 requires the Corporation to pay interest on such capital as may be provided by the Central Government or the State Government. Sub-section (2) of Section 28 states that where the Road Corporation raises its capital by the issue of shares it shall pay dividend on such shares at such rate as may be fixed by the Corporation. The above-mentioned and other provisions of the 1950 Act leave no doubt in my mind that the Bombay State Road Transport Corporation satisfies even the first ingredient of Section 3(e) of the Act. Nothing stated by the Supreme Court in the case relating to that Corporation can, therefore, be of any avail to the appellants. For the foregoing reasons, we hold that the Food Corporation of India is not a Company within the meaning of Section 3(e) of the Land Acquisition Act.

22. Mr. M. R. Sharma, the learned Deputy Advocate-General for the State of Punjab, then contended that though if it is held that the Corporation is neither a Company nor a department of the Cen-

tral Government, it should be held that it is a "Central Government undertaking" or a venture of the Government and land can, therefore, be acquired for it, as if the Corporation is itself the Government. We are unable to appreciate this argument. Sub-section (2) of Section 27 of the Food Act provides that the Central Government may guarantee the loans and advances taken by the Corporation as to the repayment of principal and interest and other incidental charges. The borrower cannot be expected to be the guarantor also. In the nature of things, the Corporation is a separate juristic person than the Central Government. Even if the Corporation is held to be a "Central Government undertaking" or a venture of the Central Government, it would not thereby become the Government itself.

23. Having held that the Corporation is not a "Company", we have to reject the argument of Mr. Chawla to the effect that the acquisition is bad for non-compliance with the provisions of Part VII of the Act as those provisions apply only to cases of acquisition for companies etc. We, therefore, uphold the finding of the learned Single Judge to the effect that it was not necessary for the State Government to follow in this case the special procedure prescribed in Part VII of the Act. At the same time it is the admitted case of both sides that the land in question was not acquired for the State but for the Food Corporation of India. The appellants specifically stated in the last lines of paragraph 8 of their replication that the entire money on the land is being spent by the Food Corporation of India and no part of it comes out of the Consolidated Funds of the State. In the State's rejoinder, these facts were not specifically controverted. At the hearing of the appeal we specifically asked, the learned Deputy Advocate-General if he could state even at that stage if any part of the compensation for the acquisition of the land in question was being paid from the State funds. Though he took one day's time to answer that question, he was unable to make any such assertion. On a later day, he told us that he had received a letter from the Punjab Government wherein it was stated that the Government would be making a contribution of Rs. 100/- towards the cost of acquisition of land required for the construction of godowns by the Corporation.

We asked him to place on record the affidavit of any responsible authority and to state therein specifically if it had been decided to make any such contribution towards the acquisition of the site in question and if so when had such a decision been arrived at. The counsel submitted that no decision had been arrived at before the issue of the impugned notifications and that the letter referred to by

him merely states that the Punjab Government is making such a contribution. No affidavit of any responsible Government official containing the requisite information was filed. After the conclusion of the hearing of the appeal and before the pronouncement of this judgment the State submitted C. M. 641 of 1970 praying for leave to place the Government's letter in question addressed to its counsel on the record of this appeal. By our order dated February 16, 1970, the said application was dismissed by us as it had been filed after the conclusion of the arguments. Even if we were to allow the letter being placed on the record, it would not serve any purpose as it is merely a communication between the counsel and his client, wherein it is neither stated as to when the Government made the decision referred to therein, nor as to whether the decision related to the land in question or not, nor even as to whether the State had in fact contributed anything at all towards the acquisition of the site in dispute.

24. The relevant facts, which emerge out of the above discussion, are that the Corporation is not a Company, that Part VII of the Act was not invoked in this case, that the Corporation is not the Government, that it is not proved that the compensation for the acquisition of the land in question is to be paid either wholly or partly out of public revenues or by a company, or out of some fund controlled or managed by a local authority. The only other relevant fact which may be mentioned is that it is the admitted case of the State that the land has not been acquired for the Government but exclusively for the Food Corporation of India. No mention of the Corporation was made in any of the impugned notifications issued under the Act. What then is the legal effect of this situation?

Section 6 of the Act reads as follows:—

"6. (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders:

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

(2) The declaration shall be published in the Official Gazette, and shall state the district or other territorial division in which the land is situate, the purpose

for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

25. Mr. Chawla contended that the Act does not allow land being acquired for a juristic person or a private person who is neither a Company nor the State, nor a local authority. In *Jhandu Lal v. State of Punjab*, AIR 1961 SC 343, it was held that a declaration for the acquisition for a public purpose cannot be made unless the compensation wholly or partly, is to be paid out of public funds. Their Lordships of the Supreme Court made it clear in that case that acquisition of land can be made for a Company for a public purpose otherwise than under the provisions of Part VII of the Act, but this can be done only if the cost or a portion of the cost of the acquisition is to come out of public funds. In that case the acquisition notifications stated that the land was required to be taken by the Government for a public purpose, namely, for the construction of a labour colony under the Government Sponsored Housing Scheme for the industrial workers of the Thapar Industrial Workers Co-operative Housing Society Limited. According to the terms and conditions of the Housing Scheme in question 25 to 50 per cent of the cost of land and structures to be built upon the land was to be advanced by Government out of public funds in the shape of subsidy and loan. It was held that this showed that a large proportion of the compensation money was to come out of public funds.

In their Lordships' authoritative pronouncement in *Shyam Behari v. State of Madhya Pradesh*, AIR 1965 SC 427, it was held that where, in land acquisition proceedings, the entire compensation to the land-owner is to be paid by a Company for which the land is acquired and no part of the compensation is to come out of the public revenues or some fund controlled or managed by a local authority, the notifications, issued by the Government declaring that the land is needed for a public purpose, must be held to be invalid in view of proviso to S. 6(1) of the Act. Their Lordships proceeded to hold further (relying on the dictum of the Supreme Court in *Jhandu Lal's case*, AIR 1961 SC 343 (supra)), that under the proviso to Section 6(1), no declaration under Section 6 for acquisition of land for a public purpose can be made unless either the whole or part of the compensation for the property to be acquired is

to come out of public revenues. No notification under Section 6 can be made, where the entire compensation is to be paid by a company, declaring that the acquisition is for a public purpose.

26. Following propositions of law relating to valid acquisition of land appear to emerge from an analysis of the relevant provisions, of the Act, and from a careful study of the above-mentioned and various other judgments of their Lordships of the Supreme Court:—

(1) No land can be acquired under the Act without the making of a declaration under sub-section (1) of Section 6;

(2) A valid declaration under Section 4 or Section 6 of the Act can be made:—

(a) if the land is needed for a public purpose, i.e., when the entire compensation for the acquisition of the land has to be paid from public revenues or some fund controlled or managed by a local authority;

(b) when the land is sought to be acquired for a "company" and the compensation therefor is paid at least partly out of public revenues or some fund controlled or managed by a local authority. In such a case also the acquisition will be for a public purpose;

(c) if land is required for a "company" (as defined in Section 3(e) of the Act), and the entire compensation for acquisition of the land is paid by such company, and no part thereof is paid from public revenues or from some fund controlled or managed by a local authority;

(3) The State cannot acquire land under the Act for any other purpose, i.e., the State cannot acquire land for an ordinary individual or for a juristic person which is neither a "company" within the meaning of Section 3(e) of the Act, nor a local authority;

(4) It is not necessary to resort to the procedure prescribed under Part VII of the Act for acquiring land under categories (a) and (b) mentioned in Item No. (2) above, but any acquisition made under category (c) for a company for which no part of the compensation is paid from public funds would be invalid:—

(i) if the procedure prescribed in Part VII of the Act is not followed; or

(ii) if the land is sought to be acquired for a "private company" for any purpose other than that mentioned in clause (a) of sub-section (1) of Section 40 (Vide Section 44-B of the Act.)

(5) Once a valid declaration under Section 6(1) of the Act is made, it would be conclusive evidence that the land is needed for a public purpose or for a company as the case may be, but this would not be so in a case where the declaration has

been made in mere colourable exercise of the power conferred on the appropriate Government under Section 6. In such a case it would be open to the Court to hold that in the eye of law no declaration has been made under Section 6 of the Act.

27. The relevant facts found by us in the instant case are:—

(i) that the land in dispute was acquired for the Food Corporation of India;

(ii) that it has not been proved that any part of the compensation for acquisition of the disputed land was to come from public funds;

(iii) that no mention of the Food Corporation of India was made in the impugned notification wherein it was given out that the land was needed by the Government at the public expense for a public purpose;

(iv) that it was the State itself which came out with the revelation in its written statement that in fact the land had been acquired for the Food Corporation of India, and possession thereof was also taken from the owner by that Corporation and not by the Collector; and

(v) that the Food Corporation of India is not a department of the Central Government, and is not a "company" within the meaning ascribed to that expression in Section 3(e) of the Act.

28. Applying the law laid down above to the facts of this case as summarised in the preceding paragraph, we appear to be bound to hold that the impugned notifications, in so far as they relate to the petitioners' land, are invalid:—

(a) because the corporation is neither Government nor a "company" as defined in the Act; and

(b) because even if the corporation could be held to be a company, no part of the compensation has been paid from public funds, and part VII of the Act has not been followed.

29. Clause (1) of Article 31 of the Constitution states that no person shall be deprived of his property save by authority of law. Inasmuch as the respondents seek to deprive the appellants of their property otherwise than in accordance with the provisions of the Act, the acquisition proceedings must be held to be violative of the fundamental rights guaranteed to the appellants under Art. 31(1) and Article 19(1) (f) of the Constitution.

30. Notice must be taken, before parting with this judgment, of an objection of a somewhat preliminary nature taken by the learned Deputy Advocate-General to the grant of the writ petition. The counsel submitted that the appellants had disentitled themselves to obtain any relief on account of their conduct in claiming the existence of constructions and structures on the site in dispute, which allegation is no more pressed.

There is no doubt that the conduct of a writ petitioner is a relevant consideration for the exercise of discretion under Article 226 of the Constitution, but no such objection was raised before the learned Single Judge who could have been persuaded to decline to go into the merits of the controversy on that ground after having come to a finding about the claim of Vishav Karma Mandir and Dharamsala existing on the plot being untrue. We do not consider it proper, in the circumstances of this case, to allow that objection being raised at the appellate stage to defeat the claim of the appellants for safeguarding their fundamental rights enshrined in Articles 19(1) (f) and 31(1) of the Constitution.

31. For the reasons recorded above, this appeal is allowed, the order of the learned Single Judge declining to interfere in the matter is set aside and the impugned notifications, in so far as they relate to the land of the appellants, are declared to be null and void. In the circumstances of the case, the appellants would be entitled to get their costs from respondent 1.

32. MEHAR SINGH, C. J.: I agree.
Appeal allowed.

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FULL BENCH

R. S. NARULA, R. S. SARKARIA
AND S. C. MITAL, JJ.

Shamsher Singh Hukam Singh, Petitioner v. The Punjab State and others, Respondents.

Civil Writ No. 1890 of 1966, D/- 19-2-1970, decided by Full Bench on order of reference made by R. S. Narula and R. S. Sarkaria, JJ., D/- 16-5-1969.

Constitution of India, Arts. 15(3), 16(2) — Equality of opportunity in matters of public employment — Discrimination in favour of females — Article 15(3) can be invoked to justify discrimination.

Per Sarkaria and Mital, JJ., (Narula, J. contra):—

Articles 14, 15 and 16 are the constituents of a single code of constitutional guarantees supplementing each other. Clause (3) of Article 15 can therefore be invoked for construing and determining the scope of Article 16(2). If a particular provision squarely falls within the ambit of Article 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the ground of sex. Only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not altogether obliterate or

DN/DN/B642/70/MVJ/D

render illusory the constitutional guarantee enshrined in Article 16(2). Case law discussed. Basu's Commentary on Constitution of India, criticised.

(Paras 27, 11, 7)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 1 (V 56) =

(1969) 1 SCR 103, Triloki Nath

Tiku v. State of Jammu and

Kashmir 23

(1968) AIR 1968 SC 349 (V 55) =

1968 Lab IC 360, State of Mysore

v. P. Narasinga Rao 22

(1967) AIR 1967 SC 1427 (V 54) =

(1966) 3 SCR 451, S. G. Jaisinghani

v. Union of India 22

(1967) AIR 1967 SC 1643 (V 54) =

(1967) 2 SCR 762, L. C. Golak

Nath v. State of Punjab 22

(1964) AIR 1964 SC 179 (V 51) =

(1964) 4 SCR 680, Devadasan v.

Union of India 18

(1963) AIR 1963 SC 649 (V 50) =

1963 Supp 1 SCR 439, M. R.

Balaji v. State of Mysore 17, 25

(1962) AIR 1962 SC 36 (V 49) =

(1962) 2 SCR 586, General

Manager, Southern Rly. v.

Rangachari 8

(1961) AIR 1961 SC 564 (V 48) =

(1961) 2 SCR 931, Gazula Dasaratha

Rama Rao v. State of Andhra

Pradesh 8

(1954) AIR 1954 SC 321 (V 41) =

(1954) Cri LJ 886, Yusuf Abdul

Aziz v. State of Bombay 9

(1953) AIR 1953 Bom 311 (V 40) =

ILR (1953) Bom 842, Dattatraya

v. State of Bombay 10, 11, 16, 24

(1910) 1910-1 KB 465, Moss v.

Elphick 12

Abnasha Singh, (J. L. Gupta with him),

for Petitioner; S. K. Jain for Advocate-

General (Punjab) (for Nos. 1 and 2),

G. C. Mittal for Advocate-General, Hary-

ana (for Nos. 3 and 4), for Respondents.

SARKARIA, J.:— The question refer-

red to this Full Bench is:

"whether the provisions of clause (3)

of Article 15 can be invoked for constru-

ing and determining the scope of clause

(2) of Article 16 of the Constitution, and

if so, to what extent and in what kind

of cases?"

2. Some material facts giving rise to

this reference may first be noted:

Prior to the 12th of May, 1963, in the

united State of Punjab, there were two

branches of the Punjab Education Ser-

vice, Non-gazetted (Class III) School

Cadre, in the grade of Rs. 110-8-190/10-

250. One was exclusively manned by

men and the other by women. The mem-

bers of both the Branches were either

employed on teaching work or on inspec-

tion work. By a Memorandum No. 1965-

ED-III (2E)-61/8123, dated 21st/27th

March, 1961, the Government of Punjab

granted special pay equivalent to 25 per cent of basic pay but not exceeding Rs. 50/- per month, to the Women's Branch, who were posted as Assistant District Inspectresses of Schools. Subsequently, (per Memorandum No. 1/49-63-Imp-Cell, dated 9th/10th April, 1963) the Education Department in the field of School-cum-Inspection was reorganised. The Assistant District Inspectors and the Assistant District Inspectresses were designated as Block Education Officers and a unified cadre came into existence with effect from May 12, 1963. After the above reorganisation, the Block Education Officers, both males and females, have to perform identical duties. Their scales and responsibilities are the same. The posts as between male and female Block Education Officers are interchangeable.

3. Shamsher Singh petitioner, a male Block Education Officer, has moved this Court by a petition under Article 226 of the Constitution, alleging that this amounts to discrimination solely on the ground of sex and, as such, is violative of Article 16(2) of the Constitution.

4. The stand taken by Respondents 1 and 2 in the written statement is that the women members of the service having been granted more pay on administrative grounds, such a grant does not amount to discrimination only on the ground of sex within the contemplation of Article 16(2); that even if it does, such a special provision could be justifiably made for women officers in view of clause (3) of Article 15 of the Constitution.

5. The Articles of the Constitution relevant for this discussion are 14, 15 and 16. They, along with Articles 17 and 18 (which deal with abolition of untouchability and titles, respectively) have been grouped together under the common caption "Right to Equality". They read as follows:—

"Article 14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

6. Sardar Abnasha Singh, learned counsel for the petitioner, contends that clause (3) of Article 15 cannot control or derogate from the specific guarantee against discrimination solely on the ground of sex contained in clause (2) of Article 16. Had that been the intention, a provision similar to clause (3) of Article 15 should have been repeated in Article 16 also. It is stressed that the words "nothing in this article" in clause (3) of Article 15 were clear and unambiguous and delimit the scope of that clause to anything said in that Article only. They cannot, proceeds the argument, be twisted and strained to mean "nothing in this Constitution". To illustrate his point, Mr. Abnasha Singh has referred to clause (4) of Article 15, which, according to the counsel, is a provision similar to clause (4) of Article 16. Support has been sought from certain observations made by Shri Durga Das Basu in his Commem-

tary on the Constitution of India, Fourth Edition, page 478, where the learned author has observed as follows:—

"It is to be noted that there is no provision in Article 16 corresponding to the clause (3) of Article 15. The result is, that for purposes of employment under the State, though reservation in favour of backward classes is permissible under clause (4) of Article 16, no such reservation is possible in favour of women; nor is any other discrimination in favour of women possible, e.g., relaxation of rules of recruitment or standard of qualifications or the like."

7. The scheme and the setting of Articles 14, 15 and 16, particularly under a common caption, and their language unmistakably show that they belong to one family. While Article 14 can be called the genus, Articles 15 and 16 are its species. Article 14 is the basic Article which guarantees right to equality before law in a general way. It is of very wide amplitude. It ensures equal treatment to persons in similar circumstances both in the privileges conferred and in the liabilities imposed by the law, and thus prevents discrimination between one person and another, if as regards the subject-matter of the legislation they are similarly situated. Article 15(1) guarantees the same right of equality by prohibiting discrimination only on the ground of religion, race, caste, sex, place of birth or any of them. Whereas Article 14 is applicable to all persons, Article 15(1) reserves that guarantee for citizens only, and touches only one aspect of the general guarantee contained in Article 14, by affording protection against discrimination.

8. As pointed out by their Lordships of the Supreme Court in *Gazula Dasratha Rama Rao v. State of Andhra Pradesh*, AIR 1961 SC 564, Article 15, in one respect, is more general than Article 16, because its operation is not restricted to public employment; it operates in the entire field of State discrimination. In *General Manager, Southern Ry. v. Ranganachari*, AIR 1962 SC 36, their Lordships of the Supreme Court were considering the scope and effect of Article 16 (4). Gajendragadkar, J., (as his Lordship then was) speaking for the Court, made these illuminating observations:—

"..... it may be relevant to remember that Article 16(1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). The three provisions form part of the same constitutional code of guarantees and supplement each other."

9. Though the question for determination before the Supreme Court in *Ranga-*

chari's case, AIR 1962 SC 36 was different, yet the principle enunciated therein for interpreting these Articles will be of great assistance for answering the question posed for this Bench. The very language of clause (3) of Article 15 is clear enough to show that it is a proviso to the general guarantee against discrimination contained in clauses (1) and (2) of that Article. Further, there is ample authority in support of the proposition that the validity of a law apparently offending the general Article 14 can be upheld if it falls within the ambit of clause (3) of Article 15. In Yusuf Abdul Aziz v. State of Bombay, AIR 1964 SC 321, the validity of Section 497 of the Indian Penal Code was challenged on the ground that it contravenes the provisions of Article 14. Repelling this contention, Bose, J., speaking for the Court, observed:—

"Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two Articles read together validate the impugned clause in Section 497, Penal Code."

10. In Dattatraya v. State of Bombay, AIR 1953 Bom 311, the question for determination was, whether the provisions of Section 10(1) (c) of the Bombay Municipal Boroughs Act and the Rules made thereunder for reservation of seats for women for their election to the Jalgaon Municipality were intra vires. The contention was that they offended Articles 14, 15 and 16 of the Constitution. On behalf of the State, it was contended in reply that these were special provisions covered by clause (3) of Article 15. Chagla C. J., speaking for the Division Bench, enunciated the law on the point, as follows:—

"Article 15(3) is obviously a proviso to Article 15(1) and proper effect must be given to the proviso. It is true that in construing the proviso one must not nullify the section itself. A proviso merely carves out something from the section itself, but it does not and cannot destroy the whole section. The proper way to construe Article 15(3) is that whereas under Article 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1). Therefore, as a result of the joint operation of Articles 15(1) and 15(3) the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women. In this particular case, even if

in making special provision for women by giving them reserved seats the State has discriminated against men, by reason of Article 15(3) the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex. Therefore, in our opinion, the legislation we are considering does not offend Article 15(1) by reason of Article 15(3)."

11. If I may say so with respect, the above is a correct statement of the law on the point. If clauses (1) and (2) of Article 15, as held in Dattatraya's case, AIR 1953 Bom 311 *ibid*, cover the entire field of State discrimination, including the field of public employment specifically dealt with in Article 16, then it will not be wrong to say that, in a way, it overlaps and supplements what is said in Article 16. It follows as a necessary corollary therefrom that the scope and the content of the exception in clause (3) will extend to the entire field of State discrimination, including that of public employment. Thus construed, clause (3) of Article 15 is to be deemed as a special provision in the nature of a proviso qualifying the general guarantees contained in Articles 14, 15(1), 15(2), 16(1) and 16(2).

12. The above view is in consonance with what is called the principle of harmonious construction of the Constitution. A Constitution is an organic whole. It has to be read as a whole. It does not mean one thing at one time and another subsequently. It is, therefore, not only proper but imperative to construe one provision in the light of the other cognate provisions. "An author", says Maxwell in *The Interpretation of Statutes*, Eleventh Edition, "must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it It cannot be assumed that Parliament has given with one hand what it has taken away with the other." Similarly, in *Moss v. Elphick*, (1910) 1 KB 465, at page 468, it was laid down that where there are two sections dealing with the same subject-matter, one section being unqualified and the other containing a qualification, effect must be given to the section containing the qualification. When in clause (3) of Article 15, which covers the entire field of discrimination, the framers of the Constitution clearly stated that special provisions may be made in favour of women (even if they amount to discrimination in their favour against men), it would have been needless tautology to repeat the same clause in Article 16, which is only an instance of the same right which has been guaran-

teed in general and wider terms by Article 15(1).

13. It is manifest that the word 'for' in Article 15(3), in the context, connotes 'in favour of.' Webster's Dictionary, *inter alia*, gives these meanings of the word 'for':—

"2. To the advantage of; on behalf of; with reference to the needs of. 3. In favour of. 4. Specially appropriate or adapted to."

14. The Concise Oxford Dictionary also says that 'for' means "in defence, or in support or favour of". The authors of the Constitution were aware of the need for uplifting women and children in our society and were particularly solicitous of their welfare. It was with the intention to protect the interests of women and children, which did not get their due under the social conditions then prevailing, that clause (3) of Article 15 was incorporated in the Constitution.

15. For the reasons aforesaid, I respectfully disagree with the contention of Mr. Abnasha Singh and the view of the learned author of Basu's Commentary on the Constitution of India, as this view proceeds on too narrow a construction of Articles 14, 15 and 16, dividing the same into water-tight compartments.

16. Having seen that Article 15(3) can be invoked for construing and determining the scope of Article 16(2), the further question that remains to be considered is the extent to which such invocation can be done. Again, on this point, it will be useful to recall the observations of Chagla C. J., in Dattatraya's case, AIR 1953 Bom 311 *ibid*. It was there argued that Article 15(3) must be read to mean that only those special provisions for women are permitted which do not result in discrimination against men. It was also said that there are certain facilities which only women can enjoy, and to the extent that those facilities can only be enjoyed by women, provision can be made for those facilities, and with regard to such a provision it could not possibly be said that it discriminated against men. An illustration was given with regard to maternity homes. Similar arguments have been addressed by Mr. Abnasha Singh on behalf of the petitioner in the case before us. These arguments were negated by Chagla C. J., with the following observations:—

"In our opinion, if that was the object of enacting Article 15(3), then Article 15(3) need not have been enacted at all, because if the special provisions for women contemplated by Article 15(3) were only those provisions which did not discriminate against men, then no proviso to Article 15(1) was necessary."

17. I am in respectful agreement with the aforesaid observations. While it is

neither possible nor desirable to lay down an abstract proposition as to what kind of special provisions derogating from the constitutional guarantee contained in Article 16(2) can be made under clause (3) of Article 15 in favour of women, it can be said that such a provision should not give unreasonable benefit or protection, at the cost of men to women, which will make the constitutional guarantee against discrimination solely on the ground of sex enshrined in Article 16, nugatory. While construing similar exceptions contained in Articles 15(4) and 16(4), the Supreme Court in *M. R. Balaji v. State of Mysore*, AIR 1963 SC 649, at page 664, observed:—

"There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Article 15(4) like Article 16(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary."

18. The above remarks of the Supreme Court will fully apply to a special provision made under Article 15(3). What is true with regard to Articles 15(4) and 16(4) is equally true in regard to Article 15(3). Again, in *Devadasan v. Union of India*, AIR 1964 SC 179, it was emphasised that a proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. In view of these settled principles, it can safely be said that unreasonable provisions in favour of women cannot be made under Article 15(3), which would, in effect, either efface the guarantee contained in Article 16(2) or make it illusory.

19. For the foregoing reasons, I would answer the question referred to the Bench as follows:—

"Articles 14, 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, clause (3) of Article 15 can be invoked for construing and determining the scope of Article 16(2). And, if a particular provision squarely falls within the ambit of Article 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the ground of sex."

Only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2)."

20. **R. S. NARULA, J.:** It is with deep and sincere regret that I express my inability to persuade myself to agree with the view expressed by my learned brother Sarkaria, J. in the most scholarly and lucid judgment prepared by him. I admit that on the question referred to this Full Bench there is room for difference of opinion and though I have very great respect for the view taken by my learned brother, which appears to me to have appealed to him at least partly from a point of view of convenience of administration, the solemn duty with which I feel myself charged is to ensure that the scope of a fundamental right conferred by any provision contained in Part III of the Constitution is not allowed to be belittled or restricted and that such a right is not permitted to be diluted by reference to a similar other provision in the same chapter which the Constituent Assembly in its wisdom expressly abstained from applying to the right in question.

21. The relevant facts giving rise to this reference have already been detailed in the judgment of my learned brother with requisite clarity and need not be unnecessarily repeated. I may, however, state at the very outset that I am expressing this opinion in answer to the abstract question referred to this Bench and may not be understood to have even impliedly recorded any finding in connection with the particular facts of this case as to the applicability of Article 16(2) of the Constitution thereto. I am expressing the opinion contained in this judgment on the assumption that the special allowance in question has been refused to the petitioner only on the ground of sex and that, but for that ground, the Government would have granted the allowance in question to him as a matter of right. I am further assuming for the purposes of this reference that the grant of a special allowance to a Government servant is a matter in respect of the employment of the person concerned under the State. The answer which I propose to return to the question referred to us is—

"The provisions of clause (3) of Article 15 cannot be invoked for restricting the scope of application of clause (2) of Article 16 of the Constitution."

I now proceed to give my reasons for holding that opinion.

22. If Article 16 was confined to its first clause and if clause (2) had not been there, discrimination between classes of Government servants on the ground of sex would not have been invalid as it is

settled law that there can be reasonable classification of the employees for the purposes of employment or appointment because Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Article 14 thereof; and Article 16 merely gives effect to the doctrine of equality in the matter of appointment and employment. Article 16(1) does not bar a reasonable classification of employees. This was so held by their Lordships of the Supreme Court in *S. G. Jaisinghani v. Union of India*, AIR 1967 SC 1427, and in *the State of Mysore v. P. Narasinga Rao*, AIR 1968 SC 349. Clause (2) of Article 16 appears to me to be an exception to the well-recognised rule of discrimination being permitted between different classes of persons who are not similarly situated. Though I entirely agree with my learned brother that while Article 14 can be called the genus of the Articles in the Constitution relating to equality and Articles 15 and 16 are its species, whereas Article 14 would not be offended in case of different laws being made for men on the one hand and women on the other in matters which have a rational relationship to the classification on basis of sex, such a classification is expressly prohibited in respect of any employment or office under the State by clause (2) of Article 16. Again, though discrimination on grounds of race, caste, sex, etc., in regard to matters mentioned in sub-clauses (a) and (b) of clause (2) of Article 15 is prohibited, yet special provision being made in favour of women and children in respect of those two matters is specifically permitted by clause (3) of Article 15. I am in respectful agreement with the view expressed by D. D. Basu (now Basu, J. of the Calcutta High Court) in his 'Commentary on the Constitution of India' (Volume I, page 538 — 1965 Edition) to the effect "that for purposes of employment under the State, though reservation in favour of backward classes is permissible under clause (4) of Article 16, no such reservation is possible in favour of women; nor is any other discrimination in favour of women possible, e.g., relaxation of rules of recruitment or standard of qualifications or the like."

Same considerations cannot, in my opinion, apply to matters relating to access to shops, public restaurants, hotels and places of public entertainments or use of wells, tanks etc., as would apply to matters in respect of any employment or office under the State. It may indeed be necessary in the interest of women themselves that special provision may be made in their favour in the matters of access to places of public entertainments or use of tanks and bathing Ghats etc. But the Constitution makers appear to have consciously and deliberately kept

equality of opportunity in matters relating to employment or appointment to any office under the State at a higher pedestal so as to avoid any possible heart-burning amongst members of the services which might be caused by making special provision in favour of women in matters relating to employment etc. I find great force in the contention of Mr. Abnasha Singh to the effect that had the Constitution makers the intention to make a provision similar to clause (3) of Article 15 in the matter of the prohibition against discrimination in respect of employment etc., they would have carved out a similar exception in Article 16 also as they did in case of the provision for discrimination in favour of backward classes by enacting clause (4) in Article 16. I also agree with the learned counsel that the words 'nothing in this article' in clause (3) of Article 15 cannot be construed to read (for the purpose of diluting the guarantee of equal opportunity in the matters of employment) — "nothing in this or the succeeding article" or "nothing in this Constitution". Straining of the express language of clause (3) of Article 15 in this respect does not appear to me to be justified by any valid consideration. It was observed in the majority judgment of their Lordships of the Supreme Court in *L. C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643, that the doctrine of necessary implication cannot be invoked if there is an express provision or unless but for such implication the Article will become otiose or nugatory. It has not even been contended, nor can in fairness it be contended at all, that the guarantee contained in clause (2) of Article 16 of the Constitution would become otiose or nugatory if it is not restricted by invoking clause (3) of Article 15.

23. The question of interpretation of Article 16 of the Constitution came up recently before the Constitution Bench of the Supreme Court in *Triloki Nath Tikku v. State of Jammu and Kashmir*, AIR 1969 SC 1. While dealing with the scope of clause (4) of Article 16 of the Constitution, Shah, J. who prepared the judgment of the Court, held that clause (4) provides a limited exception to the operation of the other clauses of Article 16. He further observed as follows:

"Article 16 in the first instance by clause (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens."

A little later in the same passage (paragraph 4 of the A. I. R. report), the learned Judge observed—

"But for the purpose of Art. 16(4) in determining whether a section forms a

class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution."

In paragraph 6 of that judgment, it was emphasised that the normal rule contemplated by the constitutional provision is equality between aspirants to public employment, but in view of backwardness of certain classes it would be open to the State to make a provision for reservation of appointments or posts in their favour. The view which I hold about the absolute guarantee contained in Cl. (2) of Art. 16 of the Constitution being subject only to the exceptions provided in Cls. (3), (4) and (5) of Art. 16 and to no other exception appears to find support from the above-mentioned observations in the judgment of the Supreme Court in *Triloki Nath Tikku's case*, AIR 1969 SC 1. I am unable to find any observation in the earlier judgments of the Supreme Court to which reference has been made by my learned brother, which could be inconsistent with the view expressed by me. Reference to the guarantees of equal protection or equal opportunity contained in Arts. 14 and 15 of the Constitution has often been made while discussing the scope of Art. 16, but it does not appear to have ever been held that Cl. (3) of Art. 15 should be permitted to control the fundamental right contained in Cl. (2) of Art. 16 so as to virtually add a fourth exception to the three already contained in Cls. (3) to (5) of Article 16 in the matter of the guarantee enshrined in Cl. (2) of that article.

24. I have no quarrel with the principles laid down for interpreting constitutional provisions in various judgments. Article 14 is the general article. Articles 15 and 16, however, cover their separate specified fields within the general field covered by Art. 14. It can easily be envisaged that invidious discrimination offending against general guarantee contained in Art. 14 may nevertheless be held valid if it relates to the subject-matter of Art. 15 and falls in Cls. (3) or (4) thereof or if it falls within the scope of Art. 16 and is covered by the exceptions contained in Cls. (3) to (5) of that article. But the reverse of that proposition cannot be true. It cannot, in my opinion, be successfully argued that what is made specifically invalid by Art. 16 can be upheld by reference to something stated in and specifically restricted to Art. 15, and so on, in the reverse order.

In AIR 1953 Bom 311, *Chagla, C. J.* was not dealing with a case under Art. 16. The matter in that case related to a special provision for women giving them reserved seats in an election to a municipal committee. It was in that context that the learned Chief Justice (as he then

was) observed that something which falls within Art. 15(3) cannot be considered to offend against the general guarantee contained in Cl. (1) of Art. 15. The correctness of that view cannot be doubted. But that does not furnish an answer to the question which has been referred to us. I am unable to appreciate how the exception to Cls. (1) and (2) of Art. 15 contained in Cl. (3) of that article can be made applicable to the guarantee contained in Cl. (1) or Cl. (2) of Art. 16 as the field covered by the two articles is not only entirely different, but mutually exclusive.

25. I agree with Sarkaria, J. that a constitution is an organic whole and the principle of harmonious construction must be applied to the interpretation of constitutional provisions. That principle cannot, however, in my opinion, be stretched to imply that an exception carved out to the purview of a particular article should also be extended to the purview of another article, though the Constitution-makers expressly avoided doing so. The amendment of Art. 15 of the Constitution comprised in the adding of Cl. (4) thereto instead of leaving it to the interpreters of the Constitution to bring in by implication the contents of Art. 16(4) into Article 15 shows that the Constitution makers were not avoiding tautology while doing so, but were making clear and unambiguous provision in matters relating to fundamental rights. What has been observed by their Lordships of the Supreme Court in AIR 1963 SC 649 (at p. 664) has reference only to a comparison between the provisions of Cl. (4) of Art. 15 on the one hand and Cl. (4) of Art. 16 on the other.

I cannot construe anything stated in that judgment to suggest that their Lordships of the Supreme Court were, in any manner, inclined to import from Art. 15(4) anything into Art. 16 which is not already contained in Cl. (4) of the last mentioned article. In fact Gajendragadkar, J. (as he then was), while preparing the judgment of the Court, specifically noticed in *M. R. Balaji's case*, AIR 1963 SC 649 that Art. 15 (4) was added by the Constitution (First Amendment) Act, 1951, so as to bring Arts. 15 and 29 in line with Article 16(4). The learned Judge observed that Art. 15(4) has to be read as proviso or an exception to Arts. 15(1) and 29(2). It is significant to note in this connection that Art. 29(2) of the Constitution has been specifically mentioned in Cl. (4) of Article 15. It has never been said that if Art. 29(2) had not been mentioned in Article 15(4), the guarantee contained in the former Article would still have been controlled by the exception contained in Article 15(4). If a provision contained in one Article could also, by invoking the principle of harmonious construction, be read

into another one, it would have been wholly unnecessary to make a mention of Art. 29(2) in Art. 15(4) and the object of making the provision of Art. 29(2) subject to Art. 15(4) of the Constitution could have been achieved by resorting to the principle of harmonious construction.

26. For the foregoing reasons, I would answer the question referred to us in the manner already indicated, that is to say, the provisions of Cl. (3) of Art. 15 cannot be invoked for restricting the scope of application of Cl. (2) of Art. 16 of the Constitution.

27. MITAL, J.:— I agree with my learned brother Sarkaria, J.

27-A. ORDER OF THE COURT: In view of the majority decision, the answer to the question referred to this Full Bench is as follows:—

"Articles 14, 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, Cl. (3) of Art. 15 can be invoked for construing and determining the scope of Article 16(2). And, if a particular provision squarely falls within the ambit of Article 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the ground of sex. Only such special provisions in favour of women can be made under Art. 15(3), which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Art. 16(2)."

Answer accordingly.

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(V 57 C 60)

FULL BENCH

MEHAR SINGH, C. J., HARBANS SINGH
AND D. K. MAHAJAN, JJ.

Jai Singh Rathi and others, Petitioners
v. State of Haryana through the Chief
Secy. to Govt. Haryana and others, Res-
pondents.

Civil Writ No. 463 of 1969, D/-28-4-1969.

(A) Constitution of India, Art. 227 —
Power of superintendence of High Court —
Power does not extend to exercising of
jurisdiction by Court over Legislative As-
sembly — Proceedings of Legislative As-
sembly are immune from jurisdiction of
High Court under Cl. 2 of Art. 212.

(Para 13)

(B) Constitution of India, Art. 212(1) —
Courts not to inquire into proceedings of
Legislature — Non-observance of pro-
cedure laid down in R. 121 of Rules of
Procedure and conduct of business in
Haryana Legislative Assembly — Irregu-
larity is mere of procedural nature — It
cannot be questioned in Court. (Para 15)

BN/DN/A435/70/RGC/C

(C) Constitution of India, Art. 194(3) — Powers and Privileges of House of Legislature — Suspension of provisions of Rule empowering House to punish its members for its contempt — House still can punish its members by use of its inherent power — Powers and privileges of Assembly under Art. 194(3) are complete and are not controlled by Rules made under Article 208(1).

(D) Constitution of India, Arts. 194 (1), 189 — Freedom of speech — Suspension of member from House for disobedience and defiance of Chair—Suspension cannot be said to deprive him of his freedom of speech and right to vote — It merely enforces his absence from service of House as measure of punishment. (Para 17)

(E) Constitution of India, Art. 190 — Vacation of seats in House — Suspension of member from House for disobedience and defiance of Chair — Suspension does not cause any vacancy in House — It merely enforces his absence from service of House. (Para 17)

(F) Constitution of India, Art. 226 — Ex parte application to High Court for rule nisi or other process — Affidavit in support of application suppressing facts and misleading Court — Court can refuse to consider such application on merit. (Para 20)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Madh Pra 95
(V 54) = 1966 MPLJ 1037,
Yeshwant Rao Meghawale v.
Madhya Pradesh Legislative As-
sembly 16
(1965) AIR 1965 SC 745 (V 52) =
1965-1 SCJ 847, Under Art. 143
of the Constitution of India, In
the Matter of Special Reference
No. 1 of 1964 16
(1959) AIR 1959 SC 395 (V 46) =
1959 Supp (1) SCR 806, M. S. M.
Sharma v. Sri Krishna Sinha 14, 16
(1954) (1954) 92 Com. W. L. R. 157,
Queen v. Richards 16
(1917) (1917) 1 KB 486 = 86 LJKB
257, Rex v. Kensington Income-
tax Commissioners 20

M. C. Chagla, Sr. Advocate, Anand Swarup, Sr. Advocate, R. S. Mittal, U. S. Sahni and S. S. Khanduja, for Petitioners; M. K. Nambayar, Sr. Advocate, C. D. Dewan, Advocate-General, Haryana, N. A. Subramanyam, P. S. Daulta with them, for Respondents Nos. 1, 2, 5 and 6.

JUDGMENT:— This is a petition under Arts. 226 and 227 of the Constitution by four petitioners, namely, Mr. Jai Singh Rathi, Mr. Mahant Ganga Sagar, Mr. Ganpat Ram and Mr. Fateh Chand Vij, Petitioners 1 to 4, all members of the Haryana Legislative Assembly, for a writ, order or direction to quash the proceedings of the Haryana Vidhan Sabha of February 5, 1969 during the course of

which the petitioners were suspended for the remainder of the session of the Legislative Assembly, and for quashing all the subsequent proceedings of the Legislative Assembly leading to the passage of the appropriation bill for the year 1969-70 on February 12, 1969. The respondents to the petition are the State of Haryana, Mr. Bansi Lal, Chief Minister of Haryana, Mr. Ran Singh, Mr. Speaker of the Haryana Legislative Assembly, Secretary of the Haryana Vidhan Sabha, and Smt. Chandra Vati and Mr. Banarsi Dass Gupta, members of the Haryana Legislative Assembly, respondents 1 to 6.

2. There was a mid-term poll in Haryana State for the election to the Haryana Legislative Assembly on May 14, 1968. The total strength of the membership of the Assembly is 81. Congress party secured 48 seats, other various parties secured together 27 seats, and there were 6 independents. One member of the Congress party was elected Mr. Speaker, respondent 3, and so the strength of the parties in the House was 47 Congress as against 33 others, including 6 independents. So the Congress party had a clear majority in the House. Respondent 2 became the Chief Minister as leader of the Congress party. He, therefore, formed the Government.

3. In the petitioners' petition paragraphs 2 to 20 give details of internal strains in the functioning of the Congress party. Some allegations are made with regard to respondent 2, who has in his affidavit in return given denial to the same. It has, however, not been denied at the hearing of this petition that what is stated in those paragraphs concerns the internal political organisation and functioning of the Congress party and has nothing to do with the merit of controversy raised in this petition by the petitioners which is for consideration of this Court. The subject-matter of those paragraphs is completely irrelevant and the petitioners were ill-advised to bring in this petition such political matters with which this Court can possibly have no concern. This manner of using the forum of this Court with reference to Arts. 226 and 227 of the Constitution to bring before it political matters, not that such matters are relevant to the controversy before the Court but merely to embarrass the opposite party, is clear indication of the irresponsible attitude of the petitioners and their advisors. In so far as these proceedings are concerned, it is much to be deprecated and it is hoped that this type of thing shall in future not find repetition. Respondent 2 in his affidavit very rightly complains that the allegations in those paragraphs deal with internal matters relating to the Congress Legislative party of which the petitioners are not members and with which they have no concern. It

is affirmed that those allegations do not have the remotest bearing on the relief sought in the petition, having been made just to embarrass respondent 2 and to drag the question of his leadership of the party into controversy before this Court. This is a just grievance on the part of respondent 2. The conduct of the petitioners in this respect as also of those who advised the petitioners into a course of this type must be disapproved and, as I have said, repetition of this type is not expected in future in such proceedings or rather in any proceedings before this Court, because it has nothing to do with matters political.

4. It appears that there were defections from the Congress party and also return to it of some members, in which connection an approach appears to have been made to the Governor of Haryana so as to claim that respondent 2 no longer commanded majority in the Haryana Legislative Assembly, but even with that part this Court has nothing to do. All that was a political intrigue in consequence of which shifting of political loyalties may have taken place, but, as I have already said, a matter of this type is not the concern of the Court and cannot be aired and agitated before it.

5. The Haryana Legislative Assembly having been summoned by the Governor to meet, it did so on January 28, 1969. Seat of one member of the Congress party had become vacant in consequence of acceptance by this Court of an election petition against his election. While the petitioners allege that on January 28, 1969, the strength of the Congress party was 39, that of the newly formed Samyukt Vidhayak Dal 36, and of the independents 6, thus claiming that the Congress party had become a minority party in the House, in his affidavit respondent 2 has, on the contrary, clearly stated that in spite of what happened on the political canvass of Haryana before January 28, 1969, he still had the support of 41 Congress legislators and 2 independent legislators, so that excluding Mr. Speaker and one member whose seat had become vacant on account of the success of the election petition against him, in a House of 79 he had the following of 43 members:-

6. The programme of the Haryana Legislative Assembly for its session commencing January 28, 1969, was to last, copy of the programme annexure 'A', till February 12, 1969. This programme, however, did not have in it for consideration the budget for the year 1969-70. The Governor of Haryana addressed the Legislative Assembly at 2 p. m. on January 28, 1969, and excluding two off days of February 1 and 2, 1969, the other four days from January 29 to February 4, 1969, were for discussion on the address of the Governor. On the last of those days, a privilege

motion was moved by a member of the opposition that another opposition member, Mr. Joginder Singh, had been abducted and was thus being physically prevented from participating in the proceedings of the House. What followed on the move of the privilege motion is described by the petitioners just in these few lines in paragraph 22 of their petition — "There was an uproar in the House during which the Speaker named the petitioners and asked them to leave the House. The petitioners, however, stated that their safety outside the House must be assured before they were asked to go out. After this the Speaker did not take any further action against the petitioners and asked the Chief Minister to reply to the debate on the Governor's address. Thereupon the Chief Minister moved the motion of thanks to the Governor, which was carried by voice vote and the House rose for the day." The statement, as it will appear from the reply to this paragraph in the affidavit of respondent 2, is the limit of over-simplification of facts of what transpired in the House on that day and, in substance, really amounts to a deliberate suppression of their own conduct by the petitioners in the House on that day. In the affidavit of respondent 2 by way of return to the petition, in paragraph 22, a fair and an accurate summary of what transpired in the House on that day is given. A copy of the proceedings of the House has been produced. At the hearing of this petition nobody on the side of the petitioners was able to say that what is affirmed in paragraph 22 of the affidavit of respondent 2 is not in any respect an accurate summary of what went on in the House on that particular day. In spite of Mr. Speaker having given his decision repeatedly a number of times that he had the notice of the privilege motion and that he would give early consideration to it, the members of the opposition persisted in discussion over the same, thus obstructing the continuance and completion of the discussion on the Governor's address. A good part of the summary of what happened in the House on that day on this aspect of the matter may be left out, but so far as this petition is concerned and so far as the petitioners are concerned, this is the relevant part of the summary giving a fair and an accurate description of their conduct in the matter — "When Ch. Jai Singh Rath, petitioner No. 1 rose on a point of order, the Speaker observed, 'well, if I find a wrong point of order is raised or that an unnecessary interference is being caused to the debate or to the discussion on the Governor's address, I shall name the member concerned. So I am telling you early.' Ch. Jai Singh Rath again raised a point of order which was overruled. Thereafter, Shri Ganpat Rai, a Member of the Legis-

lative Assembly, petitioner No. 3, raised a point of order. He wanted to quote an example that the Members sitting on the Treasury Benches did not behave properly with 'thin and lean' M. L. As. The Speaker ruled that this is no point of order at all and further observed, 'No, not now please. Let us resume discussion on Governor's Address.' Shri Ganpat Rai, M. L. A., went on persisting this point of order and the Speaker again ruled that this was no point of order. The Speaker said, 'The Hon'ble member should please take seat.' Shri Ganpat Rai did not resume his seat and the Speaker observed, 'If the Hon'ble Member does not resume his seat he will be named.' Shri Mangal Sain said, 'I am prepared to be named.' The Speaker observed, 'All right, since he is defying the Chair, he is named.' The Members again raised the question, that the Speaker was the Custodian of the House and he had to give them necessary protection. The Speaker observed, 'Hon'ble Member should please take his seat. A procedure is laid down in the Rules of Procedure of this House and that should be followed.' Thereafter Dr. Mangal Sain tried to raise another point of order and the Speaker observed, 'I am sorry, I cannot allow you to make a speech. Hon'ble Member can rise on a point of order.' The Speaker further observed, 'If the Hon'ble Member does not resume his seat, he will be named.' The Speaker further said, 'Kindly one man should speak. All at one time cannot speak.' On this Ch. Jai Singh Rathī stood up and the Speaker asked him to sit down. Shri Jai Singh Rathī persisted to speak and the Speaker asked him to resume his seat. The Speaker observed, 'I am asking the Hon'ble Member, Shri Jai Singh Rathī, to resume his seat and this is the last time that I request him to take his seat. The Speaker repeated his request, but the Member did not take his seat. Thereupon the speaker named Shri Jai Singh Rathī but Ch. Jai Singh Rathī did not resume his seat. There was uproar in the House and the Speaker gave him another warning and observed, 'If the Hon'ble Member does not take his seat, he will be asked to withdraw from the House.' Shri Jai Singh Rathī continued to stand, and thereupon the Speaker observed, 'The Hon'ble Member, Ch. Jai Singh Rathī, would you please withdraw from the House.' Ch. Jai Singh Rathī disobeyed the Chair when the Chair ordered him thrice to withdraw. Thereon the Speaker observed, 'Since the Hon'ble Member, Ch. Jai Singh Rathī has continuously defied the Chair and he is not withdrawing from the House, the Marshal should please go and comply with my orders.' At this stage Marshal went to the seat of Ch. Jai Singh Rathī. Rao Birinder Singh, Leader of the Opposition said, 'Speaker Sahib, all these would re-

main in the Assembly.' At this stage Shri Fateh Chand Vij petitioner No. 4 proceeded towards the seat of Shri Jai Singh Rathī and stood by his side and thus obstructed the Marshal in discharging his duties. The Speaker again asked Shri Jai Singh Rathī to please withdraw from the House. Shri Jai Singh Rathī replied, 'No, please.' The Speaker further observed, 'Those Hon'ble Members who are causing obstruction in the performance of duties by the Marshal will have to be named if they do not go back to their seats.' At this stage some Members covered Shri Jai Singh Rathī from both sides who remained standing by his seat and thus all these Members prevented the Marshal to carry out the orders of the Hon'ble Speaker. The Speaker observed, 'Since the Hon'ble Members are defying the Chair and are not going to their seats to enable the Marshal to perform his duties I will have to name them.' The members remained standing on both sides of Shri Jai Singh Rathī and did not leave that place. Thereon, the Speaker said, 'Mr. Vij is also named. Mahant Ganga Sagar (Petitioner No. 2) is named, Shri Ganpat Rai (Petitioner No. 3) is also named. They should please leave the House. All the four Members named should please withdraw from the House.' On this there was a noise in the House. After some time the Speaker said, 'Order please; let me make an observation. I find that absolutely undue interference is being caused by a number of Members which is extremely bad and disgraceful for the proper decorum and proper functioning of the House. I adjourn the House for 15 minutes and we will then see.' The House then adjourned. When the House reassembled at 4-45 p. m., all the petitioners who had been named by the Speaker were still in the House and the Speaker observed, 'I find that Mr. Rathī is still here in his seat. I had requested him to withdraw. This will be a very rare occasion when the dignity and decorum of the House is flouted by a Member. I will again request him to withdraw from the House.' There was uproar in the House. The Speaker asked all the petitioners who were earlier named by him to withdraw from the House, and observed, 'I cannot allow the decorum and the dignity of the House to be touched. I shall hear you only after the four Members have left the House.' But the noise and interruption continued. The opposition Members were persistently making interruption and noise. The Speaker observed, 'We cannot under any circumstance let down the decorum and dignity of the House. It is a matter of shame. I assure you it is a matter of shame that the four Members who have been named are still in the House. It is shameful. It is very bad, very poor.' When there was no stop to

these interruptions and noises, the Speaker again observed, 'May I ask Shri Chand Ram to sit down. Since I find that there is a deliberate obstruction to the proceedings of the House, I will request the Leader of the House to reply to the debate.' Thereupon Malik Mukhtiar Singh, Member of the Opposition said, 'No certainly not. He cannot make any speech at this stage.' The Leader of the House, thereupon, requested for closure of debate and the Speaker put the question and the closure motion was carried by voice vote. The amendment to the Motion of thanks was moved by the Opposition (Shri Roop Lal Mehta), but this was lost. The Motion of thanks was put to vote and the same was carried by voice vote. All this happened during noise and interruptions and the opposition shouted slogans 'Joginder Singh Ko Pesh Karo. Dhake Shahi Nahin Chalegi' and thereafter the House was adjourned by the Speaker for the 5th February, 1969. The demand by the petitioners for their safety outside the House was however, frivolous." If one thing is apparent that is just this, that in spite of all what the petitioners have stated in their petition that respondent 2 was in danger of losing his majority, the fact of the matter is that the motion of thanks to the Governor for his address was carried by the Treasury Benches on just a voice vote, the opposition not even claiming a division in this respect. Apparently they were not in a position to bring down the majority with the Government on that day. The conduct of the petitioners as appears from the summary of the proceedings of the House given in paragraph 22 of the affidavit of respondent 2 hardly does credit to them. They persistently and continuously defied and disobeyed the Chair.

7. The House when it met on February 5, 1969, had before it a motion moved by respondent 5 for suspension of R. 104 of the Rules of Procedure and Conduct of Business in the Haryana Legislative Assembly. An affidavit has been made by respondent 5 that the motion in that respect had been delivered by her personally to Mr. Speaker at 12 noon on that date. The motion was in this form — "To move that Rule 104 of the Rules of Procedure and Conduct of Business in the House be suspended in its application to the motion regarding the suspension of Shri Jai Singh Rath (petitioner 1) and three others." There is an affidavit of respondent 6 that on the same day at about 12 noon he had personally delivered to Mr. Speaker a motion for the suspension of the petitioners for the rest of the session of the Assembly and that motion read — "That yesterday, the 4th February, 1969, four members of the House, namely, Sarvshri Jai Singh Rath, Mahant Ganga Sagar, Fateh Chand and

Ganpat Rai, having been named by the Hon'ble Speaker did not withdraw from the House and continued to defy his orders. They committed gross contempt of the House and breach of privilege. This House suspends them for the rest of the session and directs the aforesaid members to absent themselves from the meetings of this House for the remainder of the present session." These two motions had thus been delivered by respondents 5 and 6 to Mr. Speaker round about noon on February 5, 1969, before the House met for the business of the day. Both the motions were with Mr. Speaker.

8. When the House met on that date, respondent 5 moved her motion for suspension of Rule 104. It was passed by the House by a majority. According to the petitioners this motion was illegally admitted by Mr. Speaker and passed by force of the Government majority. According to the return affidavit of respondent 2, this motion was put to vote and was carried by 42 votes for and 33 votes against it, including the petitioners'. There is no averment by the petitioners that any objection was taken on the side of the petitioners or by any other member of the opposition in regard to any illegality or irregularity in the move of that motion before the House. After that respondent 6 moved his motion for suspension of the petitioners from service of the House for the rest of the session. It is admitted in the petition that this motion was also passed by the House with majority of the Government supporters, but it is stated clearly in the return affidavit of respondent 2 that this motion was also carried by a majority of votes, 41 voting for, and 32 (including the petitioners) against the motion. It has been the case of the petitioners that motion for suspension of Rule 104 was illegal being contrary to Rule 121 as when it was moved, there was no motion before the House for suspension of the petitioners. To this the reply rendered in the return affidavit of respondent 2 is that this averment on the side of the petitioners is not true, respondents 5 and 6 having already given notices of both the motions and delivered the same to Mr. Speaker before the House met, apart from this that in the motion of respondent 5 for suspension of Rule 104 with regard to the petitioners it was clearly stated that the suspension of the rule was to be 'in its application to the motion regarding the suspension of Shri Jai Singh Rath (petitioner 1) and three others', thus making it absolutely clear that the other motion of respondent 6 for suspension of the petitioners from service of the House was already with Mr. Speaker and was due to be formally moved before the House immediately. The petitioners do not again give the details of what transpired in the House when res-

pondent 5 moved her motion for suspension of Rule 104 qua the petitioners, but in paragraph 23 of his return affidavit respondent 2 again gives a fair and an accurate summary, unquestioned as to its correctness, in regard to the proceedings in the House on the move of her motion by respondent 5. This part of the summary is relevant here — "When a discussion was raised on the motion for suspending Rule 104 and a point was raised that no discussion was permissible on such a motion, the Speaker ruled, 'I agree that normally no speeches are made on such a motion. But, since the Hon'ble Member asks for a permission to say something, I allow her to speak.' On this Rao Birinder Singh, Leader of the Opposition, raised a point of order. He said, 'I rise on a point of order. Sir, the subject-matter of this motion is already before you. The matter had been referred to the Privileges Committee of the House on a motion from the Treasury Benches. The Committee will consider the matter in all its aspects and give their report. Now where is the need for giving this motion.....' Thereon the Speaker ruled, 'I will answer this question, but before I do that I will read the Privilege Motion.' It says, 'Yesterday, the 4th February, 1969, during the sitting of the Haryana Vidhan Sabha, Sarvshri Jai Singh Rath, M. L. A., Fateh Chand Vij, M. L. A., Ganpat Rai, M. L. A., Mahant Ganga Sagar, M. L. A., Dr. Mangal Sain, M. L. A., Rao Birinder Singh and Chand Ram, M. L. As, raised the slogans in the House and created disorder and defied the order of the Hon'ble Speaker and they have committed a breach of privilege of the House. Appropriate action should be taken against them.'

... .. It will be seen that this privilege motion contained the slogans raised and the disorder created by certain Members and not the order of the Speaker which certain Members defied by refusing to withdraw from the House when asked to do so by the Speaker. On this Rao Birinder Singh said, 'Sir, the subject-matter is the same. It involves the whole affair. In fact, it covers the whole matter, that is, raising of slogans and objectionable behaviour which is the subject-matter of this privilege motion. The Privileges Committee of the House is going to consider this question. In any way, this matter is sub judice before the House or a Committee of the House and the Members of the Privileges Committee are going to take a decision on this motion. If it is now put before the House, this will be prejudging the issue before the Privileges Committee considers the matter and gives its report. So, the placing of this motion before the House will be against the privilege of the House itself. The Speaker ruled, 'I will just explain this question,

As far as I can see from this side (Government side) they have made two issues. One was that certain members, the names of whom I have mentioned just now, indulged in slogans and also disobeyed the orders of the Chair. At that time they did not sit down and did not maintain proper order when the question was put to the House. The second issue appears to be that certain members were named and were ordered to withdraw from the House, but they did not leave the House. So, this is a different issue as far as I can see. The ruling of the Speaker was again sought and he ruled 'My ruling is that as I have mentioned, these are two separate issues.' Again a point of order was raised and the Speaker ruled, 'Anyway, let me explain it again. The said disobedience relates to the incident when the Members on this (opposition side) side stood up and raised slogans while the other matter concerns the withdrawal of the members from the House. This is the difference as far as I can make out.' The matter was again raised and the Speaker ruled, 'In this they have made out two issues. The first issue relates to the time when the members were named and they were requested to leave the House. But they failed to obey the orders of the Chair. This is one thing. The other issue relates to the time when the question was put from the Chair. At that time some members got up and started raising slogans and shouting. At that time of course, if you remember I had said 'Order, order.' So, these are two separate issues.' When the members from the Opposition persisted to rake up this question, the Speaker ultimately ruled, 'I have already said that there are two separate issues.' At one place the Speaker observes, 'Could you kindly take your seat now?' The fact remains that four Members had been requested to leave the House and it is very painful that it was not done. This was what really happened. It is a matter of shame and disgrace that the dignity and decorum of the House was not maintained. The official Report of the Assembly dated the 5th February is produced, and a true English translation thereof is also filed herewith. It is clear that the motion was before the House, admitted and passed by a majority. No objection to the legality of the admission can therefore be validly taken. I say that it was not even necessary to move a motion for suspending the rule. I submit that the House has always an inherent power to not merely suspend a member, but even to expel him, if considered necessary for the preservation of dignity and decorum of the House. It may be mentioned that even though the motion for suspending the petitioners was carried, the petitioners did not yet leave the House. They did not leave the House

even though ordered by the Speaker. The Speaker consequently observed, 'I regret to say that the Members have not complied with the Chair's orders. It is bad again for our House and its dignity and decorum; also not very healthy for our democracy, and since there is non-cooperation from a certain section I adjourn the House till tomorrow.' It appears that on the previous day members of the opposition had shouted slogans and with regard to that a privilege motion was before the Privileges Committee. The members of the Opposition in the wake of that endeavoured to persuade Mr. Speaker that the subject-matter of what was before the Privileges Committee was the same as the motion with regard to the suspension of the petitioners from the service of the House for the rest of the session. This whole discussion and the repeated decisions of Mr. Speaker on the point raised were with regard to the move of her motion by respondent 5 for suspension of Rule 104 so far as the petitioners were concerned. It was after all this discussion that that motion was adopted by the House.

9. In the Rules of Procedure and Conduct of Business in the Haryana Legislative Assembly, hereinafter referred to as 'the Business Rules', Rule 104 reads—

"104. (1) The Speaker shall preserve order and have all powers necessary for the purpose of enforcing his decisions on all points of order.

(2) He may direct any member whose conduct is, in his opinion, grossly disorderly to withdraw immediately from the Assembly and any member so ordered to withdraw shall do so forthwith and shall absent himself during the remainder of the day's meeting. If any member is ordered to withdraw a second time in the session, the Speaker may direct the member to absent himself from the meetings of the Assembly for any period not longer than the remainder of the session and the member so directed shall absent himself accordingly. Such member shall be deemed to be absent from the meetings of the Assembly for purposes of Section 3(2) (a) of the Punjab Legislative Assembly (Allowances of Members) Act, 1942, but shall not be deemed to be absent for the purposes of Article 190(4) of the Constitution."

And Rule 121 says—

"121. Any member may, with the consent of the Speaker, move that any rule may be suspended in its application to a particular motion before the Assembly and if the motion is carried the rule in question shall be suspended for the time being."

When these rules are taken together what has been the objection on the side of the petitioners is that respondent 5's motion for suspension of Rule 104 could not be

moved unless respondent 6's motion for suspension of the petitioners from the service of the House had already been moved, so that the application of Rule 104 may be suspended to that motion of respondent 6.

10. In their petition the petitioners come thereafter immediately to February 10, 1969, and express their surprise to having found a revised legislative programme lying on their seats at 2 p.m. on that day when the House met, according to which programme the budget for the year 1969-70 was to be presented by the Finance Minister on the very day and the session had been extended to February 18, 1969. However, in the return affidavit of respondent 2, in paragraph 24, it is stated that on February 7, 1969, an order of that date of the Governor recommending the presentation of the budget for 1969-70 was received and a list of business, copy annexure 'R. 2/1', of the very date, indicating that the Finance Minister would present the budget on February 10, 1969, was issued, and despatched to the members of the House by post. Respondent 2 claims that he received the list on the very day and says the other members must have received it about the same time, it not having been claimed by any member of the House by an affidavit that he had not received that communication. It is further pointed out by respondent 2 that a news item appeared in the Tribune of February 8, 1969, with regard to the introduction of the budget in the Haryana Assembly on February 10, 1969. It is, however, admitted that the revised programme was placed on the seats of the members on February 10, 1969. A copy of this revised programme is annexure 'B' to the petitioners' petition. The budget was to be taken up on February 10 and the appropriation bill was to come before the House on February 14, 1969. There followed two off days and the remaining two days of February 17 and 18, 1969, were allotted to legislative business of the House. The petitioners aver that having been the revised programme on their seats on February 10, 1969, the members were completely taken aback by the sudden change in the programme, which, according to them, went to show that respondent 2 and his supporters were not sure of their position and wanted to have the budget passed in an indecent haste after having had the petitioners illegally suspended from the House and also showed that the action of the Government supporters in passing the motion of suspension was mala fide and taken in bad faith to obviate the possibility of the Government being defeated in the budget session. In the return affidavit of respondent 2 it is stated in reply that the intention of the Govern-

ment right from the start was to introduce the budget in the session in the interest of economy if it could be got ready. Instructions were issued to all Departments much before the commencement of the session regarding the preparation of the budget estimates, but no firm indication could be given to the members at the commencement of the session because the Government was not certain that all the relevant information necessary for the preparation of the budget would be available in time. During the session it became evident that there would not be much difficulty in having the budget prepared for presentation during that very session. So there was change in the programme and the budget presented. It is denied that the resolution of the House suspending the petitioners was mala fide and taken in bad faith in order to obviate the possibility of the Government being defeated in the budget session. This allegation is described as baseless.

11. According to the averments of the petitioners on February 10, 1969, nineteen bills were passed by the Haryana Legislative Assembly in ninety minutes, and during its second sitting there was a general discussion on the budget. On February 12, 1969, respondent 2 and his ruling party became so desperate and were in such a hurry that they did not stick to the published programme and the demands for grants on budget were placed for voting during the first sitting and the appropriation bill on the budget estimates which was originally to be considered on February 14, 1969, was actually brought in the second sitting of the House and passed. The petitioners say that 'the whole sequence of events narrated above clearly shows that respondents 2, 5 and 6 have been actuated by mala fide and in order to illegally keep the present Ministry in power, all the time apprehending the loss of the uncertain support of the independent members and three others, resorted to the tactic of getting the petitioners suspended from the House and bringing the budget estimates for the consideration of the House after revising the programme of business at the eleventh hour.' This really again does not give the real picture of what happened and, as will appear from the reply of respondent 2 in his return affidavit, much has been suppressed by the petitioners. It is explained in that return that twenty bills were passed and one referred to the Select Committee on the first sitting of the House on February 11, 1969. The second sitting on February 11, and the two sittings on February 12 were for general discussion on the budget and vote on demands for grants and passing of Appropriation (No. 2) Bill, 1969, in accordance with the provi-

sions of Rule 29. On February 10, the entire opposition walked out before the speech of the Finance Minister and the presentation of the budget of 1969-70. On February 11, after question hours, the Opposition again walked out and thereafter did not participate in the deliberations of the Assembly for the remainder of the session. It is pointed out that the whole of the legislative business for which otherwise two full days and two half days had been allotted, was concluded in the first sitting of February 11. According to the programme, the second sitting of that day was for general discussion on the budget which was done. On February 12 no legislative business was left over and so vote on demands for grants on budget, otherwise intended to be taken in the first and second sittings of February 13, was taken up and concluded in the first sitting on that day. In the second sitting on the very day, the appropriation bill on the budget estimates, otherwise intended to be taken up on February 14, was taken up and carried. That concluded the entire business of the Assembly for which the session had been extended to February 18, 1969. Respondent 2 further points out that in the circumstances the entire business was concluded earlier than scheduled because there was no opposition.

12. It is on the facts and circumstances as above that the petitioners have challenged the legality of their suspension from the service of the House on February 5, 1969, till the end of the session and have claimed that as that was illegal and they as members of the House were prevented from exercising their constitutional right, all proceedings, subsequent to that, of the Haryana Legislative Assembly including the passage of appropriation bill for 1969-70 have been illegal. The grounds given in the petition are (a) that according to sub-rule (2) of Rule 104, the power to order a member to withdraw immediately from the Assembly for disorderly conduct and to suspend him has been given to Mr. Speaker, and so the power to suspend a member having been vested in Mr. Speaker by law could not be exercised by the House; (b) that the suspension of R. 104 could not re-vest the power of suspension in the House; (c) that the motion of suspension of Rule 104 was itself illegal being contrary to Rule 121 as when that motion was moved, the motion for suspension of the petitioners was not before the House; (d) that the Haryana State Legislature cannot claim the power to suspend a member under Article 194(3) of the Constitution as such power is inconsistent with the rights of the members given to them by Articles 189 and 194(1) and the basic concepts of Parliamentary Government recognised by the Constitu-

tion; (e) that even if the Haryana Legislative Assembly has such a power, its exercise in the present case has been mala fide and amounts to an abuse of power and bad faith having regard to the sequence of events before and after the exercise of that power as that was done with the ulterior object of ensuring a majority for the ruling party during the discussion and voting on the budget estimates and appropriation bill for the year 1969-70; and (f) that the suspension of the petitioners from the session amounted to a fraud on the Constitution. Respondent 2's reply in his return affidavit to these grounds has been (a) that apart from the power of Mr. Speaker under Rule 104, the House itself possesses the power under Article 194(3) of the Constitution to take appropriate action, including an action to suspend its members, in the event of the breach of its privileges, and that it is a breach of the privilege of the House amongst the established privileges if a member thereof indulges in disorderly conduct, defies the authority of the Chair, disobeys the lawful command of the Chair and thus commits contempt of the House; (b) that the House possesses its own inherent power, apart from Rule 104, and there is no question of any revesting of the power in it on the suspension of that rule; (c) that both the motions were with Mr. Speaker when respondent 5's motion for suspension of Rule 104 was moved and the opposition members were aware of the second motion because of reference to the suspension of the petitioners in respondent 5's motion and because of the reference of the substance of respondent 6's motion by members of the opposition during the discussion on respondent 5's motion; (d) that the operation of Article 194(3) is independent of anything said in any other article of the Constitution in so far as its operation has not been made subject to the provisions of the Constitution; (e) that the allegation of the petitioners that the power exercised by the House in suspending them is mala fide and amounts to abuse of power, bad faith or fraud is baseless and so is the allegation of ulterior object attributed by the petitioners in regard to securing majority; and (f) that the suspension of the petitioners does not amount to a fraud on the Constitution. Some preliminary objections on the side of the respondents may also be noticed (a) that Article 227 of the Constitution is not attracted even on the averments and allegations of the petitioners because the Haryana Legislative Assembly is not a Court or tribunal inferior to this Court, (b) that respondents 3 and 4, Mr. Speaker and the Secretary of the Haryana Legislative Assembly, are not amenable to the jurisdiction of this Court because of Arti-

cle 212(2) of the Constitution, and (c) that the Haryana Legislative Assembly is supreme and has exclusive control and jurisdiction in all its internal affairs and is the sole judge of the lawfulness of its own proceedings, so that no part of its proceedings concerning the suspension of the petitioners is justiciable in this Court.

13. There is merit in the first two preliminary objections on the side of the respondents, but the third objection concerns the merit of the controversy in this petition. Article 227 gives superintendence to this Court over all Courts and tribunals within its territorial jurisdiction, but the Haryana Legislative Assembly is neither a Court nor a tribunal subordinate to this Court over which it has jurisdiction of superintendence according to that article. The power of Mr. Speaker to regulate the procedure or the conduct of business in the House or for maintaining order in it is immune from the jurisdiction of this Court under clause (2) of Article 212. Same or similar immunity is also available to other officers of a State Legislature, such as its Secretary. So Mr. Speaker and the Secretary of the Haryana Legislative Assembly are unnecessary parties to this petition. No relief has been claimed against them — Neither has filed any return to this petition. Although these two preliminary objections on the side of the respondents have merit, there still remains for consideration the main controversy in this petition.

14. The first argument of Mr. M. C. Chagla, learned counsel for the petitioners, was that the resolution of the Haryana Legislative Assembly suspending Rule 104 with regard to the petitioners was not legal inasmuch as it did not conform to Rule 121. The two rules have already been reproduced above. He said that there was no motion before the House for suspension of the petitioners when respondent 5 moved her motion for suspension of Rule 104 with regard to the suspension of the petitioners. In reply on behalf of the respondents, Mr. M. K. Nambyar, learned counsel for them, pointed out that there was reference in the motion of respondent 5 for suspension of Rule 104 to the suspension of the petitioners in connection with which that rule was to be suspended, and then he referred to the brief account given in the return affidavit of respondent 2 in regard to the discussion on that motion to show that in fact the opposition members knew that the other motion of respondent 6 for suspension of the petitioners from service of the House was already with Mr. Speaker. He, therefore, contended that as both the motions were with Mr. Speaker, respondents 5 and 6 having made affidavits to that effect, before the

House met, and were before him when respondent 5 moved her motion for suspension of Rule 104, so there was really no substantial infringement of Rule 121. He also pointed out with reference to observations of their Lordships in *M. S. M. Sharma v. Sri Krishna Sinha*, AIR 1959 SC 395, at p. 411, para (29-a), that no objection was taken by any member of the opposition when respondent 5 moved her motion for suspension of Rule 104 and when that motion was carried by a majority of the House. This was one of the considerations which prevailed in rejecting a somewhat similar arguments by their Lordships in the case just cited above.

15. In Rule 121 it is provided that there may be suspension of any rule in its application to a particular motion before the House, and if the motion is carried the rule in question shall be suspended for the time being. It is apparent that there was not strict and literal compliance with this rule in so far as the motion for suspension of the petitioners from service of the House had not been moved by respondent 6 when respondent 5's motion for suspension of Rule 104 came before the House for consideration. The fact of the matter, however, is that both the motions had been given by respondents 5 and 6 near about noon on the particular date to Mr. Speaker before the House met. So both the motions were with Mr. Speaker when respondent 5 moved her motion for suspension of Rule 104. The factual statement made by Mr. Nambyar remains uncontroverted that in the motion of respondent 5 for suspension of Rule 104 there was reference to the purpose for which Rule 104 was to be suspended, that is in regard to the suspension of the petitioners, and in the discussion on that motion the members of the opposition really referred to the question of suspension of the petitioners, because they pressed Mr. Speaker not to allow the motion as the subject-matter was already before the Privileges Committee. So, as I have already said, even having regard to all these facts, there still was not motion of suspension of the petitioners before the House when respondent 5's motion for suspension of Rule 104 in its application to the suspension of the petitioners was moved and strictly and literally there was not compliance with Rule 121. It is, however, apparent that this is no more than a mere procedural irregularity in the proceedings of the House, and the validity of those proceedings on this account is not open to question in view of clause (1) of Article 212. So this argument on the side of the petitioners that the move of respondent 5's motion for suspension of Rule 104 and the passing of

the resolution to that effect by the House were attended by illegality does not prevail. It amounted to no more than an irregularity of procedure in the proceedings of the House.

16. It was next contended by Mr. Chagla that even if the suspension of Rule 104 was good or a mere irregularity of procedure not open to question in this Court in view of Article 212(1), Rule 104 having been suspended, there remained no power in the House and none was, in the circumstances, vested in the House to suspend the petitioners from service of the House. He said that the privilege of suspending a member of the House had to be exercised by Mr. Speaker according to Rule 104 and as, on account of its suspension, it was not operative, the House could not suspend the petitioners, nor could the House create a situation in which it could depart from Rule 104. He referred to this passage at page 104 in May's Parliamentary Practice, Seventeenth Edition.—"Suspension from the service of the House was a punishment employed by the House of Commons under its power of enforcing discipline among its Members, long before it was prescribed by standing order for particular offences, such as disregard of the authority of the Chair, or obstruction, and it can still be imposed at the discretion of the House, although, of course, not under the summary procedure authorized by that standing order", and then to this passage at page 468— "A standing order passed on 28 February 1880, and amended on 22 November 1882, provides that when a Member is named by the Speaker for grossly disorderly conduct, disregarding the authority of the Chair or abusing the rules of the House by persistently and wilfully obstructing the business of the House or otherwise, a motion may be made 'That such Member be suspended from the service of the House', upon which the Speaker forthwith puts the question, no amendment, adjournment or debate being allowed." This he has pointed out is provided in Standing Order 24 which appears at page 1073 of the same book. At page 469 it is further stated— "A Member who is suspended from the service of the House under this order must forthwith withdraw from the House. If he does not withdraw the Speaker directs him to do so. If he does not comply with the direction, the Speaker orders the Serjeant at Arms to summon the Member to obey the Speaker's direction. If he still refuses to obey, the Speaker calls the attention of the House to the fact that recourse to force is necessary in order to compel obedience to his direction, and directs the Serjeant to remove the refractory Member. The standing order provides that in such a case the Member shall there-

upon, without any further question being put, be suspended from the service of the House for the remainder of the session (S. O. No. 24 (4))". He pointed out that in the Rules of Procedure and Conduct of Business in the Lok Sabha there is Rule 3.74 which is exactly the same as Standing Order 24 of the House of Commons. It is only in the Lok Sabha that the power of suspension of a member for disorderly conduct and disobedience of the Chair has been retained by the House, but so far as the Haryana Legislative Assembly is concerned, the power has been passed on to Mr. Speaker under R. 104. So Mr. Speaker alone in the Haryana Legislative Assembly can exercise such a power and no residuary power in this respect has been left to the House, nor has the House been given disciplinary jurisdiction in this respect. Suspension of Rule 104 having deprived Mr. Speaker of this power, the suspension of that rule does not give that power back to the House. He then referred to Article 189 of the Constitution which in sub-art. (1) provides that "Save as otherwise provided in this Constitution, all questions at any sitting of a House of the Legislature of a State shall be determined by majority of votes of the members present and voting other than the Speaker or Chairman, or person acting as such" and urged that forcibly excluding the petitioners from the House, they were prevented from taking part in the debate of the House and voting therein contrary to sub-article (1) of Article 189. Such exclusion, according to him, is not contemplated by the Constitution because the substantial effect of such exclusion is to cause a vacancy in the House when there is no power in the House to do so under any Article of the Constitution. So he pressed that the deprivation of the petitioners of their right to vote in the determinations of the House was violative of sub-article (1) of Art. 189. Referring to sub-article (1) of Article 194, which provides that "Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State", he contended that by preventing the petitioners from attending the House and from the service of the House there was denial of the right of freedom of speech in the House to them, which was violative of sub-article (1) of Article 194. It was not a mere irregularity of procedure in the proceedings of the House as referred to in sub-article (1) of Article 212 but an illegality which can be called into question by the petitioners. He relied in this respect on the observations of their Lordships in the case reported as In the matter of Spl. Ref. No. 1 of 1964 under Art. 143 of the Constitution, AIR 1965

SC 745, at pp. 767 and 768,— "Similarly, Article 212(1) makes a provision which is relevant. It lays down that the validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure. Article 212(2) confers immunity on the officers and members of the Legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. Article 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular." So he pressed that the petitioners had a fundamental right of freedom of speech in the House and it was a denial of that right when they were prevented from exercising it on account of their having been forcibly excluded from being present in the House. This was an illegality in the proceedings of the Haryana Legislative Assembly and not a mere irregularity. If such a thing was countenanced, he said, not only one member of the House may be suspended but the whole opposition may be wiped out, thus defeating the very purpose of the Constitution and the very conception of democracy. The only other thing that he said in this respect was that what happened on February 4 came to an end and the chapter was closed by the adjournment of the House at the end of the session on that day and there was nothing that happened on February 5, 1969, which invited the House to suspend the petitioners so as to exclude them from the service of the House denying them their rights to vote in regard to the determinations in the House and to have freedom of speech in the House in relation to the debate in the same. To this argument on the side of the petitioners, the reply by Mr. Nambyar on behalf of the respondents was that the power of a State Legislature to make rules regulating its procedure and the conduct of its business has been expressly made subject to the provisions of the Constitution according to sub-article (1) of Article 208. It is, therefore, subject to sub-article (3) of Article 194 dealing with the powers, privileges and immunities of State Legislatures and their members. So the Rules of Procedure and Conduct of Business of

Haryana Legislative Assembly have not the effect of abrogating the powers, privileges and immunities of the Haryana Legislative Assembly as conferred on it by Article 194(3), nor can these rules detract from those powers, privileges and immunities. According to that constitutional provision the powers, privileges and immunities of the Haryana Legislative Assembly are the same as those of the British House of Commons on the date of the coming into force of the Constitution in 1950. His contention was that in spite of Rule 104, the Haryana Legislative Assembly has retained the power and privileges of punishing a recalcitrant member of the House for contempt of the House because of his conduct in disobeying the Chair and for being disorderly in the House. He referred to these statements in May's Parliamentary Practice — "The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are 'absolutely necessary' for the due execution of its powers." They are enjoyed

by each House for the protection of its Members and the vindication of its own authority and dignity". (page 42); "Such powers are essential to the authority of every legislature. The functions, privileges and disciplinary powers of a legislative body are thus closely connected. The privileges are the necessary complement of the functions, and the disciplinary powers of the privileges" (page 43); "Article 9 of the Bill of Rights

lays down that 'freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament' (page 59); "..... There are three principal matters involved in the statement of the law contained in this Article:—

1. The right of each House to be the sole judge of the lawfulness of its own proceedings;
2. The right implied to punish its own Members for their conduct in Parliament;

Further, there is the question,

3. What is the precise meaning of the term 'proceedings in Parliament?' (page 60);

and "It seems that the Speaker, in his petition, also sought for the Commons the right to punish any Member who, by his conduct, might offend the House. This privilege is now partly embodied in S. O.'s No. 23, No. 24 and No. 25, which prescribe a summary procedure for enforcing discipline but is not dependent upon them for its existence" (pages 61 and 62). He endeavoured to demonstrate by these citations that although in the British House of Commons Standing

Order No. 24 deals with the question of suspension of a member for disobedience of the Chair and for disorderly conduct, but the power is not dependent upon that standing order and is independent of it, and further that the House may depart from any such standing order while exercising its inherent power to punish a member for its contempt. He urged that it is one of the privileges of House of Legislature in a State to punish a member for its contempt of the nature of disobedience of the Chair and disorderly conduct in the House, by way of suspension and to regulate its own proceedings, relying in this respect on the observations of their Lordships of the Supreme Court in M. S. M. Sharma's case, AIR 1959 SC 395 at p. 403, paragraph 18, and in the matter of Spl. Ref. No. 1 of 1964, AIR 1965 SC 745 at p. 771, para 74. He also referred in this respect to Yeshwant Rao Meghwal v. Madhya Pradesh Legislative Assembly, AIR 1967 Madh Pra 95, at p. 103, para 25, that one of the powers and privileges of a State Legislature is to expel a member for disorderly conduct even though there is no rule to that effect in the rules made under Article 208(1). So he urged that by the suspension of R. 104 in the Haryana Legislative Assembly in no way ever lost its privilege and power of punishing a member for its contempt for his having disobeyed and defied the Chair and for his disorderly conduct in the House. The power and privilege in this respect, so Mr. Nambyar said, continues to exist in spite of Rule 104, and there was no question of revesting of any such power or privilege in the House on the suspension of Rule 104. Such power or privilege is not dependent, as shown from May's Parliamentary Practice at pages 60 to 62, upon any standing order or rule with regard to the matter of suspension of a member for such conduct. On the date of the coming into force of the Constitution, the British House of Commons possessed the power and privilege to punish a member for its contempt on account of his disobedience of the Chair or disorderly conduct, in spite of Standing Order No. 24, and Mr. Nambyar contended that the position is exactly the same in the Haryana Legislative Assembly in view of Article 194(3). The House, he said, is complete master of its own proceedings and what goes on in it, and merely because it has by Rule 104 given its power of suspension of a member of it to Mr. Speaker, that does not mean that the House has for ever lost the power. In regard to Article 189(1), his argument was that the right referred to therein is subject to other provisions of the Constitution and hence subject to Article 194(3) in regard to the powers, privileges and immunities of the House. He pointed out that in fact no vacancy

had been caused in the Haryana Legislative Assembly by the suspension of the petitioners who were only compelled to be absent, in the circumstances, to the end of the session. The right of freedom of speech in the Legislature, as referred to in Article 194(1) he pointed out, is subject to the rules and standing orders regulating the procedure of the Legislature, as are made under Article 208(1) of the Constitution which in turn are again subject to the provisions of the Constitution, so that the rules must be subject to Article 194(3). In this way the claim of the petitioners to a right of vote in the House and to freedom of speech therein is subject to Article 194(3). He referred to AIR 1965 SC 745 at p. 762, para 38, in regard to the observation of their Lordships that Article 194(3) of the Constitution is the sole foundation of the powers, and no power which is not included in it can be claimed by a House of Legislature. He pointed out that while sub-article (1) of Article 194 is made 'subject to the provisions of this Constitution', that is not so far as sub-article (3) of that Article is concerned, so that the powers, privileges and immunities given to a House of Legislature are uncontrolled by any other provisions of the Constitution like those in Arts. 189(1) and 194(1). In this respect he made reference to *Queen v. Richards*, (1954) 92 Comm WLR 157, in which the learned Judges considered the provisions of the Australian Constitution, Section 49, which corresponds to Article 194(3), and Section 50, which corresponds to Article 208(1), and observed, at page 169, — "The material words of Section 50 are that each House may make rules and orders with respect to the mode in which its powers, privileges, and immunities may be exercised. The argument, I think, may be stated in more than one way. It may be stated that the issue of the warrant and the giving it a conclusive character is merely a mode of exercising the powers given by Section 49 and therefore falls within Section 50. It may also be stated in a much wider way, namely, in effect that the powers under Section 49 are contingent upon the Houses exercising their authority under Section 50 and making rules and orders with respect to the mode by which the powers, privileges and immunities may be exercised. As the House has not made such rules in relation to a matter of this description, it is suggested that the power under Section 49 has not arisen The argument is illfounded, in our opinion. Section 50 is a mere power. It is clear that Section 49 has an operation which is independent of the exercise of the power of Section 50. It seems clear too that the operation of Section 50 is permissive or enabling and that Section 49 carries with it the full powers of

the House of Commons, including the power which is now in question, even although nothing is done under Section 50". He has thus emphasised that the powers, privileges and immunities of a House of Legislature as guaranteed in Article 194(3) are not subject, in any way, either to sub-article (1) of Article 194 or Article 189, and, if anything, those two provisions have to be taken to be subordinate to sub-article (3) of Article 194. In this way the powers and privileges of the Haryana Legislative Assembly are not controlled by the Business Rules, including Rule 104 or for that matter the suspension thereof. On the matter of Article 194(1) and the right of freedom of speech in the Legislature claimed by the petitioners, Mr. Nambyar further pointed out that the right in that sub-article is expressly made subject to the rules regulating the procedure of the Legislature, Rule 97(ii) and (ix) of the Business Rules says— "Whilst the Assembly is sitting, a member — (ii) shall not interrupt any member while speaking by disorderly expression or noises or in any other disorderly manner; (ix) shall not obstruct proceedings, hiss or interrupt and shall not make running commentaries when speeches are being made in the Assembly"; then Rule 99(2) says— "A member who desires to speak shall speak from his place, shall rise when he speaks and shall address the Speaker. At any time if the Speaker rises any member speaking shall resume his seat;" and then R. 100(2) (vii) further says— "A member while speaking shall not use his right of speech for the purpose of obstructing the business of the Assembly." Mr. Nambyar very rightly said that any right of freedom of speech in the House claimed by the petitioners has been made subject to the aforesaid rules and so the right claimed by them is not unrestricted and unqualified.

17. The powers and privileges of a State Legislature as given and guaranteed by sub-article (3) of Article 194 are to be those of the British House of Commons on the date of the coming into force of the Constitution in 1950. Unlike sub-article (1) of Article 194, sub-article (3) is not subject to the provisions of the Constitution. The powers and privileges so far given are complete and cannot be controlled by any rules made under Article 208(1). It has been shown from May's Parliamentary Practice, page 60, that there is the right of the House to punish its own members for their conduct in the Legislature, and, at page 62, that such a privilege in spite of standing order or rule relating to it is not dependent upon the same for its existence. It is pointed out by the author at page 469 that 'Members ordered to withdraw from the House

In pursuance of S. O. No. 23 or suspended from the service of the House in pursuance of S. O. No. 24 must withdraw forthwith from the precincts of the House. A Member suspended from the service of the House on a motion not made pursuant to S. O. No. 24 is not excluded from the precincts of the House unless the order for his suspension expressly provides therefor'. It is thus apparent that in the British House of Commons suspension from the service of the House may be made under Standing Order No. 24 or otherwise than by that standing order, and in either case the effect is different, for when it is made under Standing Order No. 24, the member concerned must withdraw from the precincts of the House, but not so when it is made on a motion not pursuant to that standing order. It clearly means that in spite of that standing order the House of Commons retains the power and privilege to suspend a member as a measure of punishment for its contempt for the member disobeying the Chair and for disorderly conduct in the House. So the argument on the side of the petitioners that by making Rule 104 the Haryana Legislative Assembly for ever lost the power of suspension of a member of it as a measure of punishment for its contempt because of his disorderly conduct or disobedience of the Chair is untenable. The approach urged on the side of the petitioners cannot be correct because unless the Haryana Legislative Assembly had the power to suspend a member of it in the circumstances as explained above, it could not confer such power upon its Speaker, and, it having conferred that power on him in the shape of Rule 104, once it suspends that rule, it retains to itself that power as it is inherent in this behalf. An argument is unacceptable that although it had this power which it conferred upon its Speaker under Rule 104, but by making that rule it lost that power for ever and after the making of the rule the power can only be exercised by Mr. Speaker or not at all. Rule 104 is one of the Business Rules, and Rule 121 within the same contains a provision for suspension of any rule made by the House. There is nothing referred to either in the Business Rules or in any provisions of the Constitution which justifies the argument that by making Rule 104 the Haryana Legislative Assembly lost its power and privilege to punish a member of it for its contempt as explained above. So this argument does not prevail on the side of the petitioners. Sub-article (1) of Article 189 gives a right of vote to a member in determination of questions before the House of Legislature of a State, but the suspension of a member from the House in exercise of its power and privilege under Article 194(3) is not causing any

vacancy in the House in the sense in which the same is used in the remaining sub-articles of Article 189 and in Article 190. Suspension does not cause a vacancy in the House of Legislature, and it merely enforces absence from service of the House as a measure of punishment for contempt of the House, as in this case, on account of a member's disobedience and defiance of the Chair and for disorderly conduct. When such absence is enforced by the House in exercise of its power and privilege under Article 194(3) then the right of vote is not taken away from that member but he is only placed in the same position as if he was not present in the House. What is guaranteed as a right of vote is to a member present in the House. So far as the right of freedom of speech in the House as referred to in sub-article (1) of Article 194 is concerned, in that very sub-article it is clearly stated that such a right is subject not only to the provisions of the Constitution but also to the Business Rules of a House of Legislature and it has already been pointed out that the Business Rules of the Haryana Legislative Assembly require a member to obey the Chair and to conduct himself in the House in an orderly manner. Apart from the rules, there inheres in the Haryana Legislative Assembly power which is necessary for its own functioning to punish its members for its contempt on account of their disorderly conduct or disobedience and defiance of the Chair. So the right of freedom of speech in the House as in sub-article (1) of Article 194 is not unrestricted and uncontrolled as has been contended on the side of the petitioners. The suspension of the petitioners was thus not illegal and so the jurisdiction of this Court with regard to the proceedings of the House on February 5, 1969, is expressly barred by Article 212(1). Consequently this argument on the side of the petitioners cannot be accepted.

18. The third argument of the learned counsel for the petitioners was that the whole of the proceedings of the Haryana Legislative Assembly after February 5, 1969, up to the date of passing of the appropriation bill for the year 1969-70 must also be struck down as illegal and unconstitutional, but the argument had its basis in the last argument on the side of the petitioners as above. It was urged by the learned counsel that because the suspension of the petitioners was illegal and not according to the Constitution, therefore, all proceedings of the House, after the petitioners were forcibly prevented from exercising their right of vote in it according to Article 189(1) and right of freedom of speech according to Article 194(1) on account of their suspension, were illegal and contrary to those provisions of the Constitution. So everything

done and every decision taken, or proceedings had or bills passed by the Haryana Legislative Assembly after February 5, 1969, were illegal and unconstitutional. It is, as stated, immediately apparent that this could only come in for consideration if the second argument on the side of the petitioners, as above, had prevailed, but that argument having not been accepted, this approach obviously cannot be accepted either. There was nothing illegal or unconstitutional in the suspension of the petitioners and the consequence as urged on the side of the petitioners, therefore, does not follow.

19. The last argument urged by Mr. M. C. Chagla on behalf of the petitioners was that the suspension of the petitioners was mala fide, an argument which at least has not been comprehensible to me. If, as has been found to be the power and privilege of the Haryana Legislative Assembly, the House in exercise of such power and privilege suspended the petitioners from the service of the House in a lawful and constitutional manner, how could the vote of the House be described as mala fide? How can any motive be attributed to the vote in the House? In my opinion the vote in the House of Legislature cannot ever be said to be mala fide. If the House surpasses its constitutional limitations, its action will be open to question on the ground of unconstitutionality, but even then it will not be described as mala fide. The learned counsel for the petitioners urged that there was political intrigue in the Congress party, there were defections and re-defections, and there prevailed uncertainty on the political canvass of Haryana, and so it was to ensure majority of his party that of the respondents, respondent 2 manoeuvred to obtain suspension of the petitioners. This ignores undenied facts. The opposition had not the courage to challenge the Government to a division on the motion of thanks to the address of the Governor, which was carried in the House by voice vote; the opposition was defeated on the motion for suspension of Rule 104 by nine votes; and it was defeated on the motion for actual suspension of the petitioners again by a margin of nine votes; and all the time the petitioners were voting in opposition. Thereafter the opposition did not have the courage to stay in the House and contribute its share of the responsibilities and duties to the House as a responsible opposition, because it walked out of the House, never attending the proceedings. At no stage was there the least possible chance of respondent 2's Government being ever defeated when the question came to a vote before the House. What went on behind the scene is a matter utterly and entirely irrelevant so far as this Court is concerned, and, as I have said, it is to be regret-

ted that such matters were brought in as part of the averments and allegations by the petitioners in their petition. Factually, therefore, there is no basis in the allegation of mala fide on the side of the petitioners so far as any of the respondents and particularly respondent 2 is concerned. It is an allegation which has been made in a most reckless manner and has not, in the least, even a shadow of suggestion in fact in support of it. So this argument obviously must be rejected.

20. It was pointed out by Mr. Nambiar that in their petition the petitioners have totally suppressed their part of the conduct both on February 4 and 5, 1969, in that they persistently disobeyed and defied the Chair and their conduct was not, in the least, orderly in the House. They also suppressed the fact that after the introduction of the budget the opposition walked out and took no part in the proceedings of the House in regard to the acceptance of budget estimates, money grants and the passage of the appropriation bill. He referred to this observation of Viscount Reading C. J., in *Rex v. Kensington Income Tax Commissioners*, (1917) 1 KB 486, at p. 495. "Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived." On this consideration also the petitioners are not entitled to the exercise of the discretion of this Court in their favour so far as Article 226 of the Constitution is concerned.

21. In consequence, this petition of the petitioners is dismissed with costs, counsel's fee being Rs. 500/-.

22. HARBANS SINGH, J.: I agree.

23. MAHAJAN, J.: I agree.

Petition dismissed.

AIR 1970 PUNJAB & HARYANA 393
(V 57 C 61)

SHAMSHER BAHADUR, J.

M/s. Bhagwan Gold and Silver Store, Rewari, Petitioner v. Hissar Iron and Mechanical Works, Respondent.

Civil Revn. No. 744 of 1968, D/-14-8-1969, from order of Addl. Dist. J., Hissar, D/-6-2-1968.

KM/CN/F834/69/HGP/C

Civil P. C. (1908), O. 5, Rr. 10 (Punjab), 20 and 20-A and S. 115 — Mode of service of summons — Not in accordance with provisions — Objections to, raised for first time in revision — High Court will not interfere.

Where in the first instance summons was issued to the defendant and when no report had been received an order for service by registered post was made, and before any summons was returned unserved to the Court, the order for substituted service under O. 5, R. 20 was made:

Held that both orders were not in accordance with the provisions of the Code. But where the defendant had knowledge of the legal position and when an ex parte order was passed, in the proceedings for setting aside it he never raised any objections in either of the Courts below, the High Court will not interfere in revision, as it would be a denial of justice to remand the case at such a late stage.

(Para 6)

Cases Referred: Chronological Paras

(1965) 1965 Cur LJ 709 (Punj),
Jaswant Kaur v. Ravinder Singh 5
(1959) AIR 1959 Punj 467 (V 46) =
60 Pun LR 374, M. G. Dua v.
M/s. Ballimal Nawal Kishore 4

P. S. Jain with V. M. Jain, for Petitioner.

ORDER:— This is a rule at the instance of the judgment-debtor directed against the appellate order of the Additional District Judge, Hissar, who, on 6th of February, 1968, declined to set aside an ex parte decree passed in favour of the plaintiff-respondent and against the petitioner for a sum of Rs. 669/30 on 5th of March, 1965.

2. The suit was filed by the plaintiff-respondent, Hissar Iron and Mechanical Works against Bhagwan Gold and Silver Store, Rewari, on 15th September, 1964, for recovery of Rs. 669-30. The first order of the Court was passed on 16th of September, 1964 for summoning of the defendant for 6th of November, 1964. On 6th of November, 1964, the summons which had been issued to the defendant had not been returned and the Court ordered that a registered cover should be sent to the defendant for 18th December, 1964. On the registered letter, the defendant is stated to have refused to accept it on 11, December, 1964. It has to be observed that the summons had been sent in the first instance to the defendant for appearance on 6th of November, 1964. The Court then directed a proclamation to be issued under O. 5, R. 20 of the Code of Civil Procedure in 'Jaggat Weekly' for 18th of February, 1965. The notice appeared in this paper and the defendant did not turn up on the date of hearing. An ex parte decree was accordingly passed against the petitioner on 5th of March, 1965.

3. In the application filed for setting aside the ex parte decree the only point taken up was that the defendant was not a subscriber of 'Jaggat Weekly.' Both the Courts below rightly held that this objection was devoid of any force and substance. The application for restoration of the suit and setting aside of the ex parte decree was accordingly dismissed. The Additional District Judge, Hissar, having upheld the order of dismissal in appeal on 6th of February, 1968, the defendant judgment-debtor has come to this Court in revision.

4. Mr. Jain, the learned counsel for the petitioner, no longer subscribes to the objection which was taken by the judgment-debtor before the Courts below. He now submits that no basis existed for an order for substituted services to be effected on the defendant. His argument, in the first instance, is based on the amendment made by the Punjab High Court in R. 10 of O. 5 of the Code of Civil Procedure which says that:—

"Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court."

A proviso was added in the amendment introduced in respect of Punjab on 24th of November, 1927, this being:—

"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule."

Mr. Jain submits that in the first instance summons was issued for the service of the defendant and no report had been received when an order for service by registered post was made. It is contended that the proviso only empowers the Court to issue summons by registered post in the first instance and not after another mode for service has been adopted. There is authority in support of this view of Chopra, J. in M. G. Dua v. M/s. Balli Mal Nawal Kishore, (1958) 60 Pun LR 374 = (AIR 1959 Punj 467).

5. The second argument on which Mr. Jain supports this petition is based on the provisions of R. 20-A of O. 5 of the Code of Civil Procedure. Under this rule:—

"(1) Where, for any reason whatsoever, the summons is returned unserved, the Court may, either in lieu of, or in addition to, the manner provided for service of summons in the foregoing rules, direct the summons to be served by registered post addressed to the defendant or his agent empowered to accept service at the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain.

(2)
It has been ruled by the learned Chief Justice of this Court in Jaswant Kaur v. Ravinder Singh, 1965 Cur LJ 709 (Punji), that Order 5, Rule 20-A has no application where the summons was never returned unserved to the Court when the order for substituted service was made. The trial Court, according to the principle laid down in this authority, has no power to have recourse to substituted method of service until the prerequisite mentioned in R. 20-A(i) has been complied with.

6. There is some force in the contentions raised by the learned counsel for the petitioner, but these objections were never raised either before the Court of first instance or the lower appellate Court. The petitioner is presumed to have had knowledge of the legal position and such a long delay in making a point for the first time in revision before this Court cannot be countenanced. It would be recalled that the suit was instituted as far back as 1964 and it would be a denial of justice at this stage to order a remand of this case for a fresh decision on merits. It was the business of the defendant to have raised these points before the trial Court and the lower appellate Court as perhaps it may have been found necessary on an examination of objections to have evidence thereon of the parties.

7. In this view of the matter, I decline to interfere in revision which would stand dismissed, without any order as to costs.

Revision dismissed.

AIR 1970 PUNJAB & HARYANA 395
(V 57, C 62)

HARBANS SINGH AND
S. S. SANDHAWALIA, JJ.

State of Punjab and others, Appellants
v. Kirpal Singh and others, Respondents.

Letters Patent Appeal No. 159 of 1969, D/-15-12-1969, against judgment of Bal Raj Tuli J., D/-20-12-1968 reported in 1969 Ser LR 120 (Punji).

(A) Constitution of India, Art. 16 — Equality of opportunity in matter of public employment — Punjab Police Rules R. 13 — Police employees on eligibility lists 'C' and 'D' — Prescription of any method for selection from the said lists for sending employees to relevant training courses — Article 16 not infringed. 1969 Ser LR 120 (Punji), Reversed.

Police employees whose names are borne on eligibility lists 'C' and 'D' have no indefeasible right to attend corresponding training courses for promotion and any method of making a selection from the said lists will not involve a violation of the

equality of opportunity guaranteed by Art. 16. 1969 Ser LR 120 (Punji), Reversed. (Para 10)

An employee has no fundamental right of promotion and as such cannot claim an inalienable right to each of a number of stages which may lead to such promotion if the authority in accordance with prescribed rules, if any, does not deem him fit. All that he could possibly claim is that he be equally considered at these relevant stages. (Para 14)

Article 16 does not lay down any rule of abstruse and mathematical equality qua the employees of the State. After considering those who may be eligible for promotion, the promoting authority is entitled to have a process of selection and this is particularly so when it is dealing with a large number of employees in the same class. As such there cannot be a bar for the prescription of reasonable rules which may be equally applicable to all its employees in the specific classification. Also it is equally entitled to prescribe qualification or any pre-requisite conditions for promotion. Case law discussed. (Para 11)

(B) Civil Services — Punjab Police Rules (1934), Rule 13 — Eligibility for promotion — Prescription of qualification for being eligible — Not incumbent on Government to provide the qualifications to concerned police employees — Employee has no right to qualify in the course merely because it is conducted by Government: 1969 Ser LR 120 (Punji), Reversed. (Paras 16, 19)

(C) Civil Services — Punjab Police Rules (1934), R. 13.10 — Instructions issued by I. G. P. — Creation of Promotion Committee under instructions for making selection for Upper School Course from amongst confirmed Assistant Sub-Inspectors — Instructions also making qualification of Upper School Course the sine qua non for bringing the name of Assistant Sub-Inspectors to list 'E' — Instructions direct in conflict with corresponding provisions of Police Rules — Instructions are invalid. 1969 Ser LR 120 (Punji), Affirmed. (Para 21)

Cases Referred: Chronological Paras
(1969) AIR 1969 Punj 161. (V 56) =
1968 Cur LJ 846, Union of India
v. P. C. Bahl 14
(1969) 1969 Lab IC 56 = 1968 Ser
LR 808 (Punji), Bikkar Singh v.
State of Punjab 14
(1967) AIR 1967 SC 1910 (V 54) =
1967-1 Ser LR 907, Sant Ram
Sharma v. State of Rajasthan 13, 20
(1966) AIR 1966 SC 175 (V 53) =
1964-2 SCR 279, G. S. Rama-
swamy v. I. G. P. of Mysore 14
(1964) AIR 1964 SC 179 (V 51) =
1965-2 Lab LJ 560, T. Devadason
v. Union of India 10

- (1962) AIR 1962 SC 36 (V 49) =
1962-2 SCR 586, General Manager
S. Rly. v. Rangachari 10
- (1961) AIR 1961 Ker 155 (V 48) =
ILR (1961) 1 Ker 430, V. K.
Nambudiri v. Union of India 12
- (1961) AIR 1961 Mys 247 (V 48), N.
Rudraradhya v. State of Mysore 12
- (1957) AIR 1957 Pat 617 (V 44) =
ILR 35 Pat 1, Sukhmandan
Thakur v. State of Bihar 12
- (1956) AIR 1956 SC 520 (V 43) =
1956 SCR 357, Banarsidas v. State
of U. P. 11
- (1953) AIR 1953 Hyd 298 (V 40) =
ILR (1953) Hyd 498, Mohmed
Hussain v. State of Hyderabad 12
- (1952) AIR 1952 Trav-Co 7 (V 39) =
1951 Ker LT 385, Vishnukrishnan
Namboodiri v. K. N. Kripal 12, 25
- B. S. Dhillon, Advocate General, Pun-
jab, for Appellants; Abnasha Singh, for
Respondents.

JUDGMENT:— The constitutional vali-
dity of the Instruction No. 21146-206/B
dated the 25th of August, 1964, issued by
the Inspector General of Police, Punjab, to
all Heads of the Police Offices, and also
its conflict with the relevant Punjab Police
Rules are the primary questions which fall
for determination in these five Letters
Patent Appeals (159, 137, 165 of 1969, 471
and 527 of 1968) and two writ petitions
(2245 and 2348 of 1968). Common ques-
tions of law, and fact, arise in these cases
and we deem it expedient to deal with all
of them by this judgment.

2. The facts in Letters Patent Appeal
No. 159 of 1969 (The State of Punjab v.
Kirpal Singh) alone may be first noticed
in detail. The respondent Kirpal Singh
enlisted as a Foot Constable in the Punjab
Police in 1941 and after promotion as Head
Constable was confirmed as such in the
year 1951. Dismissed on a charge of cor-
ruption after a departmental enquiry, he
was, however, reinstated on the 18th of
February, 1956, and subsequently his name
was brought on the provisional list 'D'
maintained under Rule 13.9 of the Punjab
Police Rules in the year 1957. Having
qualified in the Intermediate School
Course at the Police Training School at
Phillaur in 1961, the name of the respon-
dent was placed on the confirmed list 'D'
under the rule above said. Thereafter, he
was promoted as an officiating Asstt. Sub-
Inspector and his name appeared at No. 1
in the 'D' list whilst the other respondents
in the writ petition filed by him figured
below him. In October 1964, whilst at-
tached to the Criminal Investigation
Agency of the Government Railway Police
at Ambala Cantonment the respondent was
implicated and tried on a criminal charge
along with one Rameshwar pick-pocket
and was convicted by the Special Railway
Magistrate, Ambala Cantonment, under

Section 221, Indian Penal Code. On ap-
peal, however, he was acquitted on the
21st of April, 1967, and was subsequently
reinstated in service on the 26th of May,
1967. Subsequently a State appeal against
his acquittal was dismissed in limine by
a Division Bench of the High Court on the
14th of September, 1967.

3. According to the allegations in the
writ petition by the respondent Kirpal
Singh, during the period of 29 months, for
which he remained suspended owing to
the above said criminal case, a number of
officiating Assistant Sub-Inspectors junior
to him were sent to undergo the Upper
School Course Training at Phillaur and on
completion thereof were confirmed as As-
sistant Sub-Inspectors and subsequently
also promoted as Sub-Inspectors of the
Police. These allegations, however, stand
denied on behalf of the State. It is also
the admitted case that two adverse reports
dated the 30th of November, 1964, and the
22nd of April, 1965, suggesting unreli-
ability, corruption and harbouring of cri-
minals were conveyed to the respondent
and his representations against these ad-
verse reports were rejected after consi-
deration. In September, 1967, after his
reinstatement, Kirpal Singh respondent
applied for being deputed for training in
the Upper School Course at Phillaur but
the Assistant Inspector General of Police
declined the request on the ground that as
yet the appeal filed by the State against
his acquittal was still pending in the High
Court. The respondent then represented
and interviewed the Inspector General of
Police, Punjab, and was informed that the
selection for the Upper School Course was
to be made by a Departmental Promotion
Committee (hereinafter referred to as
Committee) consisting of the Deputy In-
spector General of Police of the range and
two Superintendents of Police. The re-
spondent appeared before this Committee
but was not selected, but later, on the 26th
of March, 1968, he appeared before this
Committee and was recommended for
training but since he was over-age his case
was sent for approval to the Inspector
General of Police for relaxation of the
age limit. The Inspector General of Police
directed the respondent to appear before
another Committee which after interview-
ing him made a conditional order that if
there were good reports of the respondent
during the next 6 months and further that
the district authorities recommended him
then the respondent would be sent for the
Upper School Course at Phillaur. In
September, 1968, Shri Daljit Singh
Dhillon, Assistant Inspector General of
Police made only one recommendation per-
taining to the respondent for the relaxa-
tion of the age limit and the matter was
considered by a Committee consisting of
Shri A. S. Midha, Deputy Inspector Gene-
ral of Police (C. I. D.), Shri Parkash

Chand, Assistant Inspector General of Police (I) and Shri B. R. Kapoor, Assistant Inspector General of Police (II). This Committee, however, rejected the name of the respondent without interviewing him and the allegations of the respondent in the writ petition were that this rejection was based on the warnings and adverse remarks earlier communicated to him and also for the reason that he had not been confirmed as an Assistant Sub-Inspector. These allegations are not admitted on behalf of the State and the position taken up was that the Committee had taken into consideration the record of the respondent Kirpal Singh as a whole and, therefore, did not recommend his name for relaxation of the prescribed age limit. The respondent then filed the writ petition which stands allowed by the learned Single Judge and is the subject-matter of the appeal under Cl. 10 of the Letters Patent.

4. The police force within the States of Punjab and Haryana is constituted under the provisions of the Police Act of 1861. Detailed rules, however, for the governance thereof have been framed and are styled at the Punjab Police Rules 1934 (hereinafter called the Police Rules). Therein Chapter XIII of the Police Rules relates to promotions and contains the relevant provisions which fall for consideration in all these cases. The primary rule for promotion is laid out in 13.1 sub-cl. (1) and is in the following terms:—

"Promotion from one rank to another, and from one grade to another in the same rank, shall be made by selection tempered by seniority. Efficiency and honesty shall be the main factors governing selection. Specific qualifications, whether in the nature of training courses passed or practical experience, shall be carefully considered in each case. When the qualifications of two officers are otherwise equal, the senior shall be promoted. This rule does not affect increments within a time-scale." For the purposes of regulating promotion amongst enrolled police officers Chapter XIII provides for six promotion lists, namely, A, B, C, D, E and F to be maintained under the relevant provisions of Chapter XIII is necessary. Rule 13.5 provides for the promotion to the Selection Grade from amongst the enrolled Constables and lays down the basic qualifications for such promotion. List A of eligible Constables fit for promotion to the selection grade is enjoined by Rule 13.6 whilst Rule 13.7 provides for two parts of List B from which selection for the candidates for admission to the courses in the Police Training School at Phillaur is to be made. Rule 13.8 provides that a List C of Constables who have passed the Lower School Course at Phillaur and are considered eligible for promotion to Head Constables be maintained and therefrom

promotions shall be made in accordance with the principles described in sub-rules (1) and (2) of R. 13.1. Similarly, Rule 13.9 enjoins the maintenance in card index form of those Head Constables who had passed Lower School Course and the Intermediate School Course and are further approved by the D. I. G. and normally officiating promotion to the rank of Assistant Sub-Inspector is to be made from this list. List E maintained under R. 13.10 in the same order provides for a list of all Assistant Sub-Inspectors who have been approved by the D. I. G. as fit for trial in independent charge of a police station and promotion to the rank of Sub-Inspectors is normally to be made from this list. Identical provisions for maintaining List F for promotion to Inspector is enjoyed by Rule 13.15, whilst the rest of the provisions of the Chapter provide for the annual confidential reports; probationary period of promotion and special promotion to recipients of the President's Police and Fire Services Medal and the Police Medal etc. It deserves mention that the power to make promotions amongst gazetted officers and from non-gazetted to gazetted rank vests in the local Government with the concurrence of the Governor under Rule 13.3.

5. An analysis of these provisions in Chapter XIII discloses that selection is the key-note for the promotion to the next rank for the members of the police force. Efficiency and integrity have been made the premier factors influencing selection whilst specific qualifications, practical experience, passing of the requisite training courses and other things being equal seniority, and various other factors also necessarily enter for consideration in the process of selection. It is evident that for the purposes of selection, the rules provide a number of steps or stages before the final stage of promotion to the next higher rank. To take the matter at the lowest rung of promotion from the rank of enrolled Constables to that of Head Constables the relevant rules provided for the first step of eligibility in the shape of basic qualifications of physique, education, character etc. and further provide for an objective standard of awarding marks for various qualifications under Rule 13.5. Then falls the next step for bringing a limited number of eligible names on List 'A' succeeded by bringing the name of a selected police constable on either of the two categories of List 'B' in Rule 13.7 from which again selection is made for the Lower Course or for other Special Courses at the Police Training School, Phillaur. A candidate so selected may or may not successfully cross the hurdle of qualifying in such a course. If he has done so, his eligibility and the fact of having passed in the Lower School Course may entitle him to be brought on list 'C' under Rule 13.8.

Even this does not guarantee automatic promotion to the rank of Head Constable. Such promotion has yet to satisfy the subjective test of the promoting authority in consonance with the basic provisions of Rule 13.1 sub-clauses (1) and (2). After these are satisfied a Constable may be promoted to officiate as a Head Constable and having satisfied the conditions of service may then be confirmed as such. It thus appears that an enlisted Constable has to cross a hierarchy of hurdles or stages before he finally achieves promotion to the rank of Head Constable. Similarly identical procedures are laid down in the Rules for promotion to the next higher ranks of the Assistant Sub-Inspector, Sub-Inspector and to that of an Inspector of Police.

6. The provisions of Chapter XIII of the Rules supplemented, where necessary, by instructions and longstanding practices, governed the mode of promotion of the non-gazetted ranks of the police force. However, in 1964 the impugned instruction was issued by the Inspector General of Police, Punjab, and it is necessary to reproduce the relevant parts thereof in extenso:—

"From

Sardar Gurdial Singh, I. P.,
Inspector-General of Police,
Punjab.

To.

All Heads of Police Offices in the Punjab. No. 21146-206/B, dated, Chandigarh the 25th August, 1964.

Subject: Promotion system in the Police Department, Departmental promotion Committees at various levels.

Memo.

The system of promotions in the Police Department has been engaging our attention for some time past. In January, 1962, a committee consisting of Range D. Is. G. and AIG/GRP was formed to look into the matter of promotions in pursuance of a decision taken in the Senior Administrative Officers Conference. Prior to the appointment of this committee, another committee had also examined this matter. Both the Committee recommended the constitution of departmental promotion committees at various levels to examine the promotion cases of Police personnel. The two committees also put forward various proposals relating to such like matters as competitive examinations, weight to be attached to the outdoor and written tests, age factor, educational qualifications, record of service, etc. etc.

2. The State Government have yet to take final decision on most of the recommendations of the Punjab Police Commission which has recommended vital changes in the structure of the Police Organisation. Unless Government decisions in this re-

gard are taken, it will not be worthwhile to frame a detailed scheme regulating promotions in the department and to take necessary steps to amend the relevant Punjab Police Rules. In the meantime it is considered necessary that steps should be taken to ensure that the promotions are made on merit and extraneous influences do not come into play with regard to them. It is, therefore, proposed to set up Departmental Promotion Committees at various levels. It has been decided that the scheme explained below should come into force with immediate effect:—

(a) to (j) x x x x

The rest of the above instruction created Promotion Committees at different levels for the purpose of selecting police personnel for undergoing various training courses conducted at the Police Training School at Phillaur. For example para 2(c) created a Promotion Committee consisting of the D. I. G. of the range along with two Superintendents of Police for making selections for the Upper School Course at Phillaur from amongst the confirmed Assistant Sub-Inspectors of Police. The age limit, and the basic qualifications etc. for making this selection were also prescribed therein. It was further provided that after the completion of the Upper School Course, the names of the successful officers should be brought on list 'E' in accordance with the order of merit obtained by them in the examination at the Phillaur School and that promotions to the rank of Sub-Inspectors was to be made from such a list 'E' in accordance with the seniority of the officers on it. Identical provisions and Promotion Committees were constituted for the purpose of selection to the Intermediate School Course and for the Lower School Course conducted at the Police Training School. A provision for exemption from the age limit prescribed in the impugned instruction was also provided and an ancillary provision regarding the Government Railway Police, the Punjab Armed Police and regarding the superseded officers etc. was also made therein.

7. The above-said instructions were impugned in a number of writ petitions on the ground of being contrary to the corresponding Punjab Police Rules on the subject. In two writ petitions out of which L. P. As. Nos. 159 and 165 arise, a contention that these instructions were violative of the fundamental right of the police employees and that these were contrary to the provisions of Art. 16 seems also to have been raised, though it does not find specific mention in the writ petitions. The learned Single Judge in allowing the writ petitions which are the subject of the above-said two Letters Patent Appeals in elaborate judgments accepted both these contentions. It is the correctness of this view, which has been

the subject of challenge by the State in Letters Patent Appeals Nos. 159 and 165 along with the connected appeals. In view of the fact that elaborate arguments have been advanced, we find it necessary to briefly summarise the findings of the learned Single Judge in L. P. As. 159 and 165 which are as follows:—

(i) that a police officer whose name is borne on list 'D' maintained under R. 13.9 has an inalienable right to go through the Upper School Training Course at Phillaur and he cannot be deprived thereof by prescribing any method for selection for that Course or by prescription of any age limit;

(ii) the refusal to send an Assistant Sub-Inspector, whose name is borne on list 'D' to the Upper School Training Course at Phillaur in order to qualify for his name being brought to list 'E' amounts to interference with his fundamental right guaranteed under Art. 16 of the Constitution for seeking promotion to a higher post;

(iii) that it is the inalienable right of a Head Constable, whose name appears on list 'C' to undergo the Intermediate School Training Course in case he is willing to do it and no obstruction can be placed in his right to do so;

(iv) that if the Government prescribes any qualifications for being eligible for promotion it must also provide opportunity to the officer concerned to acquire that qualification and if the examination or training course is held or conducted by the Government, every officer willing to undergo that examination or course in order to qualify himself for promotion has a right to pass that examination or to go through that course. No obstacle can be placed in his way by prescribing a method of selection of age limit;

(v) that the impugned instruction is contrary to the corresponding provision of the Police Rules and is against the old practice (under which every A. S. I. borne on 'D' list was in due course of time entitled to go for the Upper School Training Course) and hence invalid. Further no provision prescribing a method for selection for those eligible to attend the Upper School Training Course can be provided by mere instructions which have no statutory force;

(vi) Fixation of age at 45 years by the instructions for eligibility for the Upper School Training Course is arbitrary and contrary to the Police Rules;

(vii) that these instructions by the Inspector General have not been approved by the Government; and

(viii) that the adverse remarks made against Kirpal Singh respondent on the basis of an earlier criminal case cannot be a matter for consideration after his acquittal by a competent Court.

8. For the sake of convenience we would first take up the findings Nos. (i), (ii) and (iii) of the learned Single Judge as common arguments, for and against these, have been addressed by the learned counsel for the parties. These findings have been strenuously assailed by the learned Advocate-General for the State of Punjab on the ground that Article 16 of the Constitution does not lay down that each police officer whose name is borne on an eligibility list is absolutely or mathematically equal to the others on the said list, nor does it guarantee that a police officer has an indefeasible right to undergo training Courses conducted by the State for selected personnel, and lastly nor does Article 16 preclude the State from prescribing a reasonable mode for selecting the more efficient, honest and suitable persons out of large number of police employees for sending them to these training courses with a view to their subsequent promotion.

9. To appreciate the rival contentions the provision of Article 16(1) and (2) around which the basic argument revolved deserves notice and is in the following terms:—

"16(1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State;

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

A long line of precedent has settled the law that the provisions of the abovesaid Article guarantee an equality of opportunity both at the stage of original appointment and also at the stage of subsequent promotion. It is equally axiomatic, however, that this equality of opportunity qua promotion only envisages that the eligible employees shall be considered for the same and it does not guarantee any indefeasible right to promotion. The learned Single Judge has opined that a police employee of the State has a fundamental right to the steps which may precede his ultimate promotion to the higher rank. Whilst construing the conflict of the impugned instruction with the relevant Police Rules, the learned Single Judge had at great length elaborated the principle and cited authority in support of his finding. However, in arriving at the finding regarding the fundamental right of the respondents in L. P. As. 159 and 165 of 1969 to attend the Upper School and the Intermediate Training School Courses at Phillaur and the consequent constitutional invalidity of the impugned instructions, the learned Single Judge has not elaborately enunciated the

principle or any authority on which he based himself for coming to this conclusion. On a close analysis of the two judgments, however, it appears that tenor of the observations therein show that the learned Single Judge proceeded on the premises that the fact of the names of the respondents having been brought on the eligibility lists 'C' and 'D' gave them an indefeasible right to attend the corresponding training courses and any method of making a selection from the said eligibility lists which may tend to bar this right would involve a violation of the equality of opportunity guaranteed by Article 16 of the Constitution.

10. With great respect to the learned Single Judge we regret our inability to agree. The relevant Police Rules nowhere lay down that the names of those borne on the eligibility lists 'C' and 'D' would ipso facto be entitled to attend the training courses conducted at the Police School at Phillaur. Nor in our view can Article 16 be construed to warrant that there exists any absolute or mathematical equality in all the police employees whose names may happen to be brought on lists 'C' and 'D' at a particular time which would preclude the authority from making any selection from the said lists for sending employees to the relevant training courses. That a doctrinaire approach to the provision of Article 16(1) and (2) is to be avoided is apparent from a number of authoritative pronouncements by the Supreme Court and it is unnecessary to refer to all of them. In *General Manager, Southern Railway v. Rangachari*, AIR 1962 SC 36, their Lordships whilst decrying a technical approach to Article 16 observed as follows:—

"This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16(1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity; but in regard to employment like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service." Again in *T. Devadasan v. Union of India*, AIR 1964 SC 179, their Lordships whilst construing the cumulative effect of Articles 14 and 16 laid down the law as follows:—

"What is meant by equality in this Article is, equality amongst equals. It does not provide that what is aimed at is an absolute equality of treatment to all persons in utter disregard in every conceivable circumstance of the differences such as age, sex, education and so on and so forth as may be found amongst people in general. Indeed, while the aim of this Article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law, reasonable classification is permissible. It does not mean anything more."

11. It is evident from the above that Article 16 does not lay down any rule of abstruse and mathematical equality qua the employees of the State. After considering those who may be eligible for promotion, the promoting authority is entitled to have a process of selection and this is particularly so, when it is dealing with a large number of employees in the same class. For this end in view there can possibly be no bar for the prescription of reasonable rules which may be equally applicable to all its employees in the specific classification. Yet again, it is equally entitled to prescribe qualification or any pre-requisite conditions for promotions. All doubts on this score are laid to rest by the observations of their Lordships in *Banarsidas v. State of Uttar Pradesh*, AIR 1956 SC 520 in the following terms:—

"Article 16 of the Constitution is an instance of the application of the general rule of equality laid down in Article 14, with special reference to the opportunity for appointment and employment under the Government. Like all other employers, Government are also entitled to pick and choose from amongst a large number of candidates offering themselves for employment under the Government." This right to 'pick and choose', as their Lordships have termed, is no other than a right to have a process of selection. In a large organisation for the purpose of promotion a continuous process of grading, screening and selective testing for culling out a nucleus from which promotion is to be ultimately made is not only necessary but inevitable. For purposes conducive to the efficiency of its employees, the State may provide aid in the shape of training courses etc. As in the present case the learned Advocate-General for the Punjab points out that even in the reorganised State of Punjab the police force consists of more than ten thousand Constables and corresponding number of higher ranks and at the time

of the issuance of the impugned instructions in the erstwhile State of Punjab, the number of police Constables was much larger. Can it be said that each one of them has a fundamental right to go through the corresponding training courses which are conducted at the Police Training School at Phillaur? We are unable to subscribe to a view which would lead to this rather anomalous result. The argument ab inconvenienti apart, nothing has been pointed out either in principle or authority which would be a pointer to any such supposed right.

12. It thus falls to be determined, whether a process of grading, screening and progressive selection for the purpose of promotion is valid and does not infringe the provisions of Article 16 of the Constitution. We believe it is patently so and apart from the fact that we see no bar to it in principle, there is considerable support of authority for this proposition as well. As early as 1952 the matter arose for consideration in the context of the integration of the State Forces of the Travancore-Cochin States with those of the Indian Army. A number of officers of the erstwhile Travancore-Cochin State Forces after a process of screening and selection were declined appointments in the Indian Army. The matter came up before Sankaran J. in *Vishnukrishnan Nambudiri v. K. N. Kripal*, AIR 1952 Trav Co 7 and the learned Judge observed as follows:—

"The screening of these Officers by the Selection Board was only a step in that direction. Even though the result of such screening has been unfavourable to these petitioners, they cannot now complain that it was the result of any discrimination shown against them. Discrimination as between those 'acceptable' and those 'unacceptable' is inevitable in any process of selection and grading and there can be nothing wrong in such a discrimination. Admittedly all officers of the Travancore-Cochin State Forces were subjected to the screening by the Selection Board, and those who were graded as 'acceptable' were given Commission as Officers in the regular Indian Army. Thus as between Officers similarly situated, there has been no discrimination in the matter of being subjected to 'screening' by the Selection Board. It follows, therefore, that the fundamental right guaranteed by Article 16 of the Constitution has not in any way been violated or infringed by the proceedings which culminated in the sanction referred to in Exhibit I."

The above view of the law was expressly affirmed by Misra, C. J. and Mohammad Ahmed Ansari, J. in *Mohd. Hussain v. State of Hyderabad*, AIR 1953 Hyd 298 with the following observations:—

"It was argued before us that the circular violates Article 16 of the Constitu-

tion; but in our opinion the power of selection and rules framed for purposes of choosing candidates to fill public services are not excluded by the Article. The case directly on point is — *Vishnu Krishnan v. K. N. Kripal*, AIR 1952 Trav-Co 7."

In *Sukhnandan Thakur v. State of Bihar*, AIR 1957 Pat 617 Ramaswami J. (as he then was) on a difference of opinion between Das C. J. and Ahmed J., after an exhaustive consideration of the point, laid down as follows:—

"It is manifest that equality of opportunity mentioned in Article 16(1) is not mathematical equality. It is equally manifest that Article 16(1) does not preclude the administrative authority from making a selection from numerous candidates before making appointments but the selective test employed must be reasonable and not arbitrary. The selective test must be based upon some reasonable principle.

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The administrative authority may lay down qualifications for the office; qualifications not only of mental excellence but also of physical fitness, sense of discipline, moral integrity and loyalty to the State. In the case of technical appointments the administrative authorities may further require evidence of technical qualification and standards."

A similar opinion has been expressed by Madhavan Nair J. in *V. K. Nambudiri v. Union of India*, AIR 1961 Ker 155 but a more succinct enunciation in the context of promotion of State employees was made by the Division Bench in *N. Rudradhya v. State of Mysore*, AIR 1961 Mys 247 as follows:—

"It is, we think, clear that a variety of considerations govern the promotion of an employee, none of which alone could render an employee suitable for promotion. Ordinarily, it would be for the State or the promoting authority to determine such suitability after an assessment of all relevant considerations, such as seniority, competence, rectitude, and antecedent official records, none of which is less important than the other, for the preservation of purity and efficiency in public service."

In the light of the above decisions it appears that there is a consensus of authority that a reasonable process of selection involving grading and screening at different stages for the purpose of promotion does not infringe the provisions of Article 16 or 14 of the Constitution.

13. As a corollary to the main argument regarding the infringement of Article 16 it had been strenuously urged by Mr. Abnasha Singh on behalf of Kirpal Singh respondent that a police officer has a fundamental right to go through all the

stages which may be requisite for ensuring his eligibility for promotion to the next higher rank, and thus any selective process intervening at these stages is an infringement of his indefeasible rights. To particularise, it was contended before us that Kirpal Singh respondent has a fundamental right to go through the Upper School Training Course in order to become eligible for bringing his name on list 'E' in order subsequently to seek promotion as a Sub-Inspector on the basis of the said list. This right it was vehemently contended, cannot be blocked by any system of graded selection or screening and it was submitted that irrespective of all other considerations the respondent is entitled to be considered at the final stage of selection for Sub-Inspectorship. All earlier hurdles which may be prescribed were characterised as unauthorised blocks in his fundamental right. We are afraid we cannot agree. The purpose of a promotion system is ultimately public weal and not the guaranteeing of any private interest of the employee. Leonard D. White in Chapter 26 relating to promotion in his authoritative work on Public Administration which was noticed with approval by the Supreme Court in *Sant Ram Sharma v. State of Rajasthan*, AIR 1967 SC 1910 tersely states as follows regarding the object of a promotion system:—

"The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organization. The main interest to be served is the public interest, not the personal interest of members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur, and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment."

The learned author rightly visualises the path of promotion to the next higher rank as a ladder which may have many rungs. To reach the top it is necessary for the employee to climb all these rungs on the promotion ladder and it is perfectly legitimate for the authority to prescribe qualifications and to exercise its discretion in selecting an employee to go from one rung to another. The State posed with the problem of dealing with a large number of employees is not precluded from having a promotion system and it is for it to decide the method by which it would select from its employees for that purpose in view. The necessity of resorting to a promotion system and the criteria which

may be employed for the said purpose are again succinctly stated by Mr. Leonard D. White in the following terms:—

"More difficult is the problem of the grounds upon which promotion should rest. In a small organisation the answer is simple: a department head acts on the basis of his personal knowledge of the men under his control. But this rule breaks down in the huge administrative units of the larger governments; the superintendent of schools in New York City, the public welfare commissioner of Ohio, the Commissioner of Immigration and Naturalization, cannot possibly depend on their own acquaintance with their subordinates. Several methods are available where personal knowledge fails which are used either alone or in combination with each other. They include selection on the basis of a promotional examination, or an efficiency rating or service record, or seniority, or finally on the basis of the unabridged discretion of a higher official informed by conference with his immediate advisers."

and lastly the necessity, may the inevitability of the exercise of discretion by these higher officials for the purpose of promotion has been stated in the following terms:—

"If the good judgment, freedom of action, and good intent of higher officials could be taken for granted at all points, the best basis for making promotions would be found in the free discretion of the responsible officials, informed by reference to efficiency records and other relevant data. Good intent normally prevails, although it may be and sometimes is obscured by political, factional, or personal considerations. Despite these human frailties, the final decision must be left primarily to the judgment of high-ranking officials. No mechanical substitute has been devised which can precisely weigh and evaluate the many delicate factors which play a part in the final conclusion that A is more likely to succeed than B in a specific situation."

14. It thus follows that in a large organisation running into thousands, like the police force of the State it is inevitable that the path of promotion of a police employee to the next rank may consist of a number of steps prescribed by the promoting authority. Each step may involve a selective process which may consist of an objective standard (e.g., a promotional examination or a physical test) or a subjective standard (e.g., the satisfaction or the discretion of the senior officer) or a combination of both. Those who fail in the initial or the intermediate steps may not be entitled to be at par with those who qualify through all. No employee has a fundamental right to go from one step to the other, if

the authority in accordance with the prescribed rules, if any, does not deem him fit to do so. To put it in other words, promotion to the next rank may involve a number of stages. Would it be possible to say that those who even fail at the earliest or the intermediate steps, had nevertheless an inalienable right to reach the ultimate stage of eligibility for promotion irrespective of their total failure, inability or unsuitability to cross the initial hurdles? We believe that our answer must necessarily be in the negative, both on the basis of principle and authority. It was conceded before us and is otherwise settled law that an employee has no fundamental right of promotion to the higher rank. If that be so, we fail to see how he has an inalienable right to each of a number of stages which may lead to such a promotion. All that he could possibly claim is that he be equally considered at these relevant stages. An analogous matter arose regarding the various stages of promotion for consideration in the context of the Indian Administrative Service (Appointment by Promotion) Regulations 1955, before a Division Bench of this Court consisting of Narula J. and myself in *Union of India v. P. C. Bahl*, AIR 1969 Punj 161. It was held therein that even the process of determining the seniority on the provisional list prepared by the statutory committee may involve two steps; the first being the test of eligibility for promotion and the second being the subjective test whether an eligible State civil servant should, at all be brought on the provisional select list. Further steps are visualised by the regulation abovesaid including the forwarding of the list to the Public Service Commission and after due consideration and consultation, the approval of the said list by the Commission. Thereafter is yet another step under sub-regulation (9) relating to selection for appointment from the Select List prepared pursuant to the earlier regulation. All these steps in the promotion system were considered and *prima facie* held valid. In *Bikkar Singh v. State of Punjab*, 1968 Ser LR 808 = (1969 Lab IC 56 (Punj)), Pandit J. in the context of the promotion to the post of Superintendent in the office of the Director of Public Instruction has observed as follows:—

“Admittedly, no service rules had been framed under Article 309 of the Constitution for regulating the appointments to the posts of Superintendents in the office of the Director of Public Instruction. In the absence of such rules, the head of the Department, namely, the Director of Public Instruction, is entitled to apply his own judicious mind in making selections to higher posts. * * *

In the instant case, the Director of Public Instruction along with the Deputy Director, Schools Administration and the Establishment Officer of the Department held a meeting and considered the case of the petitioner and other candidates. When the selection is made, it is obviously the subjective satisfaction of the Director of Public Instruction and the same is not justiciable and not subject to the judicial review of the Court under Article 226 of the Constitution, unless such selection is either mala fide or based on irrelevant or extraneous considerations. A comparative assessment of the various candidates based on their personal files and over-all assessment of their work and conduct, has to be made by the said officer. Even if this Court was inclined to take a different view, it could not substitute its own opinion in place of that of the officer concerned. In my view, it would be difficult to run any administration if one were to hold otherwise.”

Lastly the Supreme Court authority which appears to be closest on the facts is *G. S. Ramaswamy and others v. Inspector-General of Police, Mysore*, AIR 1966 SC 175. Their Lordships were construing the provisions of the Hyderabad District Police Act (10 of 1329 F) and the Hyderabad District Police Manual under which Sub-Inspectors of Police were after interview by the Board put on the eligibility list for the posts of Circle Inspectors. A somewhat analogous question was posed and their Lordships observed therein as follows:—

“The first two questions that fall for consideration are whether the fact that a Sub-Inspector's name is put in the eligibility list gives an indefeasible right to him to promotion, and whether after such promotion on a temporary or officiating basis he gets a right not to be reverted under any circumstances. We are of the opinion that the fact that a Sub-Inspector's name is in the eligibility list gives him no right of the kind urged on behalf of the petitioners.”

15. We believe that in nearly two decades, since the promulgation of the Constitution, a matter of the present nature canvassed before us allegedly infringing the guarantee of Article 16 could not possibly have remained *res integra*. We had repeatedly asked the learned counsel to cite authority in support of the proposition that Article 16 was infringed or that there was an indefeasible right to undergo a training course conducted by the State for its employees. The galaxy of the learned counsel appearing in all the cases frankly conceded that despite painstaking research through the whole gamut of service law, they are unable to cite a single decision on this point in their favour. In the ultimate analysis, therefore, we are of the view that Article 16 is not attracted

to the facts of the case and there exists no inalienable right in favour of respondents to go through the upper and intermediate School Training Courses conducted at Phillaur, merely because their names exist on the eligibility lists. With respect we are of the view that the observations of the learned Single Judge to this effect are too broadly stated and do not lay down the legal position correctly.

16. We now proceed to consider finding (iv) of the learned Single Judge summarised above. The categorical finding under this head is two-fold and for clarity, each may be considered separately. It is observed first as follows:—

"It is no doubt true that no public servant has the right to be promoted but he has the right to be considered for promotion, if eligible. If the Government prescribes any qualification for being eligible, it must also provide opportunity to the officer concerned to acquire that qualification."

With respect we differ. We do not find anything either in the Police Rules or the Police Act which lays any such burden on the Government to provide the qualification to its employees which may be prescribed for promotion, nor any provision has been brought to our notice which confers any such right on the employees. It was fairly conceded before us that the Government is entitled to prescribe the qualifications or the other pre-requisites for promotion to the next higher rank. If so, would the mere prescription of such a qualification impose an incumbent duty on the State to provide the necessary requisites to the officer concerned to acquire that qualification. We do not think that it is so unless expressly provided by statute or by necessary implication therefrom. A rather extreme example may help to clear the issue. Suppose the Government were to prescribe that a diploma in the famous police school at London called the "Scotland Yard" to be the requisite qualification for appointment or promotion to the rank of an Inspector of Police, would it then become incumbent for the Government to provide leave, foreign exchange, passport and necessary entrance to the said School to every Sub-Inspector in order to enable him to provide himself with the opportunity to acquire this qualification? Obviously such an onerous burden cannot possibly be placed on an employer whether it be the State or a private employer unless the law categorically provides for such burden.

17. In the same context the learned Single Judge then proceeded to observe as follows:—

"..... if the examination or a training course is held or conducted by the Government, every officer willing to

undergo that examination or course in order to qualify himself for promotion should be allowed to pass that examination or go through that course. No obstacle can be placed in his way by prescribing a method of selection or age limit."

We have closely examined the Police Act and the relevant Police Rules on the point and we are unable to find any provision therein which gives any such inalienable right to the police officer to go through the respective training courses conducted at the Police School at Phillaur. On the contrary some of the rules are indicative of the fact that deputing a person to undergo one of the courses is by selection. For example the relevant part of Rule 13.7 provides as follows:—

"Selection shall be made from this list as vacancies occur for admission to the courses concerned at the Police Training School, provided that no Constable shall be considered eligible for any such course until the entry of his name in list 'B' has been approved by the Deputy Inspector-General of the Range * * *

The restrictions on admission to the lower school course and Instructors' Courses at the Police Training School limit the conditions for admission to List B."

18. As regards the Upper School Training Course, it is evident that the Police Rules in Chapter 13 make no express mention thereof. Our attention has been drawn by the learned Advocate-General for the Punjab to the relevant Government instructions under which this Course was instituted and it deserves notice that Mr. Abnashia Singh on behalf of the respondent has not challenged the holding of this course but only claimed a right for his client to attend the same. The relevant instruction regarding the constitution of this course appears in the Punjab Police Gazette at page 58 of the 20th of September, 1933, Part I and the relevant paragraph 4 thereof, which deserves notice, is as follows:—

"A new Upper School is being formed for the training of Asstt. Sub-Inspectors for the rank of Sub-Inspectors. The course will be for six months and classes will assemble, on the 1st of April and on the 1st of October. The first class of the new Upper School will assemble on the 1st of October, 1933. Only those Assistant Sub-Inspectors who have displayed investigating ability and who are likely to make good Station House Officers are to be selected for training. No Assistant Sub-Inspector over the age of forty will be admitted to the course. A period of five years should normally lapse from the date of passing the Intermediate course before an officer is admitted to the Upper School. The allotment of seats for this new class is given in the statement below." Merely because the Government con-

ducts training courses conducive to the efficiency of its employees, in our opinion, does not give the police officers an indefeasible right to qualify in the course so conducted. We do not see any fundamental or inherent right of an employee to undergo an examination or a training course against the will of the employer unless it is provided expressly by statute, the relevant rules or the necessary conditions of the service of the employee. We find neither of these three applicable in the present case of the police employees nor are we able to subscribe to this view as a general or an abstract proposition. The Government by prescribing a training course conducted by it as a qualification does not necessarily burden itself with the liability to provide such training to each of its employees who may be willing to undergo the same. Nor does it thereby denude itself of its primary right to select those from the large number of its employees to whom it may deem worthwhile to provide such training. On the contrary if an employer provides a course it prima facie has the right to govern the admission to such a course. If there is no fundamental right to promotion then equally there can be no fundamental right to acquire the qualifications requisite for such a promotion. No precedent was cited before us in support of these rather widely stated propositions and we are regretfully unable to subscribe to the view of the learned Single Judge on this finding as well.

19. We proceed to consider the finding No. (v) at page 11 supra of the learned Single Judge and it is on the bedrock of direct conflict of the impugned instruction with the corresponding provision of the Police Rules that the appeals filed by the State must founder. The learned Single Judge has given impeccable reasons and cited apt authority for his view that the instruction of the Inspector-General runs counter to the Police Rules,

Rule 13.10.

(1) A list of all Assistant Sub-Inspectors who have been approved by the Deputy Inspector-General as fit for trial in independent charge of a police station, or for specialist posts on the establishment of Sub-Inspectors, shall be maintained in card index form by each Deputy Inspector-General. Officiating promotions of short duration shall ordinarily be made within the district concerned (vide sub-rule 13.4 (2)), but vacancies of long duration may be filled by the promotion of any eligible man in the range at the discretion of the Deputy Inspector-General. Half-yearly reports on all men entered in the list maintained under this rule shall be furnished in the form No. 13.9(3) by the 15th October, in

We are wholly in agreement and wish to affirm the reasoning of the learned Single Judge without deeming it necessary to traverse the same ground all over again. We would, hence very briefly notice the argument on behalf of the appellant and our reasons for repelling them.

20. The gravamen of the argument on behalf of the State was that the statutory Rules are silent on the point of selection etc., to the various training courses conducted at Phillaur School. This omission, it was contended, could be validly supplied and the rules be supplemented by means of executive instruction like the one issued by the Inspector-General in the present case. Reliance primarily was placed on Sant Ram Sharma's case. On behalf of the respondents the vires of the Punjab Police Rules 1934 were not challenged and also the validity of the power to hold the training courses at the Police School was not assailed. Similarly the power of prescribing qualifications and the pre-requisites for the purposes of promotion was conceded to vest in the promoting authority. On this aspect of the case the primary argument on behalf of the respondents was that the impugned instruction, far from being supplementary, was in direct and patent conflict with the statutory Police Rules.

21. The crux of the question on this aspect, therefore, is whether the impugned instruction is merely supplementary providing for lacunae in the Rules or is it in conflict therewith. A comparison of the manner of constituting list 'E' for the purposes of subsequent selection therefrom to the rank of Sub-Inspector as provided for in the Rules on the one hand and in the impugned instruction on the other would clarify the issue. We would juxtapose these two provisions, namely, Rule 13.10 of the Police Rules and clause (c) of the instruction against each other:—

Clause (c) of the instruction.

Selections for Upper School Courses.

A Committee consisting of the S. I. of the Range, whose cases are to be examined as President and two Superintendents of Police to be nominated in rotation according to the alphabetical order of the names of the Districts in the Ranges, will make selections for the Upper School Course from among the confirmed Assistant Sub-Inspectors of Police who are below 45 years in age and have completed 5 years since the passing of the Intermediate School Course (relevant date will be the date of the commencement of the next Upper School Course). The Committee should scrutinise the cases of all eligible officers. In addition to going through their records of service, it may.

addition to the annual report to be submitted by the 15th April, in accordance with Police Rule 13.17(1).

(2) No Assistant Sub-Inspector shall be confirmed in a substantive vacancy in the rank of Sub-Inspector unless he has been tested for at least a year as an officiating Sub-Inspector in independent charge of a police station in a district other than that in which his home is situated.

A bare examination of the language and content of these two provisions clearly brings out the patent conflict betwixt them. What first meets the eye is that whilst Rule 13.10 does not even refer to the Upper School Course for the purpose of list 'E', clause (c) of the impugned instruction makes the qualification of the Upper School Course the sine qua non for bringing the name of an Assistant Sub-Inspector to list 'E'. Again whilst Rule 13.10 vests the discretion for bringing names on list 'E' to the Deputy Inspector-General, clause (c) on the contrary takes away this direction and vests it in an entirely new body called the Promotion Committee constituted of three persons, namely, the D.I.G. and two Superintendents of Police. Yet again clause (c) of the impugned instruction virtually abandons all earlier rules and provisions for determining the seniority of the A.S.Is. of the police and makes it wholly dependent in the order of merit obtained by them in the Upper Training School Examination conducted at Phillaur. This is in direct conflict with R. 12.2, which lays down the procedure for the seniority and probation of the Assistant Superintendents of Police and lastly the instruction categorically lays down that promotions to the rank of Sub-Inspector should be made from list 'C' in accordance with the seniority of the officers on it and departures from this rule have been virtually ruled out of consideration. This again does not seem to be warranted by the relevant Police Rules. It is unnecessary to go to the other similar details where the conflict is also apparent. Similarly the clauses (d) and (e) providing for the Promotion Committees for selection for the Intermediate School Course and for selection for the Lower School Course run counter to the corres-

ponding provision of the Police Rules. The learned Advocate-General had fairly conceded that the instruction cannot possibly override the Rule. We are, therefore, in agreement with the learned Single Judge and clearly of the view that the impugned instruction directly conflicts with the corresponding provisions of the Police Rules. We have given our close attention to the impugned instruction and conflicting provisions thereof and these are so inextricably entangled with the others that it is impossible to separate them. Consequently the whole of the impugned instruction has to be struck down and is therefore declared invalid.

22. In view of the above finding and the consequent quashing of the instruction we deem it unnecessary to go into the question whether the fixation of age at 45 years by clause (c) of the said instruction is necessarily arbitrary or contrary to the Police Rules. The learned Advocate-General had not challenged the quashing of the remarks against Kirpal Singh, respondent, in L. P. A. No. 159 of 1969 and it was further conceded before us that these instructions have not been approved by the Government. Consequently findings (vi), (vii) and (viii) of the learned Single Judge do not now fall for consideration.

23. In fairness to the learned counsel for the respondent in L. P. A. No. 165 of 1969, we must notice that it was contended that Sections 2 and 12 of the Police Act did not give any power whatsoever to issue any instruction in the nature of the impugned instruction. Similarly it was also contended that Rule 1.2 of the Police Rules also does not confer any such power. It was also contended that the provision of the written test and clause (f)

if it so wishes, interview any eligible officers and ask them to undergo parade and written tests. Assistant Sub-Inspectors of Police selected for the Upper School Course should be sent to the Police Training School in accordance with their inter se seniority in a particular batch. After the completion of the Upper School Course, the names of the successful officers should be brought on list 'E' in accordance with the order of merit obtained by them in the examination at the Police Training School. Promotions to the rank of Sub-Inspectors of Police should be made from list 'E' in accordance with the seniority of officers on it. Departures from these instructions should be permitted only where the officers concerned come to adverse notice for corruption or utter inefficiency after they have been selected for the Upper School Course. The reasons for such departures should be recorded in detail.

providing for exemption to the age limit was also not in conformity with the Rules. Detailed criticism was also directed to each part of the impugned instruction but as we have already held the whole of the same to be invalid, it is unnecessary to go into these questions.

24. We have dealt above with L. P. As. Nos. 159 and 165 of 1969. However, identical points regarding the conflict of the impugned instructions with the Police Rules arise in the connected Letters Patent Appeals Nos. 137 of 1969, 471 and 527 of 1968. Therefore, in view of the foregoing discussion all the Letters Patent Appeals must fail but in the light of our observations regarding the findings (i) to (iv) of the learned Single Judge in L. P. As. Nos. 159 and 165 of 1969, the relief granted to the respondent therein has to be necessarily slightly modified. However, it has been stated before us that as no stay was granted by the Motion Bench whilst admitting these appeals the orders of the learned Single Judges have already been complied with and consequently no modification of these orders is now necessary or possible. In view of the complicated issues involved in these appeals, however, we make no order as to costs.

25. Civil Writs Nos. 2245 and 2348 of 1968 have been placed before this Bench in view of the orders of the learned Single Judge dated 30th July, 1969. As the point arising therein is identical with that in Kirpal Singh's case (L. P. A. No. 159 of 1969), we have closely perused the petitions along with the return filed there-to on behalf of the State. Both the petitioners in these petitions are Head Constables whose names are borne on the eligibility list 'C' and they claim the right to attend the Intermediate School Course at Phillaur on the said basis. Both the writ petitioners have been declined for selection to the Intermediate Course by the Promotion Committees constituted in pursuance of the impugned instructions issued by the Inspector-General of Police and the relevant parts thereof are annexed as annexures 'B' and 'C' to the said petitions. Mr. G. C. Mittal in support of both the petitions has pressed before us the sole point regarding the invalidity of the said instructions. We have so held above. Accordingly, both these writ petitions have to be allowed and we, therefore, direct respondents Nos. 1 to 3 therein that the eligibility of the two petitioners for being sent up for the Intermediate Training Course and for promotion should be decided in accordance strictly with the Police Rules and in complete disregard of the Departmental Instructions issued by the Inspector-General of Police, which have been struck down. As above, we make no order as to costs.

26. **HARBANS SINGH, J.:** I have carefully gone through the judgment pre-

pared by my learned brother and, if I may say so with respect, have great admiration for the clarity, elucidation and details with which his Lordship has discussed the extent of the application of the principles involved in Article 16 of the Constitution of India. Before us the learned counsel for the respondents in the Letters Patent Appeals and for the petitioners in the writ petitions mainly stressed the last point dealt with in the judgment of my learned brother, namely, that the impugned instructions were in conflict with the statutory police rules and for this reason deserve to be quashed. The application of Article 16 and also the fact that these persons must also be provided with the opportunity to acquire the qualification laid down by the Government and which qualification cannot be acquired except through the Police Training School, which was under the control of the Government, were no doubt also mentioned during the course of arguments but much stress was not laid on the same. In view of the fact that the impugned instructions are to be quashed because the same are in conflict with the statutory rules, I consider it hardly necessary to express any definite views with regard to the remaining matters. I, therefore, agree that the Letters Patent Appeals should be dismissed and the other writ petitions be allowed and the impugned instructions be quashed and directions issued that the eligibility of the persons concerned for being sent for Intermediate School Course and for promotion should be decided strictly in accordance with the Police Rules and in complete disregard of the Departmental Instructions issued by the Department which have been struck down.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 407.
(V 57 C 63)

BAL RAJ TULI, J.

M. S. Oberoi, Petitioner v. Union of India through Estate Officer, Chandigarh, Respondent.

Civil Revn. No. 718 of 1969, D/-25-2-1970.

(A) Constitution of India, Art. 228 — Petition for transfer of case to High Court — Does not necessarily involve 'a substantial question of law as to interpretation of Constitution.'

The challenge to the constitutionality of some sections of an Act does not mean that a question of law relating to the interpretation of a provision of the Constitution is involved. Hence a petition under Art. 228 of the Constitution is incompetent if the only question raised is

DN/DN/B638/70/KSB/D

about the unconstitutionality of certain sections of an Act. (Para 5)

(B) Civil P. C. (1908), S. 113 — Reference to High Court — Appeal pending before District Judge against an order of eviction under Sec. 4, Public Premises (Eviction of Unauthorised Occupants) Act, 1958 — Application for reference to High Court under S. 113, Civil P. C. on ground that appeal involves validity of Ss. 4, 5 and 7 of that Act — District Judge while declining to make a reference deciding that those sections were valid and constitutional — District Judge exceeds his jurisdiction under S. 113. (Para 5)

(C) Constitution of India, Art. 227 — Power of superintendence of High Court — Lower Court exceeding its jurisdiction under S. 113, Civil P. C. — Interference.

Where the District Judge while passing an order declining to make a reference under Section 113, Civil P. C., himself decided that certain sections of the Central Act were valid and constitutional he exceeded his jurisdiction under Section 113, Civil P. C. and, therefore, the High Court, in the exercise of jurisdiction under Art. 227 of the Constitution, would adjudicate on matters raised in the petition. (Para 5)

(D) Public Premises (Eviction of Unauthorised Occupants) Act (1958), Ss. 4 and 5 — Validity — Not void on ground of violation of principles of natural justice — Estate Officer in starting proceeding under S. 4 does not act as a Judge in his own cause. (Para 6)

(E) Constitution of India, Art. 226 — Natural Justice — Principle of — No one shall be a Judge in his own cause — Meaning of explained.

To say that no one shall be a Judge in his own cause means that the Judge must not have anything like a personal interest in the cause he is to adjudicate upon and not that an officer discharging his official functions must not start proceedings in a matter which he is, under the law, competent to adjudicate upon. AIR 1963 Punj 290 & AIR 1967 Delhi 86, Rel. on; AIR 1959 SC 1376, Dist. (Para 6)

(F) Constitution of India, Art. 14 — Equality before law — Public Premises (Eviction of Unauthorised Occupants) Act (1958), S. 7 — Not violative of Art. 14 of the Constitution after its amendment by Act 40 of 1963 and insertion of S. 10-E by Amending Act 32 of 1968 — Section 7 is not discriminatory as it is no more open to authorities to have recourse to Civil Courts — Only remedy is under the Act before authorities appointed under it — Satisfactory procedure has been provided for determination of lis as to assessment of damages for period of unauthorised occupation. Contrary observations in AIR 1969 Delhi 194, held obiter dicta. (Paras 7, 8, 9, 10)

(G) Public Premises (Eviction of Unauthorised Occupants) Act (1958), S. 7 — Section is not violative of Art. 14 of the Constitution after insertion of S. 10-E by Act 32 of 1968. (Paras 7 to 10)

(H) Constitution of India, Art. 13 — Doctrine of eclipse — Applicability.

Where the invalidity of Sections 5 and 7 of the Public Premises (Eviction of Unauthorised Occupants) Act 1958 has not been removed by any amendment of the Constitution but by the amendment of the Central Act by the insertion of Sec. 10-E which has made the provisions of Ss. 5 and 7, as originally enacted valid from the date of amendment, the doctrine of eclipse does not apply. AIR 1963 SC 1019, Dist.; AIR 1969 J & K 88 (FB), Rel. on. (Para 11)

Cases Referred: Chronological Paras

(1969) AIR 1969 Delhi 194 (V 56), Raja Sahib of Nalagarh v. The Punjab State 7

(1969) AIR 1969 J & K 88 (V 56) = 1968 Kash LJ 392 (FB), H. Wali Mohd. v. Administrator Municipality 11

(1967) AIR 1967 SC 1581 (V 54) = 1967-3 SCR 399, Northern India Caterers Pvt. Ltd. v. State of Punjab 2, 7, 11

(1967) AIR 1967 Delhi 86 (V 54), M. L. Joshi v. Director of Estates Govt. of India 6

(1963) AIR 1963 SC 1019 (V 50) = 1963 Supp (1) SCR 912, Mahendra Lal Jaini v. State of Uttar Pradesh 11

(1963) AIR 1963 Punj 290 (V 50) = ILR (1963) 1 Punj 761, Northern India Caterers Pvt. Ltd. v. State of Punjab 2

(1959) AIR 1959 SC 1376 (V 46) = 1960-1 SCR 580, Gullappalli Nageswara Rao v. State of Andhra Pradesh 6

R. N. Narula, for Petitioner; Anand Swarup Sr. Advocate with U. S. Sahni, for Respondent.

ORDER:— This petition under Arts. 227 and 228 of the Constitution of India is directed against the order of the District Judge, Chandigarh, dated July 30, 1969, dismissing the application of the petitioner under Section 113 of the Code of Civil Procedure for reference of the case to this Court on the ground that questions relating to the interpretation of the Constitution were involved.

2. The petitioner took on lease the premises of the Mount View Hotel with its appurtenances from the Punjab Government on September 24, 1958. The original lease was for a period of three years which could be renewed on the same terms and conditions for another period of three years. The petitioner has been running the hotel in these premises ever since. On August 27, 1959, the Punjab Government

offered to sell the said hotel to the petitioner at a price of Rs. 12/- lacs. The petitioner did not accept the said offer which was withdrawn. Since the period of six years of lease had expired, the Government called upon the petitioner to hand over the vacant possession of the premises on or before January 1, 1960. The petitioner did not vacate the premises and a show-cause notice under Section 4 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959 (hereinafter called the Punjab Act) was issued to the petitioner on January 1, 1960, and thus eviction proceedings were started. The petitioner filed a writ petition in this Court challenging the validity of the said Act and the notice issued thereunder. A Full Bench of this Court heard the writ petition and dismissed it. The judgment is reported in the Northern India Caterers Pvt. Ltd. v. State of Punjab, ILR 1963 (1) Punj 761. The petitioner went up in appeal to the Supreme Court which was accepted and the eviction proceedings were set aside. Section 5 of the said Act was held to be ultra vires being discriminatory and violative of Art. 14 of the Constitution of India. Their Lordships of the Supreme Court delivered the judgment on April 4, 1967, and it is reported as Northern India Caterers (P) Ltd. v. State of Punjab, AIR 1967 SC 1581.

3. Chandigarh became Union territory with effect from November 1, 1966 and fresh proceedings for the ejection of the petitioner from the premises were started under Sections 4 and 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, (hereinafter called the Central Act) by the Estate Officer, Union Territory, Chandigarh, by issuing a show-cause notice to the petitioner on November 18, 1968. The said Act applied to the premises as it became the property of the Central Government with effect from November 1, 1966. Another notice under Section 7 of the said Act for the recovery of damages to the extent of Rs. 1,28,000 was also issued to the petitioner on the same day. The Manager of the Hotel with his counsel filed replies and also produced a copy of the letter received from the Finance Secretary, Chandigarh Administration, wherein an enquiry was made from the petitioner whether he was willing to purchase the Mount View Hotel building for Rs. 12/- lacs plus interest at the rate of 6 per cent per annum on the purchase price from the date of the Government's earlier offer made in August, 1959, upto the date of payment of the price. The petitioner accepted this offer by letter dated June 23, 1967, on condition that the interest should be calculated in accordance with the rules of the Capital Project. Ultimately the Capital Control Board in its meeting held on July 3, 1967, considered the matter and decided to sell the premises

to the petitioner on the following terms:

"(i) The price of the hotel would be Rs. 12 lacs plus interest at the rate of 4½ per cent per annum from August, 1959, to September, 1966, and 6 per cent per annum from September, 1966, to the date of actual sale.

(ii) The concession offered by the hotel to Government officers for staying in the Rest House portion of the hotel during the period shall not be taken into consideration.

(iii) The entire purchase money shall be paid in lump-sum and must be paid within two months of the date of offer.

(iv) The registration expenses shall be borne by the hotel.

(v) The sale deed should include authenticated zoning plan for the area."

4. The sale was still under negotiations when an order was passed by the Estate Officer on May 14, 1969, for the eviction of the petitioner under Section 5 of the Central Act and for the recovery of damages at the rate of Rs. 4000 per month with effect from January 1, 1960, to the date of vacation. A copy of this order is annexure 'A' to the petition. The petitioner filed an appeal against that order to the District Judge, Chandigarh, under Section 9 of the Central Act and during the pendency of that appeal the application under Section 113 of the Code of Civil Procedure for reference of the case to this Court was made. While deciding that application the learned District Judge held that Sections 4, 5 and 7 of the Central Act were valid and not unconstitutional and, therefore, declined to make a reference to this Court.

5. The present petition under Article 228 of the Constitution is not competent as no question arises relating to the interpretation of any Article of the Constitution. What is contended is that Sections 4, 5 and 7 of the Central Act are unconstitutional. The challenge to the constitutionality of some sections of an Act does not mean that a question of law relating to the interpretation of a provision of the Constitution is involved and, therefore, the learned District Judge was right in dismissing the application, but he decided finally that Sections 4, 5 and 7 of the Central Act were valid and constitutional, that is, while deciding the miscellaneous application the learned District Judge decided that appeal. The petitioner challenges the validity of that order under Article 227 of the Constitution. A preliminary objection has been raised by the learned counsel for the respondent that there is no question of jurisdiction involved and, therefore, the petition under Article 227 of the Constitution is not competent. I do not agree with this

submission of the learned counsel as the learned District Judge exceeded his jurisdiction by deciding the validity of Sections 4, 5 and 7 of the Central Act while passing an order on the miscellaneous application whether to make a reference to this Court or not. I have, therefore, decided to adjudicate on the matters raised in the petition.

6. The first submission of the learned counsel for the petitioner is that Ss. 4 and 5 of the Central Act are void and unconstitutional as the Estate Officer is both the prosecutor and the Judge. This argument was considered by a Full Bench of this Court (Supra) and was negatived. In the appeal before the Supreme Court, this matter was not discussed. Therefore, the judgment of the Full Bench on the point still stands and I am bound by it. Moreover, this matter was further considered by I. D. Dua, J. (as his Lordship then was) in *M. L. Joshi v. Director of Estates, Government of India*, New Delhi, AIR 1967 Delhi 86, and the learned Judge held

"the contention urged on behalf of the petitioner that the Estate Officer would be both the prosecutor and the Judge which is hit by the ratio of the Supreme Court decision in *Gullappalli Nageswara Rao v. State of Andhra Pradesh*, AIR 1959 SC 1376, is unconvincing and of no avail to the petitioner in the present case because the Estate Officer does not appear to me to be acting as a Judge in his own cause when he is disposing of the proceedings initiated by the show-cause notice under Section 4 of the Act. To say that no one shall be a judge in his own cause means that the Judge must not have anything like a personal interest in the cause he is to adjudicate upon and not that an officer discharging his official functions must not start proceedings in a matter which he is, under the law, competent to adjudicate upon. The petitioner's argument is obviously misconceived in the instant case and the decision of the Supreme Court does not seem to lend support to the petitioner's submission on the existing facts before me."

In view of this judgment, I find no merit in this argument and repel the same.

7. The learned counsel for the petitioner has then submitted that Section 7 of the Central Act is unconstitutional as no procedure has been prescribed for the trial of an important issue like the determination of damages, and reliance is placed for this submission on a judgment of a Division Bench of the Delhi High Court in *Raja Sahib of Nalagarh v. The Punjab State*, AIR 1969 Delhi 194. The learned Judges relied upon the judgment of their Lordships of the Supreme Court in AIR 1967 SC 1581 (Supra) and held S. 7(2) of the Punjab Act to be violative of Art. 14 of the Constitution. The observations are

obiter dicta as the learned Judges were of the opinion that Section 7(2) of the said Act fell with Section 5 thereof, and it was expressly stated in para 9 of the report

"that though on this ground also, the impugned order seems to be vulnerable, we would, however, like to confine our conclusions on the ground that in the absence of Section 5, Section 7(2) cannot operate, because on the second point, we have not had the privilege of hearing full-fledged arguments."

It is thus apparent that the learned Judges were influenced by the fact that Section 5 was unconstitutional and, therefore, Section 7(2) also fell with it. This argument does not apply now as there is no discrimination after the insertion of Section 10-E in the Central Act by the amending Act 32 of 1968, which reads as under:—

"No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorised occupation of any public premises or the recovery of the arrears of rent payable under sub-section (1) of Section 7 or the damages payable under sub-section (2) of that section or costs awarded to the Central Government under sub-section (4-A) of Section 9 or any portion of such rent, damages or costs."

8. By the insertion of this section in the Central Act the invalidity of Sections 5 and 7 of that Act has been removed. It is no more open to the authorities to have recourse to the Civil Courts. The only remedy is under the Act before the authorities appointed under it. Section 7 as amended by Act 40 of 1963 reads as under:—

7(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.

(2) Where any person is, or has at any time been, in unauthorised occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such instalments as may be specified in the order.

(3) No order under sub-section (1) or sub-section (2) shall be made against any person until after the issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer."

9. It is, thus, apparent that it has been provided in this section that a notice to show cause has to be issued to the person in unauthorised occupation of the premises, who has been given the right to file objections and to lead evidence in support of his objections. Until those objections are decided, the order assessing damages cannot be passed. Every safeguard has, therefore, been made in favour of the unauthorised occupant for the assessment of damages against him. Under the Central Act, rules have been framed called the "Public Premises (Eviction of Unauthorised Occupants) Rules, 1958, and Rule 7 provides for the assessment of damages, as under.—

"7. Assessment of damages.—

In assessing damages for unauthorised use and occupation of any public premises, the estate officer shall take into consideration the following matters, namely—

(a) the purpose and the period for which the public premises were in unauthorised occupation;

(b) the nature, size and standard of the accommodation available in such premises;

(c) the rent that would have been realised if the premises had been let on rent for the period of unauthorised occupation to a private person;

(d) any damage done to the premises during the period of unauthorised occupation;

(e) any other matter relevant for the purpose of assessing the damages."

10. This rule also gives guidance to the Estate Officer how to determine the damages for unauthorised occupation. The unauthorised occupant can also lead evidence on these matters and bring any other matter before the Estate Officer relevant to the determination of damages. I am, therefore, of the opinion that a satisfactory procedure has been provided for the determination of the lis as to the assessment of the damages for the period of unauthorised occupation which is in no way restricted. It gives full opportunity to the unauthorised occupant to prove the amount of damages to which he can be held liable for the period of his unauthorised occupation. It cannot, therefore, be said that Section 7 does not provide any procedure. There is, thus, no merit in this submission which is also repelled.

11. The last argument of the learned counsel for the petitioner is that Sections 4, 5 and 7 of the Central Act were still-born in 1958 when the Act was enacted as they violated the provisions of Article 14 of the Constitution and those provisions could not be revived by the insertion of Section 10-E by the amending Act 32 of 1968 but these sections had to be re-enacted. Reliance is placed on a judgment of their Lordships of the Supreme Court in *Mahendra Lal Jaini v. State of*

Uttar Pradesh, AIR 1963 SC 1019, wherein the doctrine of eclipse and revival has been dealt with. In my opinion, the ratio of that judgment does not apply to the facts of the present case. In that case the constitutionality of the U. P. Land Tenures (Regulation of Transfers) Act 15 of 1952, and the Indian Forests (U. P. Amendment) Act No. 5 of 1956 was challenged. It was held that the said Acts were unconstitutional as they violated the provisions of Art. 31(2) of the Constitution. An argument was put forth by the Advocate General that by the amendment of the Constitution the eclipse on the validity of those Acts was removed and the provisions of the Acts as revived were intra vires and, therefore, action could be taken under them. In that case the invalidity of the impugned Acts was not removed by amendment but it was pleaded that because of the amendment of the Constitution the invalidity vanished. This argument was not accepted and it was held that the Acts had to be re-enacted. In the present case the invalidity of Sections 5 and 7 of the Central Act has not been removed by any amendment of the Constitution but by the amendment of the Contract Act by the insertion of Section 10-E which has made the provisions of Ss. 5 and 7, as originally enacted, valid from the date of amendment. The learned counsel has then relied on a Full Bench judgment of the Jammu and Kashmir High Court in *H. Wali Mohd. v. Administrator, Municipality*, AIR 1969 J & K 88 (FB), but that judgment, far from helping the petitioner, goes against him, as is clear from the following observations:—

"Thus summarising the Full Bench judgment of this Court the position that emerges is as follows:—

"(1) That Section 5 of the old Act suffered from the same infirmities and was subject to the same criticism as Section 5 of the Punjab Act which was also couched in the same language as Section 5 of the old Act.

(2) These infirmities were two-fold. In the first place Section 5 being couched in a directory form, it invested a discretion in the Estate Officer to evict one unlawful occupant and refuse to evict another at his own sweet will. Secondly the jurisdiction of the Civil Court not being ousted, the Government reserved two remedies for itself; one through the drastic machinery provided under the Act and the other the remedy of the Civil Court. The Government could in its own discretion choose to proceed against one person under the Act and against another in the Civil Court. Such a power was clearly discriminatory and violative of Art. 14 of the Constitution of India as held by the Supreme Court in AIR 1967 SC 1581. There can be no doubt that Section 5 of the old Act also suffered from these infirmities and

was, therefore, clearly ultra vires, but since these infirmities were removed by the Ordinance and later by the amending Act, the old Act as amended was not struck down by this Court. The observations of the Full Bench quoted above unmistakably point to the conclusion that this Court would have held Section 5 of the old Act as ultra vires, as being violative of Art. 14 of the Constitution of India had it not been for the ordinance which came to its rescue. It was, therefore, rightly contended by Mr. Sen that since the old Act was ultra vires, any proceedings taken under the said Act were completely without jurisdiction and must be quashed."

12. The learned Judges held that Section 5 after amendment by the Ordinance and the amending Act was valid and had not been struck down on the ground that as originally enacted it was unconstitutional. There is, therefore, no merit in this submission of the learned counsel.

13. For the reasons given above, there is no merit in this petition which is dismissed with costs, counsel's fee being Rs. 100/-.

Petition dismissed.

AIR 1970 PUNJAB & HARYANA 412 (V 57 C 64)

GURDEV SINGH AND
PREM CHAND JAIN, JJ.

Workmen of New Snow View Transport Pvt Ltd., Pathankot, Petitioner v. State of Punjab through Secy. to Govt., Labour and Employment Departments, Chandigarh and others, Respondents.

Civil Writ No. 904 of 1967, D/-2-3-1970, against order of P. C. Jain, J., D/-2-5-1969.

(A) Industrial Disputes Act (1947), Section 10(1). — Reference under — Government can make reference even if it has refused it earlier — It is administrative function. AIR 1966 Punj 354, held impliedly overruled by AIR 1970 SC 1205.

An order of reference under Section 10 (1) of the Industrial Disputes Act is an administrative act of the Government. There is no bar in the way of the State Government, even if it has once refused to refer a dispute, to change its mind on a reconsideration of the matter either because new facts have come to light or because it had misunderstood the existing facts or for any other relevant consideration and decide to make a reference. This power of the State Government, however, is subject to the limitation that on reconsideration of earlier decision, the reference can be made only

if the dispute is an industrial one and either exists at that stage or is apprehended and the reference it makes must be with regard to that and no other industrial dispute. Case law discussed, AIR 1970 SC 1205, Foll.; AIR 1966 Punj 354, held impliedly overruled in AIR 1970 SC 1205. (Para 4)

(B) Constitution of India, Art. 226 — Writ of certiorari — Finding of fact — Finding of Tribunal that the demand of workmen for introduction of gratuity scheme is justified based on consideration of entire evidence — It is a pure finding of fact — There being neither any error of jurisdiction nor any error apparent on face of record, finding held could not be challenged — (However, since the Tribunal has not framed the gratuity scheme, the case was remanded to tribunal). (Para 5)

Cases Referred: Chronological Paras

- (1970) AIR 1970 SC 1205 (V 57) = Civil Appeal No. 1914 of 1968, D/-9-1-1970; M/s. Western India Match Co. Ltd. v. The Western India Match Co. Workers Union 3, 4
- (1969) AIR 1969 Madh Pra 174 (V 56) = 1969 Jab LJ 433, Rewa Coal Fields Ltd., Dhanpuri, Shahdol v. Central Govt. Industrial Tribunal-cum Labour Court Jabalpur 2, 3
- (1969) AIR 1969 Mad 21 (V 56) = 1969-1 Lab LJ 499, Workmen of Dalmia Cement (Bharat) Ltd. v. State Government of Madras 2
- (1969) AIR 1969 Raj 95 (V 56) = 1968-2 Lab LJ 682 = 1969 Lab IC 444, Goodyear India Ltd. Jaipur v. Industrial Tribunal Rajasthan, Jaipur 2, 3
- (1968) AIR 1968 SC 529 (V 55) = 1968-1 Lab LJ 834, Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal 3
- (1966) AIR 1966 Punj 354 (V 53) = ILR (1966) 2 Punj 498, Gandhasa Transport Co. (Pvt.) Ltd. v. State of Punjab 1, 2, 4
- (1964) AIR 1964 All 328 (V 51) = (1964) 1 Lab LJ 724, Champion Cycle Industries v. State of U. P. 3
- (1963) 1963-2 Lab LJ 717 = 1963-2 Mys LJ 230, Vasudeva Rao v. State of Mysore 3
- (1963) 65 Punj LR 901 = (1964) 1 Lab LJ 644, Rawalpindi Victory Transport Comp. (P) Ltd. v. State of Punjab 2, 3
- (1962) AIR 1962 All 70 (V 49) = 1963-1 Lab LJ 340, L. H. Sugar Factories and Oil Mills (Pvt.) Ltd. Pilibhit v. State of Uttar Pradesh 2
- (1962) 1962-1 Lab LJ 555 = 1962-5 Fac LR 4 (Punj), Panipat Woollen and General Mills Co., Ltd. v. Industrial Tribunal Punjab I, 2

(1958) AIR 1958 Andh Pra 276

(V 45) = (1958) 1 Lab LJ 20,

Gurumurthi v. Ramulu

(1956) AIR 1956 Mad 115 (V 43) =

1956-1 Lab LJ 498, Sri Rama

Vilas Service Ltd. v. State of Madras

(1953) AIR 1953 SC 53 (V 40) =

1953 SCR 334 = 1953-1 Lab LJ

174, State of Madras v. C. P.

Sarathy

H. L. Soni and S. S. Mahajan; for Petitioner; N. K. Sodhi, for Respondent No. 3.

PREM CHAND JAIN, J.:— The workmen of New Snow View Transport Private Limited, Pathankot, approached this Court under Arts. 226 and 227 of the Constitution of India, for the issuance of an appropriate writ, order or direction, quashing the award made by respondent No. 2, dated 28th January, 1967, published in the Punjab Government Gazette dated 24th February, 1967 (copy Annexure 'F' to the petition). This petition came up for hearing before me sitting singly on May 2, 1969, when the same was referred to a larger Bench for decision as there was a conflict in the two decisions of this Court, one reported in Panipat Woollen & General Mills Co. Ltd. v. Industrial Tribunal Punjab, (1962) 1 Lab LJ 555 (Punj) and the other reported in Gondhara Transport Co. (Pvt.) Ltd. v. State of Punjab, AIR 1966 Punj 354. In Panipat Woollen and General Mills Company, Ltd., 1962-1 Lab LJ 555 (Punj) the view taken by A. N. Grover, J. (as he then was), was, "Even otherwise there can be no doubt that the order of reference under S. 10(1) is an administrative act of the Government. If there is an industrial dispute, the factual existence of which could not really be in dispute, a fresh determination by the Government of the question of the expediency of making a reference does not amount to a review of a question judicially determined previously and, therefore, a prior order of the Government does not affect the jurisdiction of the Government to exercise the statutory power under Section 10(1) (c) of the Industrial Disputes Act."

In Gondhara Transport Co. (Pvt.) Ltd., AIR 1966 Punj 354 R. S. Narula, J. took a different view and observed thus:—

"Considering the scheme, objects and purposes of the relevant provisions of the Act as a whole it appears to be clear that words "at any time" in Section 10(1) of the Act refer to a period which commences with the issue of demand notice or with any other legal steps by which the proceedings are initiated for making a reference to a Labour Court or Tribunal and which period terminates with an order of the appropriate Government either making a reference of declining to make it for any valid reason. Once the Government has arrived at and given out its decision

one way or the other, Section 10(1) of the Act ceases to exist for that particular dispute or demand and with such a decision of the Government the words "at any time" contained in Section 10(1) of the Act also cease to operate."

From the report it is clear that the judgment of A. N. Grover, J. in Panipat Woollen and General Mills Co. Ltd., 1962-1 Lab LJ 555 (Punj) was not cited before R. S. Narula, J. In view of this conflict and in order to get an authoritative decision, I thought it desirable and proper to refer the matter to a larger Bench and that is how this matter has been placed before us for decision.

2. Mr. Soni, learned counsel for the petitioners, vehemently contended that under Section 10(1) of the Act, an order of the appropriate Government refusing to make reference at one stage could be reviewed subsequently and there was no legal bar for the exercise of such a power over and again by the State Government. Reliance in support of his contention was placed on a decision of the Supreme Court in the State of Madras v. C. P. Sarathy, AIR 1953 SC 53, two decisions of this Court in Panipat Woollen and General Mills Co. Ltd., 1962-1 Lab LJ 555 (Punj) (Supra) and Rawalpindi Victory Transport Co. (P) Ltd. v. State of Punjab, (1963) 65 Pun LR 901, two of the Madras High Court in Sri Rama Vilas Service Ltd. v. State of Madras, represented by Secy. to Govt., AIR 1956 Mad 115, and Workmen of Dalmia Cement (Bharat) Ltd. v. State Govt. of Madras, AIR 1969 Mad 21, decision of Allahabad High Court in L. H. Sugar Factories and Oil Mills Pvt. Ltd. Pilibhit v. State of Uttar Pradesh, AIR 1962 All 70, of Rajasthan High Court in Good Year India Ltd. Jaipur v. Industrial Tribunal, Rajasthan, Jaipur, AIR 1969 Raj 95, and of Madhya Pradesh High Court in Rewa Coal Fields Ltd., Dhanpuri, Shahdol v. Central Govt. Industrial Tribunal-cum-Labour Court, Jabalpur, AIR 1969 Madh Pra 174. It was also contended by Mr. Soni that the decision of this Court in Gondhara Transport Co. (Pvt.) Ltd., AIR 1966 Punj 354 did not lay down the correct law. On the other hand, it was contended by Mr. N. K. Sodhi, that the appropriate Government had no power to review its own previous order when once it had refused to refer the same for adjudication to a Labour Court. It was also contended that the case in Gondhara Transport Co. (Pvt.) Ltd., AIR 1966 Punj 354 was correctly decided.

3. After giving my thoughtful consideration to the entire matter, I am of the view that there is considerable force in the contention of the learned counsel for the petitioners and in view of the latest unreported decision of the Supreme Court in Civil Appeal No. 1914 of 1968 = (AIR 1970 SC 1205) in M/s. Western India Match

Co. Ltd. v. Western India Match Co. Workers' Union, decided on January 9, 1970, this matter needs no further scrutiny. The following observations of their Lordships of the Supreme Court may be read with advantage:—

"The next question is whether the expression "at any time" in Section 4(k) means what its literal meaning connotes, or whether in the context in which it is used it has any limitations. Counsel for the company argued that the concerned workman was admittedly not a member of the respondent-union in the beginning of 1959 when the State Government refused to make the reference, that he became a member of the respondent-union in July 1962, that it was thereafter that the respondent-union revived the said dispute which had ceased to be alive after the Government's said refusal and that it was at the instance of the union that the Government later on changed its mind and in August 1960 agreed to make the reference. The contention was that the Government, having once declined to refer the dispute, could not change its mind after a lapse of nearly six years after the dispute arose and that though the expression "at any time" does not apparently signify any limit, it must be construed to mean that once the Government had refused to make the reference after considering the matter and the employer thereupon had been led to believe that the dispute was not to be agitated in a tribunal and had consequently made his own arrangement, the Government cannot, on a further agitation by the Union, take a somersault and decide to refer it for adjudication. It was argued that if it were so, it would mean that even if a workman, who after termination of his service, has already obtained another employment, can still go to the union, become its member and ask the union to agitate the dispute by espousing it. Such an action, if permitted, would cause dislocation in the industry as when the employer has in the meantime made his own arrangement by appointing a substitute in place of the dismissed workman on finding that the latter had already found other employment. The Legislature, the argument proceeded, could not, therefore, have used the words "at any time" to mean after any length of time.

From the words used in Section 4(k) of the Act there can be no doubt that the Legislature has left the question of making or refusing to make a reference for adjudication to the discretion of the Government. But the discretion is neither unfettered nor arbitrary for the section clearly provides that there must exist an industrial dispute as defined by the Act or such a dispute must be apprehended when the Government decides to refer it for adjudication. No reference thus can be made unless at the time when the Gov-

ernment decide to make it an industrial dispute between the employer and his employees either exists or is apprehended. Therefore, the expression "at any time", though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can "at any time", i.e. even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression "at any time" thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression "at any time" in the context in which it is used, postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence.

In 1953 SCR 334, at p. 346 = (AIR 1953 SC 53 at p. 57) this Court held on construction of Section 10 (1) of the Central Act that the function of the appropriate Government thereunder is an administrative function. It was so held presumably because the Government cannot go into the merits of the dispute, its function being only to refer such a dispute for adjudication so that the industrial relations between the employer and his employees may not continue to remain disturbed and the dispute may be resolved through a judicial process as speedily as possible. In the light of the nature of the function of the Government and the objection for which the power is conferred on it, it would be difficult to hold that once the Government has refused to refer, it cannot change its mind on a reconsideration of the matter either because new facts have come to light or because it had misunderstood the existing facts or for any other relevant consideration and decide to make the reference. But where it reconsiders its earlier decision it can make the reference only if the dispute is an industrial one and either exists at that stage or is apprehended and the reference it makes must be with regard to that and no other industrial dispute. (cf. Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal, (1968) 1 Lab LJ 834 at p. 839 = (AIR

1968 SC 529 at page 533). Such a view has been taken by the High Courts of Andhra Pradesh, Madras, Allahabad, Rajasthan, Punjab and Madhya Pradesh. See *Gurumurthi v. Ramulu*, (1958) 1 Lab LJ 20 = (AIR 1958 Andh Pra 276); *Vasudeva Rao v. State of Mysore*, (1963) 2 Lab LJ 717 (Mys); (1964) 1 Lab LJ 644 (Punj); *Champion Cycle Industries v. State of U. P.*, (1964) 1 Lab LJ 724 = (AIR 1964 All 32); (1968) 2 Lab LJ 682 = (AIR 1969 Raj 95); AIR 1969 Madh Pra 174. The reason given in these decisions is that the function of the Government either under Section 10(1) of the Central Act or a similar provision in a State Act being administrative, principles such as *res judicata* applicable to judicial acts do not apply and such a principle cannot be imported for consideration when the Government first refuses to refer and later changes its mind. In fact, when the Government refuses to make a reference it does not exercise its power, on the other hand it refuses to exercise its power and it is only when it decides to refer that it exercises its power. Consequently, the power to refer cannot be said to have been exhausted when it has declined to make a reference at an earlier stage. There is thus a considerable body of judicial opinion according to which so long as an industrial dispute exists or is apprehended and the Government is of the opinion that it is so, the fact that it had earlier refused to exercise its power does not preclude it from exercising it at a later stage. In this view, the mere fact that there has been a lapse of time or that a party to the dispute was, by the earlier refusal, lead to believe that there would be no reference and acts upon such belief, does not affect the jurisdiction of the Government to make the reference."

4. In view of the decision of the Supreme Court in *M/s. Western India Match Co. Ltd.*, Appeal No. 1914 of 1968, D/- 9-1-1970 = (AIR 1970 SC 1205), it is clear that in making a reference under Section 10(1) of the Act, the Government is doing an administrative act and that there is no bar in the way of the State Government, even if it has once refused to refer a dispute, to change its mind on a reconsideration of the matter either because new facts have come to light or because it had misunderstood the existing facts or for any other relevant consideration and decide to make a reference. This power of the State Government, however, is subject to the limitation that on reconsideration of the earlier decision, the reference can be made only if the dispute is an industrial one and either exists at that stage or is apprehended and the reference it makes must be with regard to that and no other industrial dispute. Thus the contrary view taken by R. S. Narula, J. in *Gondhara Transport Co. (Pvt.) Ltd.*, AIR

1966 Punj 354 does not lay down the correct law and stands impliedly overruled. Consequently the decision of the tribunal on issue No. 1 to the effect that the Government having once declined to make reference on the point of gratuity scheme could not make a reference on that point subsequently, cannot be sustained and is accordingly set aside.

5. Issue No. 2 has been decided in favour of the petitioners and it is held that the demand of the workman for the introduction of a gratuity scheme is justified. This decision of the tribunal on issue No. 2 was challenged by Mr. N. K. Sodhi, learned counsel for respondent No. 3, on two grounds, (1) that the tribunal did not consider the evidence properly and had given a wrong finding that the demand of the workmen for the introduction of a gratuity scheme was justified, and (2) that the tribunal should have framed a scheme. In my view, there is no merit in the first ground. The finding of the tribunal on issue No. 2 is based on consideration of entire evidence and is a pure finding of fact and cannot be challenged in proceedings for a writ of certiorari. There is no error of jurisdiction nor is there any error that may be apparent on the face of the record. However, as conceded by Mr. Soni learned counsel for the petitioners, there is merit in the second ground. The tribunal having decided issue No. 2 in favour of the petitioners, should have framed the gratuity scheme and for this purpose the matter shall have to go back to the tribunal.

6. For the reasons recorded above, I allow this petition, set aside the decision of the tribunal on issue No. 1 and send back the case to him for framing of the gratuity scheme. The parties through their learned counsel have been directed to appear before the tribunal on 16-3-1970. As the matter has become very old the tribunal shall expedite it and dispose of it as early as possible. In the circumstances of the case there will be no order as to costs.

7. GURDEV SINGH, J.:— I agree.
Order accordingly.

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(V 57 C 65)

FULL BENCH

MEHAR SINGH, C. J., GURDEV SINGH
AND BALRAJ TULI, JJ.

The State of Haryana Defendant, Appellant v. Mulkh Raj, Plaintiff Respondent.

Letters Patent Appeal No. 369 of 1967, D/-1-12-1969, from decree of P. C. Pandit, J. in Second Appeal No. 1437 of 1962, D/-20-4-1967.

EN/EN/C120/70/DVT/C

(A) Constitution of India, Art. 311 — Reversion not involving penal consequences is no reduction in rank.

(Paras 2, 3)

(B) Civil Services — Punjab Police Rules (1934), R. 13.12 — Reversion to substantive post accompanied with removal of name from Promotion List E — No penal consequence involved — Second Appeal No. 1437 of 1962 D/- 20-4-1967 (Punj), Reversed.

Where an Assistant Sub-Inspector of Police officiating as Sub-Inspector is reverted to his substantive post on ground of inefficiency and his name is also removed from the Promotion List E, no penal consequence is involved as the Officer can get his name again included in the List by improving his work and conduct. It is always open to proper authority to revert a person officiating in higher post to his substantive rank on ground of inefficiency. Consequently, there is no reduction in rank. Second Appeal No. 1437 of 1962, D/- 20-4-1967 (Punj), Reversed.

(Paras 4, 5)

Cases Referred: Chronological Paras
(1966) 1966 Cur LJ 896 (Punj),

Jagraj Singh v. State of Punjab 3

(1965) 1965 Pun LR (Sup) 625 =
ILR (1966) 1 Punj 84, State of

Punjab v. Rajinder Singh 2, 3, 4, 5

(1964) 66 Pun LR 344, Punjab State
v. Gurbux Singh 3

(1961) Second Appeal No. 443 of
1961, D/-8-12-1961 (Punj), Head
Constable Jagir Singh v. Punjab
State 2, 3, 4, 5

(1961) Second Appeal No. 361 of
1961, D/-24-5-1961 (Punj), State of
Punjab v. Wattan Singh 3

D. S. Tewatia with C. B. Kaushik, for
Appellant; S. P. Jain, for Respondent.

MEHAR SINGH, C. J.:— The respondent, Mulkh Raj, was confirmed as Assistant Sub-Inspector of Police in 1951. His name having been brought on List 'E' as fit for promotion to the post of Sub-Inspector of Police according to sub-rule (1) of Rule 13.10 of the Punjab Police Rules, 1934, Volume II, Page 8, he was promoted as officiating Sub-Inspector of Police with effect from April 1, 1951. On July 5, 1957, the Deputy Inspector-General of Police made this order with regard to him— "A bad type, who deserves reversion in view of his doubtful reputation. Weak nature and colourless record. Issue orders for his reversion with immediate effect." On that the same officer passed the order, Exhibit P-10, of the same date which said — "Officiating Sub-Inspector Mulkh Raj No. 98/A of Karnal District is reverted to his substantive rank of Assistant Sub-Inspector of Police with effect from today the 5th of July, 1957. He will remain posted in the Karnal District." His name was also removed from List 'E'.

2. The respondent by a suit, instituted on February 7, 1961, sought declaration that the order of the Deputy Inspector-General of Police, of July 5, 1957, reverting him from the officiating post of Sub-Inspector of Police to his substantive rank of Assistant Sub-Inspector of Police coupled with the removal of his name from List 'E', was ultra vires, without jurisdiction, illegal and unconstitutional, and thus he continued as officiating Sub-Inspector of Police. The learned trial Judge by a decree of February 15, 1962, decreed the claim of the respondent, being of the opinion that reversion of the respondent in the wake of the nature of the order of his reversion and the removal of his name from List 'E' was by way of punishment and attracted Article 311 of the Constitution and as the provisions of that Article were not complied with before the order was made, the respondent was entitled to the declaration sought by him. On appeal, the learned Senior Subordinate Judge reversed the decree of the trial Court on August 3, 1962, following the decision of Falshaw J. in Head Constable Jagir Singh v. Punjab State, Second Appeal No. 443 of 1961, D/- 8-12-1961 (Punj) in which the learned Judge held that "In my opinion reversion of an officer to his substantive rank from an officiating rank on grounds of inefficiency does not amount to punishment and does not fall within the scope of Article 311 I am also of the opinion that the lower appellate Court has taken a correct view in holding that the removal of his name from List 'D' does not amount to reduction in rank and in my opinion no officer can claim as of right to have his name on any such list."

On second appeal by the respondent, the learned Single Judge reversed the decree of the first appellate Court, restoring that of the trial Court, following State of Punjab v. Rajinder Singh, 1965 Pun LR (Sup) 625, a decision by Dua and Narula, JJ., in which at page 657 the learned Judges stated the fifth proposition in this way — "that if on the reversion of a Sub-Inspector of Police to his substantive rank, it is further ordered as a consequence of the reversion that his name should also be removed from List 'E' or is actually so removed because of the reversion thus either debarring him from future promotion or indefinitely postponing his chances of future promotion, the case would be hit by Art. 311(2) of the Constitution as the reversion would in such a case result in penal consequences". This is an appeal by the State of Haryana, having been in the meantime substituted for the State of Punjab by reason of the provisions of the Punjab Reorganization Act of 1966, under Cl. 10

grade posts temporarily by appointing there-to for a period not exceeding six months in an officiating capacity any member of the Service who is eligible for such appointment under these Rules."

7. There was also a circular issued by the Chief Secretary to the Government; copy of that circular has been placed on record as Annexure 2. This circular provides that promotion to posts by selection strictly on the basis of merit and on the basis of seniority-cum-merit may be made in the ratio of 1:2 and as for the first promotion in a cadre against the merit quota, only such of the persons who had put in six years of service shall be eligible. This circular was issued sometime before the amendment of the Rules became effective. It was further laid down therein that the administrative instructions and the statutory service rules should together be taken as a complete code on the subject. The circular further lays down the marking system on the basis of which merit of an officer for promotion to higher post has to be assessed. As the contentions of the petitioner are based on the language of the circular, I may reproduce the relevant provisions of the circular.

8. Para. 3 of the circular embodies what is characterised as the merit formula and it runs as follows:—

"3 (a). "Merit formula" means that out of 75 marks (marking system has been defined in paragraph 5), a person should get a minimum of 65 marks for consideration of his case for promotion among those who have secured 65 or more marks; the persons who get highest marks will be the first to be promoted, and the person who comes next in the range of marks will be the second to be promoted, and so on. The inter se seniority of persons appointed in the same class, category or grade of posts by promotion strictly on merit shall, without regard to the order of preference, be determined as if such persons had been appointed by promotion on the basis of seniority-cum-merit. This is illustrated by the following example:—

Name of the officer	No. of marks	Seniority in the next below grade.
*'A'	75	8
'B'	73	9
'C'	70	4
'D'	69	3
'E'	65	1

That if there are 5 vacant posts to be filled by promotion on the basis of "merit" formula the inter se seniority of these 5 selected persons will be the same as in the next below grade, but if only 3 posts are to be filled then those who have secured 75, 73 and 70 marks respectively will be selected and the remaining left out. The inter se seniority amongst these selected shall be the same as in the next below grade.

(b) The eligible candidates for promotion on the basis of 'merit' formula shall be 10 times the total number of vacancies to be filled by way of promotion provided such number is available and they should be holding the post in the next below cadre in substantive capacity. As for example, if there are twelve posts to be filled by way of promotion on the basis of both the formulae (viz., four posts for merit and eight posts for seniority-cum-merit), the total number of eligible candidates for promotion on the basis of merit formula shall be 12, if available. If an officer could not secure 65 marks continuously for 5 years, he will not be included in this list of eligible candidates.

(c) Notwithstanding anything contained in sub-para (b) above, for first promotion by merit, only such of the candidates shall be eligible who put in six years' service in the cadre on the date of selection."

Para 5 of the circular lays down what is seniority-cum-merit formula. Since in this writ petition there is no controversy about the applicability of seniority-cum-merit formula, I need not refer to the provisions relating to that formula. It is sufficient to say that due weight has to be given first to seniority and then to the merit. The marking system which is applicable both to the selection based on merit as well as to the selection based on seniority-cum-merit is contained in para 5 of the circular. That para reads as follows:

"Para 5.—The marking system will be as follows:—

(a) Confidential Rolls for the 5 calendar years immediately preceding the date of selection will be examined, 5 marks will be earmarked for each year's confidential roll, and the marking will be: Excellent report—5 marks; Very Good report—4 marks; Good report—3 marks; Satisfactory report—2 marks; Unsatisfactory report—2 marks; Adverse report—1½ marks; and adverse report with punishment—1 mark. If a person has been awarded either "Merit Pay" or "Cash awarded by the Government, then the Committee may award him up to 5 marks more in addition to the marks already obtained by him. These additional marks will not be taken into consideration at the time of the next selection.

(b) The record of service, which means service book, personal file, and confidential rolls other than the confidential rolls of the 5 years immediately preceding the selection maintained after the formation of Rajasthan will be allotted 50 marks, and the marking will be, (a) average or satisfactory record—50 marks and (b) deduction up to 2 marks for each punishment according to gravity may be made (no deduction will be made for mere warning but, where warning has been recorded in a Confidential Roll, it should be considered as punishment and marks should be deducted), 'Recorded warn-

ing' means censure given by way of punishment under the C.C.A. Rules. If some marks have been deducted for any punishment out of the 50 marks in any year of selection, then that deduction should not be repeated or counted in the next selection. Also, if some marks have been deducted from the Confidential Roll of a particular year, then that deduction should not be repeated or counted next time. That Confidential Roll should be considered satisfactory and marks awarded accordingly. With a view to ensure implementation of this, it would be necessary for the promotion committee to keep a record of such deductions and additional marks as the case may be.

(c) On the basis of above marking only such persons who have secured a minimum of 62½ marks out of the total 75 marks will be considered for promotion on the basis of "seniority-cum-merit" formula. Thus, as has been mentioned earlier, even if a junior person secures more than 62½ marks, the senior will not be superseded, if he has secured 62½ marks. Under the 'Merit' formula those who have secured 65 marks or more will only be considered for promotions."

9. Para 6 lays down when a person should be called for interview. It is provided therein that a person who has secured less than 62½ marks but not less than 61 marks should not be called for interview.

10. As regards the Confidential Rolls, it is laid down that those persons whose Confidential Rolls were missing or those whose Confidential Rolls could not be prepared in their absence for study or training outside India may also be called for interview.

11. Para 7 of the circular lays down that adverse remarks recorded in the Confidential Rolls should be communicated to the persons concerned in time, so that he may get an opportunity to represent his case to the authority concerned. However, if by chance adverse remarks have not been communicated to him, or if the adverse remarks have been communicated but his representation has not been decided by the appropriate authority, in that event the person concerned should be called for interview by the selection or the promotion committee and before he is asked to appear for interview, adverse remarks should be communicated to him so that he would come prepared with what he has to say in the matter. It was left open to the selection or promotion committee to treat the adverse remarks as expunged and award marks for such entries, if it felt that the adverse remarks were not justified. It was clearly emphasised that normally efforts should be made to communicate the adverse remarks and to decide the representations before the selection committee meets.

12. In para 9 of the circular it was pointed out to all selection committees and

appointing authorities that the assessment of confidential rolls and the awarding of marks therein should be rational, judiciously liberal and objective, the reason being that at times a confidential roll might have been written with a greater sense of responsibility and at other times it might not have been given due care. It was also observed by way of illustration that one officer might be liberal in the assessment of his subordinate while another may be a bit miserly or strict or sometimes vindictive. It was, therefore, impressed on the selection committees that in order to have the balanced approach in the matter, it might at times be worthwhile for the selection committees as also for the appointing authority to reconsider whether the reporting officers themselves enjoyed reputation for efficiency, impartiality and integrity.

13. Lastly, it was pointed out in the circular that the instructions contained therein should be strictly kept in view while persons were considered for promotions; the reason being that evaluation and assessment of confidential rolls make or mar service prospects of Government employees. It was further enjoined on the reporting officers that they should, while drawing up confidential rolls, adhere to the instructions issued by the Chief Secretary on 28-7-1959.

14. In challenging the validity of Rules 28B and 32 of the Rules as also the circular aforesaid, it was contended by the petitioners (1) that rules 28B and 32 of the Rules were bad because no criterion for judging the comparative merits of the various candidates was laid down therein. It was urged that in the absence of any criterion to guide the exercise of discretion by the selection committee, the rules were hit by Article 14 of the Constitution; (2) in the alternative it was urged that assuming these rules to be valid the discretion was conferred on the selection committee alone for judging the merits of the officers for promotion and the impugned circular was calculated to fetter the exercise of discretion by the selection committee and was consequently bad; (3) that the issuing of the circular as well as making of amendment in the rules was mala fide. The rules were amended with a view to take power so that by this process the Government might be able to show favour to certain persons in the matter of promotions; (4) the circular does not serve the purposes of the Rules, but goes contrary to the rules; (5) the petitioner's confidential report for the year 1965-66 was prepared by one Shri Pratap Singh, Deputy Commissioner of Excise, under whom the petitioner was working during the relevant year. It is alleged that Shri Pratap Singh had prepared the confidential report of the petitioner absolutely maliciously and in clear contravention of his expressed opinion contained in a letter issued by Shri Pratap Singh to the petitioner wherein he eulogised his services in

collecting the excise revenues beyond the target fixed for his area. It was further urged in connection with this Confidential report that this was prepared in September 1966 at the time the selection committee was to meet for the selection and no opportunity was afforded to the petitioner to have his say against the adverse remarks given by Shri Pratap Singh in his confidential report concerning the petitioner. It is pointed out that such remarks contained in the confidential report were conveyed to the petitioner for the first time on 11-5-67, though the selection committee had already met in September, 1966, and made its recommendations for promotion.

15. The writ petition has been opposed on behalf of the State. The other respondents, namely, Rajeshwar Dayal Mathur, Surendra Chandra Pagoria, Mannlal Goyal and Prithvi Singh have not chosen to appear or to file any reply to the writ petition. It is denied on behalf of the State that Rules 28B and 32 of the Rules were invalid on any of the grounds taken by the petitioner. It is further denied that the circular issued by the Chief Secretary was bad. It is maintained that merit could rightly be taken to be consideration for promotion to higher posts and the circular only provided a method for assessment of merit. It was urged that the marking system laid down in the circular for assessment of merit of an officer was calculated to ensure objectivity of approach on the part of the selection committee. It was stated that there were sets of as many as 35 such rules governing the various services under the State and the circular was designed to bring about uniformity in the procedure for assessment of merit and for making selection on the basis of seniority-cum-merit. According to the respondent, even if the method evolved is not so scientific in the opinion of the Court, that will be no ground to strike down the circular. There are some more writ petitions, raising identical questions, listed for hearing. However, learned counsel for the petitioner as well as the learned Advocate-General desired that this case should be taken up as a test case for determination of the questions of law and the other writ petitions may be taken up subsequently as in some of the writ petitions the State had not filed its reply. In the circumstances learned counsel who were appearing in the other writ petitions listed today were allowed to argue the law points in the present writ petition and Shri Mridul, who appears in Kaluram's writ petition, made his submissions regarding the validity of the rules as well as the circular.

16. I may now proceed to deal with the several points stated above one by one.

Regarding No. 1 about the vires of Rules 28B and 32 of the Rules.—Shri Agarwal argued that the rule was bad inasmuch as the term 'merit' was not defined and how it was to be assessed had not been stated in

the Rules. He pointed out that corresponding Rule 27(2) of the Rules, which was deleted, laid down some criteria for judging the merits. In the absence of such criteria for merit being laid down, Shri Agarwal argued, the rule had resulted in conferment of unbridled and unhampered powers on the selection committee and this was violative of Article 14 of the Constitution. Shri Agarwal placed reliance on a number of cases such as, *State of West Bengal v. Anwar Ali*, AIR 1952 SC 75; *Dwarka Prasad v. State of U. P.*, AIR 1954 SC 224; *Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538; and *Jaisinghani v. Union of India*, AIR 1967 SC 1427.

17. It is true, a legislation which does not contain any provision which is directly discriminatory may yet offend against the guarantee of equal protection, if it confers upon the executive or the administrative authority an unguided or uncontrolled discretionary powers in the matter of application of law and then such a provision may be taken to be violative of Article 14 of the Constitution. The question, however, is whether the impugned rules do not contain a policy to guide the exercise of discretion by the selection committee. If in a law a policy which inspired the making of such law is discernible, then the mere fact that the selective application of the law is left to the administrative body will not make the vesting of discretion in such body violative of Article 14 of the Constitution.

18. In AIR 1958 SC 538, cited by Shri Agarwal himself, previous cases including *Anwar Ali's* case and other cases were reviewed by the Supreme Court. *Das C. J.* had extracted the essentials of the previous decisions and put them in the form of rules. One such principle was that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. Further it must be presumed that the legislature understands and correctly appreciated the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. Also in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

19. Therefore, if in the present case the impugned rules can be held to contain the policy of the rule making authority and the discretion though wide cannot be said to be unguided, then the provisions cannot be held to be ultra vires the Article 14 of the Constitution. It is to be remembered that the principle of merit for making promotions to higher posts has been recognised on all hands. The Administrative

Reforms Committee headed by late Shri H. C. Mathur had dealt with the question of promotions at page 106 of its report. The committee pointed out that merit should be given adequate weightage in the matter of promotions, especially for senior appointments, to ensure greater efficiency in Government functioning and also to provide adequate incentive to Government servants to give their best. Their Lordships of the Supreme Court too had referred to an important passage in a report "Introduction to the Study of Public Administration" by Leonard D. White, with approval in *Sant Ram v. State of Rajasthan*, AIR 1967 SC 1910. I am tempted to quote that passage in extenso:

"The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organisation. The main interest to be served is the public interest, not the personal interest of members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true."

Introduction to the Study of Public Administration, 4th Edn. pp. 380, 383.

This passage shows that the principal object of any system of promotion is to secure the best possible incumbent for higher positions while at the same time to maintain the morale of the whole organisation. The pertinent consideration is to serve the public interest and not the personal interest of members of the official group concerned. It was also pointed out that public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move

as rapidly up the promotion ladder as their merits deserve and as vacancies occur.

20. Rule 32 adopts in essence what was stated in Rule 28-B. Rule 28-B provides for two methods of selection; one based on seniority-cum-merit; and the other based on merit. In plain language the rule directs that promotion based on merit in contradiction to that based on seniority-cum-merit shall be strictly on the basis of merit. This clear direction that the selection against the merit quota has to be strictly on merit is clear statement of policy which was to ensure the availability of best persons in order to mark senior posts under the State. In that situation it can, by no stretch of imagination, be contended that the impugned rules placed unguided discretion in the hands of selection committees. The selection committees have to advance the policy of discovering the best talent in the lower cadre for promoting persons to higher cadre. Then it is to be further remembered that the selection committee consists of very senior officers of the State. The Chairman of the Rajasthan Public Service Commission is to be the Chairman of the Selection Committee. The Chairman undoubtedly is a person of high status and can be expected to recognise merit by adopting a reasonable standard for judging the merit. Likewise, the other members like the Chairman, Board of Revenue Commissioner, Development Department and the Special Secretary to the Government in the Appointments Department are all persons with wide knowledge of state affairs and the availability of human material in the State and can be expected to bear a proper approach in selecting persons for higher posts. These rules, therefore, are not in my opinion, violative of Article 14 of the Constitution. It is true, Rule 27 (2) which came to be deleted on 13-12-65 did provide that regard shall be had to; (a) personality and character; (b) tact and energy (including ability to undertake extensive tours); (c) intelligence and ability to express themselves in English and Hindi clearly; (d) court and other work; (e) integrity; and (f) previous record of service. But these are only broad and general considerations and even in the absence of any reference to these considerations specifically in the statutory rules, the committee consisting of high State officers cannot be taken to be oblivious of such considerations which are normal for appraisal of the merit of an officer or to evaluate the comparative merit of more than one officers. The term 'merit' in my view, is not capable of an easy definition, though one may be able to recognise merit in a person or one may very well be able to find out the demerit as well in a person.

Shri Agarwal has pointed out that merit is a sum total of good qualities and attributes of an employee, such as, his academic qualifications, his University distinctions, his

seniority, character, his devotion to duty his readiness to do everything and to suffer all discomforts for the purpose of his duty with a view to achieve the target, his punctuality, amount of work performed and the tours undertaken in a financial year, command over language and expression, courtesy and sweet reasonableness in dealing with the people, a rational and logical outlook, a broad vision, a spirit of adaptation in adverse circumstances, honesty and integrity, co-operation with seniors and obedience to their orders, affectionate co-operation with the juniors and encouraging them to improve the quantity and quality of the work and so many other factors. One may broadly accept the several indicia for recognition of merit, as pointed out by Shri Agarwal, but all the same they remain as indicia of a general nature and as I have pointed out senior officers who have to sit on the selection committee cannot be taken to be unaware of these criteria. The dictionary meaning of the term 'merit' (vide Chambers's Twentieth Century Dictionary) is "excellence that deserves honour or reward; worth; value; desert; that which one deserves; the intrinsic right or wrong." This again, in my view, can, by no means, be taken to be a complete definition of the term 'merit.' For judging one's merit one may also take into account the time and energy devoted and the quality of the performance of a person in doing any job which he is required to do. For judging the suitability of a person for a higher post the requirements of such higher posts have also to be kept in view. The recognition of merit, by and large, will depend on considerations which cannot all be put in a cut and dry formula. It is always better to leave the term undefined to be understood in its comprehensive sense than to attempt a definition which may be found to be incomplete or may, at times, be misleading and may miss the point. In view of this when the rule enjoins a selection based strictly on merit such a rule cannot be said to be bereft of a policy and the exercise of discretion will in the circumstances be taken to be guided by such a policy of selecting best person for the higher posts on considerations of merit.

However, there is one thing in the rule that struck me while I was reading the rule. Sub-rule (2) of Rule 28-B provided that the selection strictly on the basis of merit shall be made from amongst persons who are otherwise eligible for promotion under these rules and the number of eligible candidates to be considered for the purpose shall be ten times the total number of vacancies to be filled in on the basis of merit and seniority-cum-merit. I put it to learned counsel for the petitioner as well as the learned Advocate General if the restrictions contained in this sub-rule regarding the number of eligible candidates to be considered will not violate Article 16

of the Constitution. The effect of Article 16 of the Constitution is that whenever the question of promotions to a higher post is to be considered, cases of all eligible candidates for promotion have to be considered. It is the right of every civil servant, who fulfils the test of eligibility for promotion to higher posts, to be considered for promotion along with other candidates who are eligible. Learned Advocate General submitted that this ground has not been specifically taken by the petitioner in the case. This is so, but as this clause stares one in the face, I called upon both the parties to address me on this question. Learned Advocate General submitted that as in the present case the number of vacancies that were available were sufficiently large, almost about 44, and as many as 440 officers in the ordinary time scale of Rajasthan Administrative Service had to be considered and the petitioner as well as the other respondents were within that group and, therefore, there was no such violation of the provisions of Article 16 of the Constitution. The argument is, no doubt, attractive, but in judging the validity of a rule one has to see beyond the facts of a particular case in hand. The question is whether such a rule restricts the consideration of eligible candidates to only some of the candidates and does not take the entire body of candidates who are eligible for promotion and will it not be violative of Article 16 of the Constitution on the very face of it and when this has come to the knowledge of the Court such a provision cannot be allowed to exist. The writ petitioner taking the clue from the Court argued this point vehemently to which learned Advocate General had no cogent answer. Therefore, the provision in sub-rule (2) of Rule 28-B to the effect that the number of eligible candidates to be considered for the purpose shall be ten times the total number of vacancies is clearly ultra vires Article 16 of the Constitution. It may be that on the present occasion the number of available vacancies were quite large, but in future they may be just one or two to be filled up and then the choice will necessarily be limited, if this rule were allowed to stand, to 20 or 25 persons. This cannot be allowed to be done. In these circumstances I am of opinion that (i) Rules 28-B and 32 of the Rules are not bad on the ground that no criteria for adjudging merit had been laid down in the Rules, but the portion of sub-rule (2) of Rule 28-B to the extent the choice is restricted to ten times the number of eligible candidates is bad and that has to be struck down (ii) the provision that is being struck down is not easily severable from the remaining portion of the sub-rule and, therefore, the whole of sub-rule (2) of Rule 28 has to be struck down.

21. I may now turn to the circular. The circular undoubtedly contains administrative instructions and it does not profess to lay

down anything else. Shri Mridul contended that the circular could not have been issued as the selection committee being a statutory body, such directions could not have been rightly issued to such a body. Shri Agarwal likewise contended that the circular seeks to cut down or curtail the discretion vested in the committee and in fact it goes contrary to the rules and was accordingly bad. I have already referred to the salient features of the circular. There is no manner of doubt that the Government clearly intended the administrative instructions contained in the circular to be complied with by the selection committee. This is evident from what they have said in the first paragraph of the circular. It was provided therein that the Administrative instructions and the statutory service rules should together be taken as a complete code on the subject. The clear intention, therefore, was that the selection committee was to be guided both by the Rules as well as by what was contained in the circular even if the committee not so wanted to do. Shri Mridul invited my attention to a number of cases such as, *State of Punjab v. Suraj Prakash*, AIR 1983 SC 507, *Mannalal Jain v. State of Assam*, AIR 1962 SC 386, *S. K. Ghose v. Union of India*, 1968 Serv LR 741 = (AIR 1968 SC 1385) and *B. Rajagopala v. S. T. A. Tribunal*, AIR 1964 SC 1573. I have read these cases. They relate to bodies created by the statute which have to act as tribunals and have to proceed in matters before them quasi-judicially. A statute may create a statutory body. Its action may, no doubt, be administrative, but in the particular case the body may be required to act quasi-judicially and in that event it is not to be guided by anyone else and has to deal with the matter according to its best judgment. In another case where a body is created by the statute and is not required to act quasi-judicially, administrative instructions by Government may be issued, provided they do not impinge on the statutory rules. Their Lordships of the Supreme Court in *Sant Ram's case*, AIR 1967 SC 1910, observed:—

"It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

22. In my view, this is the relevant statement of the legal position governing the case in hand. Administrative instructions may no doubt be issued but such instructions cannot be allowed to impinge on the statutory rules by which the statutory body has to be guided. Let me, therefore, view the circular from this stand point. The circular proceeds to lay down what it describes as the marking system. I have already extracted Para. 5

of the circular above. A properly evolved marking system may be quite helpful for assessing the merit of persons who are already in the State service and that may have the virtue of ensuring objectivity of approach on the part of the selection committee. But where the administrative directions instead of doing that place a rigid formula before the selection committee and if such a formula is calculated to do away with the policy of selection strictly on merit as enjoined by Rule 28-B, then such directions cannot be allowed to stand. Now it is noteworthy that for first promotion to be made on the basis of merit alone under the rules, the eligibility of officers in the lower cadre is restricted to six years service in substantive capacity, but for future promotions that will have to be made as occasion arises this rule of eligibility has been done away with.

23. Now let me examine the so-called marking system for the two contingencies; (1) for first selection and (2) what will be done on the basis of the circular at the time of future selections. For future selections the marking system provides 50 marks for the record prior to 5 years and for the 5 years preceding the selection the marking will be on the basis of confidential rolls. An officer who has rendered less than 5 years of service will not be able to get a single mark out of 50 on the basis of the record for the period preceding 5 years period for which confidential rolls have to be assessed, for the simple reason that he will have no such record. Therefore, if out of 75 marks, 50 marks are to be denied to him outright, he is to show his worth within the much smaller range of 25 marks for his confidential rolls will be available only for the period of less than 5 years. Thus this formula for marking contained in paragraph 5 of the circular clearly militates against Rule 28-B; as the underlying policy of the rule being that merit and merit alone has to be the basis for promotion as against the quota provided for merit in contradiction to the provision made for promotion on the principle of seniority-cum-merit.

24. Then let me examine the position in respect of the so-called first selection. An officer who had put in just six years of service will get 50 marks for his record of previous service which just exceeds five years by one year. Another officer will have to face the destiny with much longer record. This can by no means, be a fair comparison of merits. An average officer who has just one year's record to his credit has much more chances of getting all the 50 marks, whereas another average officer with the longer experience will suffer the handicap of some marks being deducted if over a much longer period he had come to have an adverse entry or two to his credit. Thus paragraph 5 of the circular which embodies the marking system does not ensure a rea-

sonable or a fair basis for a selection strictly on merit for the first selection and for subsequent selections it fails to provide any such basis at all, but definitely puts officers with less than 5 years service at a handicap, which with the best of talent in him an officer may not be able to get over. Thus while the rule gives a wide discretion for judging merit to the selection committee, paragraph 5 of the circular impinges on the exercise of such a discretion and, therefore, paragraph 5 is very inconsistent with the underlying policy of Rule 28-B or Rule 32 for that matter. Paragraph 5 also mixes up the formula both for judging merit and seniority-cum-merit. It is not possible to rewrite para. 5 after eliminating the objectionable part contained therein relating to the so-called merit formula. This is an administrative instruction and it is not for this Court to rewrite it.

25. Now apart from this I have not been able to follow the rational basis in some of the provisions relating to the marking. It is true, it is for the administrative authority to evolve a formula for judging comparative merit, if it wants to do, but there are some startling features which cannot be ignored. Between what has been termed as "a satisfactory report" and "an unsatisfactory report" the difference is of half a mark, that is, a person who has a satisfactory report earns 2 1/2 marks and a person with an unsatisfactory report also earns 2 marks. Likewise, person with an adverse entry with punishment also earns a mark or a mark and a half, as the case may be. But when one has to evaluate the record preceding 5 years then such adverse entries result in deduction of marks. One has to strain his understanding and has to perform mental gymnastics to understand the logic of an adverse entry resulting in deduction of marks at one place and addition of marks for a different period. Ensuring of objectivity of approach on the part of an administrative body, be it the selection body, is a very desirable thing, but the way in which it is desired to be achieved by paragraph 5 of the circular has brought about a situation where a selection committee is left to ignore the clear mandate of the rule. It is better if a reasonable criteria or a marking system is embodied in the statutory rules themselves so that the candidates concerned may know in advance how their fate will be judged. But, as the matter stands, I am unable to hold that the instructions contained in paragraph 5 of the circular are in keeping with the letter and spirit of Rule 28-B or Rule 32 of the Rules. Indeed these instructions are repugnant to the rules and cannot be allowed to stand.

Learned Advocate General submitted that even though selection may be made by the selection committee, the ultimate authority for making the appointment is the Government and before making the appointments

it is for the Government to examine the suitability of the candidates to be appointed. Therefore, it was argued that even if any flaw is found in the Rule 28-B or 32 or in the circular for that matter, that will not affect the validity of the appointment made by the competent authority namely, the Government. To my mind, the submission has little force. Marking of a selection in accordance with the rules by a selection committee is an integral part of the process of making appointments to posts in the higher cadre of Rajasthan Administrative Service. Rule 32 enjoins that appointments to senior scales and selection grade posts shall be made by the Government from amongst the members of service on the basis of merit and seniority-cum-merit in the ratio of 1:2 on the recommendations of the Committee which consists of the officers named therein. To my mind, the appointment can be made only on the basis of the recommendation of the committee. If the recommendations made by the committee are on the basis of a circular which goes contrary to the rules, an appointment made on the basis of such a recommendation cannot be upheld.

Learned Advocate General also argued that the selection committee is not before the Court, as it has not been impleaded as a respondent and, therefore, he is not in a position to say how the selection committee made its recommendation. The selection committee may not be a party before the Court. Even so it has not been disputed that the appointments were made on the recommendations of the selection committee. The petitioner has asserted that the selections were made on the basis of the impugned circular. Learned Advocate General who is supposed to be in possession of all relevant information has not been able to say that the impugned circular so far as the marking system was concerned was not followed. I have, therefore, no reason to think that the selection committee did not adopt the marking system as contained in paragraph 5 of the circular. Learned Advocate General, however, had to admit that the impugned circular was before the selection committee. This is reasonable to infer because three of the members of the selection committee namely, the Chairman, Rajasthan Public Service Commission, the Commissioner, Development Department and Special Secretary to the Government must have been undoubtedly aware of the circular. Since it has not been stated by respondent No. 1, who had the special knowledge that the marking system contained in paragraph 5 of the circular was not adopted as the basis for selection based on merit, I have no reason to think otherwise and it is reasonable to infer that the marking system contained in paragraph 5 of the circular was adopted by the selection committee for the assessment of merit on the basis of the so-called merit

formula. Of course, proviso to Rule 32 enables the Government to make temporary appointments for a period not exceeding six months in an officiating capacity of any member of the service who is eligible for such appointment under the rules. This proviso could be resorted to by the State Government, for a temporary period. Respondent Nos. 2 to 5 have been appointed only in an officiating capacity. It is admitted that six months period for which they could be appointed in an officiating capacity has long expired. That being so, they cannot be allowed to continue on the senior posts in officiating capacity.

26. In view of the conclusion that I have reached on the above point, it is unnecessary to deal with the other points raised in the writ petition.

27. The result is that I allow this writ petition and declare; (1) that Rule 28-B and Rule 32 of the Rules are valid except for sub-rule (2) of Rule 28-B and I hereby declare that sub-rule (2) of Rule 28-B is ultra vires Article 16 of the Constitution; (2) that circular Annexure 2 dated 27-8-66 is bad to the extent it enjoins that the administrative instructions contained therein together with the rules have to be taken as a complete code on the subject. I also declare that paragraph 5 of the circular impinges on Rule 28-B of the Rules and is repugnant with it and is consequently bad and has to be struck down. I further hold that the appointments of respondents Nos. 2 to 5 as senior scale officers in the Rajasthan Administrative Service are bad and accordingly I direct that they shall not hold these posts. The respondents are restrained from giving effect to the portion of the rules and the circular that has been declared to be void. The parties are left to bear their own costs of this writ petition.

Petition allowed.

AIR 1970 RAJASTHAN 184 (V 57 C 40)
V. P. TYAGI, J.

Satish Chander Sharma, Petitioner v. The University of Rajasthan and others, Respondents.

Civil Writ Petn. No. 1614 of 1969, D/- 12-1-1970.

(A) Constitution of India, Article 226 — Writ — Quo warranto — Who can apply — Election to syndicate of university — Registered graduates cannot be said to be party not interested in the functioning of university of which syndicate is a very important body even though they are neither voters nor candidates.

(Paras 11, 14)

(B) Constitution of India, Article 226 — Writ — Quo warranto — Election to syndicate of Rajasthan university — In view of duties assigned to syndicate by Section 22

of Rajasthan University Act itself, membership of syndicate in University is not only an office but it is also a public office — Registered graduate of University can apply for a writ of quo warranto against person who have been declared in violation of ordinances made by syndicate for conducting election of its members.

(Para 22)

(C) Education — University of Rajputana Act (1946), Section 29 — Ordinance under — Ordinance 384-B prescribing that an employee of University cannot seek election under Section 21 (vi) — Restriction takes away right of a member of Senate who otherwise fulfils all qualifications mentioned in Section 21 (vi) — Such a provision being inconsistent with specific provision of Section 21 (vi) cannot be made under Section 29 — Ordinance 384-B is ultra vires the power of University and hence it is void.

(Para 29)

(D) Education — University of Rajputana Act (of 1946), Section 21 (vi) — Election to syndicate of University — Nomination paper of a candidate found to be in order by the Committee duly nominated by Vice-Chancellor for scrutinizing nomination papers — Later on Vice-Chancellor, rejecting his nomination paper in view of a resolution of syndicate which restricted all employees of University to seek election to any office or authority of University — Resolution cannot be placed at level of statutory rule or ordinance and it cannot take away rights of a member of Senate to contest election under Section 21 (vi) — Nomination paper held was wrongly rejected and it materially affected result of election.

(Paras 31, 32)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 828 (V 53) =	
(1966) 2 SCR 172, G. Venkateswara Rao v. Govt. of Andhra Pradesh	10, 11
(1966) 70 Cal WN 892, Shashi Bhushan Ray v. Pramatha Nath Bhandopadhyay	19
(1962) AIR 1962 Madh Pra 180 (V 49) = 1961 MPLJ 1316, Dr. S. C. Barat v. Hari Vinayak Pataskar	13, 14
(1959) AIR 1959 Punj 83 (V 46) = ILR (1958) Punj 1938, Bindra Ban v. Sham Sunder	11
(1918) AIR 1918 Mad 763 (V 5) = ILR 40 Mad 125, In re G. A. Natesan	21
(1916) 1916-1 KB 595 = 85 LJ KB 630, Rex v. Speyer	12, 15
(1828) 5 Bing 91, Henley v. Mayor of Lyme	21

N. M. Kasliwal, for Petitioner; S. M. Melhta, for Respondents Nos. 1 and 2; M. B. L. Bhargava, for Respondents Nos. 1 and 7 (Surendra Prasad Vyas).

ORDER: Petitioner Satish Chander Sharma has filed this writ application under

Article 226 of the Constitution against the University of Rajasthan and 8 others to challenge the election of respondents Nos. 6 and 7 Shri L. L. Joshi and Shri Surendra Prasad Vyas to the Syndicate of the said University and has prayed that by issuing a writ of certiorari or any other appropriate writ, order or direction the declaration of the result of the election of two non-teacher members to the Syndicate, that is, the election of respondents Nos. 6 and 7 be quashed and that a writ of quo warranto or any other suitable writ, order or direction be issued declaring respondents Nos. 6 and 7 as not entitled to hold the office of the membership of the Syndicate.

2. The case of the petitioner in a nutshell is as follows:—

Petitioner is a registered graduate of the University of Rajasthan and that his name has been entered in the electoral roll of registered graduates of the University at item No. 763. On 6th of August, 1969, the Registrar of the University sent a notice to the members of the Syndicate announcing that the term of the two non-teacher members of the Syndicate viz., (1) Shri Dinesh Chandra Swami and (2) Shri Kailash Chandra Bakliwal elected from amongst the members of the Senate shall expire on 9th October, 1969, and, therefore, he called upon the Senate to elect the two non-teacher members to the Syndicate, and for that purpose he asked the members of the Senate to send their proposals to him by 25th of August, 1969. Consequent to the said notice (Annexure 1), the names of the six candidates, namely, of respondents Nos. 3 to 8 were proposed and their nomination forms were submitted to the Registrar by 25th of August, 1969. The scrutiny of the nomination papers was held on 26th of August, 1969 and it is said that all the nomination papers were found to be valid. It is alleged that the nomination paper of Shri N. N. Gidwani respondent No. 3, who happened to be the Librarian of the University, was referred to the Vice-Chancellor and the Vice-Chancellor held that the respondent No. 3 was not entitled to contest the election to the Syndicate as he was an employee of the University. Thereafter, the voting papers were prepared wherein the names of respondents Nos. 4 to 8 were entered as the contesting candidates. These voting papers were sent to the members of the Senate along with a circular letter wherein directions were issued that the voting papers may be returned to the Registrar in accordance with the instructions which were enclosed along with the voting papers.

It is further alleged that the voting papers were duly submitted by the voters in the office of the Registrar of the University and the same were opened by Shri J. N. Mathur, the Deputy Registrar on 8th of October, 1969, and after counting the

same he declared the result that respondents Nos. 6 and 7 were returned to the Syndicate. This election has been challenged by the petitioner, inter alia, on the grounds that the nomination paper of Shri N. N. Gidwani was wrongly rejected by the Vice-Chancellor and the non-inclusion of the name of Shri N. N. Gidwani in the voting paper vitiated the result of the election; that the voting paper of Shri G. C. Chatterji which was not duly attested by the attesting authority was wrongly counted; that the counting was done by the Deputy Registrar who was not authorised under the ordinance to count the voting papers; and that the counting was not properly done. It was also alleged that after the nomination paper of Shri N. N. Gidwani was rejected by the Vice-Chancellor, the Syndicate of the University held a meeting on 27th of September, 1969 and enacted a new Ordinance 384-B laying down that a non-teacher employee of the University or its affiliated colleges/approved institutions shall not seek elections to the Senate or any other authority or body of the University. It is contended that the Syndicate was not authorised to make such an ordinance laying down qualifications for the candidates to seek election as non-teacher members to the Syndicate because it runs contra to the provisions of Section 21 (vi) of the University of Rajputana Act, 1946, as amended from time to time (hereinafter called the Act). It is, therefore, prayed that Ordinance 384-B which was beyond the competence of the Syndicate be declared void and it may also be quashed.

3. A reply has been filed on behalf of the University of Rajasthan and the Registrar of the University. The other respondents who were impleaded by the petitioner as respondents, however, did not choose to file any reply to the writ petition.

4. The facts, as alleged by the petitioner in the writ petition, are not much in dispute. It is averred by the University that the nomination papers of the candidates were scrutinised by a committee of two persons duly nominated by the Vice-Chancellor for that purpose on 26th of August, 1969, and the committee found all the nomination papers to be in order, but thereafter it was brought to the notice of the Vice-Chancellor that the nomination paper of Shri N. N. Gidwani violated the resolution passed by the Syndicate in its meeting held on 13th of January, 1969 whereby the University employees were debarred from contesting any such election and, therefore, the matter was referred to the Vice-Chancellor who found the nomination paper of N. N. Gidwani contravening the resolution of the Syndicate and, therefore, his nomination paper was rejected by the Vice-Chancellor and his name consequently was not included in the voting paper. It is averred that the removal of the name of respondent No. 3 from the

array of the contestants was perfectly legal and in accordance with the provisions of the Act. It was also averred that the Syndicate passed an Ordinance No. 384-B on 27th of September, 1969, in conformity with the resolution dated 13th of January, 1969 and the same was not motivated by any ulterior or extraneous consideration or to justify the rejection of the nomination paper of respondent No. 3.

5. As regards the allegation that the voting papers were counted by Shri J. N. Mathur, the Deputy Registrar of the University, it is averred that the Registrar was on leave on the day when the voting papers were to be counted in accordance with the schedule of the election and, therefore, Shri Mathur who was officiating and exercising all the powers of the Registrar in this particular sphere was entitled under the ordinance to perform the duty of the Registrar to count the voting papers.

6. As regards the infirmity pointed out in respect of the voting paper of Shri G. C. Chatterji, it was averred that the envelope was duly attested by Shri K. S. Mathur, the Head of the University Department of Accountancy and Business Statistics who was entitled to attest the same in terms of Ordinance 12 (a) (ii). The University, however, could not state whether Shri Chatterji ever came to Jaipur to sign or admit his signatures in the presence of Shri Mathur. According to the reply of the answering respondents, the voting papers were duly attested and the official seal of Shri Mathur as required by Ordinance 12 (b) was affixed under his attesting signatures.

7. Regarding the allegations about the counting of votes, the answering respondents submitted that the petitioner has not properly appreciated the system of single transferrable vote and, therefore, the objection has been raised by him erroneously.

8. In their additional pleas, the answering respondents pleaded that the electoral college for the elections to the membership of the Syndicate consists of the members of the Senate. Thus, the only persons who could be called aggrieved by the elections to the Syndicate are the members of the Senate. The legal rights of the registered graduates in the election for the membership of the Syndicate are not violated in any manner and the petitioner, therefore, has no locus standi to maintain the present petition. It was also averred that the decision was taken by the Vice-Chancellor about the ineligibility of respondent No. 3 to contest the election on 1st of September, 1969 and thereafter Shri Gidwani's name was not included in the voting papers but the petitioner or the other contesting candidates did not take any objection to the removal of the name of Shri Gidwani respondent No. 3 from the array of the contesting candidates and when the election was over a challenge has been thrown by the petitioner to declare the election as void. Ac-

cording to the respondent, this objection should not be allowed to be raised at this stage by resorting to a remedy of invoking the extraordinary jurisdiction of this Court.

9. Learned counsel for the respondent has vehemently pressed his preliminary objection that the petitioner has no locus standi to file the present writ application as he was neither a voter for the election nor was he a candidate and, therefore he could not file a writ application. I take up this objection for consideration before deciding petitioner's objections touching the merits of the election.

10. The argument of Mr. Bhargava appearing on behalf of the University and respondent No. 7 is that the petitioner can invoke the extraordinary jurisdiction of this Court only when his legal right has been violated. According to learned counsel, petitioner who seeks to file an application under Art. 226 of the Constitution should ordinarily be one who has a personal or individual right in the subject-matter of the petition and who has been prejudicially affected by an act or omission of an authority against whom the right has been sought. In support of this plea, reliance has been placed by him on *G. Venkateswara Rao v. Govt. of Andhra Pradesh*, AIR 1966 SC 828.

11. It may be mentioned that in this writ application the petitioner has prayed that along with a writ of certiorari quashing the result of the election, a writ of quo warranto may also be issued against respondents Nos. 6 and 7 declaring that they are not entitled to hold the membership of the Syndicate. The Supreme Court in the case of AIR 1966 SC 828, has very clearly observed that ordinarily the right that can be enforced under Article 226 of the Constitution shall be the personal or individual right of the petitioner himself but this rule cannot be extended for issuing writs like habeas corpus or quo warranto where this rule may have to be relaxed or modified.

12. In *Bindra Ban v. Sham Sunder*, AIR 1959 Punj 83, the learned Judges have discussed elaborately the question whether a private relator can apply for the issue of a writ of quo warranto and their Lordships after considering various authorities of different High Courts have laid down:

"The normal rule is that a petition under Article 226 can only be made by a person who has some right and whose right has been infringed. This rule, however, is not an inflexible or an absolute one. There are some well-known exceptions to the rule. For instance, an application for a writ of habeas corpus may, in certain circumstances, be made by a near relation or friend of the person under illegal detention. Similarly, it is not necessary in the case of an application for quo warranto that the applicant should have suffered personal injury or should seek redress of a personal grievance."

In proceedings for a writ of quo warranto, the applicant does not seek to enforce any right of his as such, nor does he complain of non-performance of any duty towards him. What is in question is the right of the non-applicant to hold the office; the order that is passed is an order ousting him from that office. Since the basic authority *Rex v. Speyer*, ((1916) 1 KB 595), the rule is well settled that any private person may apply for a quo warranto in the matter of a public office, for every person must necessarily have an interest in matters which concern the public Government."

13. In *Dr. S. C. Barat v. Hari Vinayak Pataskar*, AIR 1962 Madh Pra 180, a challenge was thrown to the order of appointment of the Vice-Chancellor of the Jabalpur University and the petitioners, who were the members of the Executive Council and the Academic Council, sought for the issue of a writ of mandamus to the Chancellor to appoint the Vice-Chancellor in accordance with Section 11 of the Jabalpur University Act. It was in this connection that Dixit C. J. speaking on behalf of the Court observed as follows:

"It is well settled that a person having a real and specific interest in the subject-matter of the petition is entitled to initiate mandamus proceedings. The person applying for a writ of mandamus must have some interest in property, franchise or personal right, an injury to which alone can entitle him to ask for the issue of the writ. No particular quantum of right is necessary in order to entitle him to relief. It is not necessary that the person applying should have a special interest in the subject-matter. One of the petitioners here is a member of the Executive Council and the other of the Academic Council. The University is a corporate body constituted under the University Act and clearly all the members of the Court, the Executive Council, the Academic Council and even the Registered Graduates are all equally interested in the University functioning according to the provisions of the Act. If, therefore, the appointment of the Vice-Chancellor of the University has been made illegally or contrary to the provisions of the Act, then every such member has the right to question the validity of the appointment and ask for the issue of a writ of mandamus commanding the filling of the office in accordance with Section 11."

14. It cannot be denied that the petitioner was a registered graduate of the University of Rajasthan. Section 21 of the Act deals with the composition of the Syndicate and clause (vi) of Section 21 lays down that two members of the Senate, being non-teachers, elected by the Senate, one of whom shall be a registered graduate, shall be the members of the Syndicate. The constitution of Senate is given in Section 18 of the Act and under the provisions of this

section, four persons not being teachers elected by the registered graduates of the University from amongst themselves shall be the members of the Senate. The composition of these two bodies of the University, namely, the Senate and the Syndicate as given in Sections 18 and 21 of the Act clearly gives representation in these bodies to the registered graduates. Under clause (vi) of Section 21 of the Act, one of the members to be elected out of the two from the Senate to Syndicate must be a registered graduate. It is true that the petitioner in this particular case is neither a voter nor was he a candidate in this election, but it cannot be said that after electing four members to the Senate, no interest was left with the registered graduates in the functioning of the University. As observed by Dixit C. J. in AIR 1962 Madh Pra 180, the University is a corporate body constituted under the University Act and clearly all the members of the Court, the Executive Council, the Academic Council and even the registered graduates are all equally interested in the University functioning according to the provisions of the Act. I am in agreement with the observations of the learned Chief Justice and am of the view that the registered graduates cannot be said to be non-interesting party to the functioning of the University of which Syndicate is a very important body.

15. It is next urged by Mr. Bhargava that the membership of a Syndicate is neither an office and even if it is held to be an office, it cannot be called to be a public office and, therefore, a private relation has no locus standi to challenge the election on the basis of the principle laid down in (1916) 1 KB 595.

16. Section 21 of the Act has been amended and the legislature has now added sub-section (2) to this section which provides that the term of the office of the elected and nominated members of the Syndicate shall be three years. This sub-section (2) shows that the legislature has also considered the membership of the Syndicate as an office. In view of this express provision of Section 21 (2) of the Act, it is now not open for Mr. Bhargava to argue that the membership of a Syndicate is not an office.

17. The next question that arises for my determination is whether this office is a public office or not. In order to decide this question we shall have to see the functions of the Syndicate. Section 22 of the Act lays down the functions of this body and it provides that subject to such conditions as may be prescribed by or under the provisions of this Act, the Syndicate shall exercise the following powers and perform the following functions, namely:—

(a) to make, amend and cancel Ordinances;

(b) to hold, control and administer property and funds of the University.

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18. It is not disputed by learned counsel for the parties that this function of making, amending or cancelling of Ordinances is the legislative function of the Syndicate and the Ordinances made by the Syndicate acquire the statutory force after they have been made in accordance with the provisions of the Act.

19. Mr. Bhargava in support of his argument that membership of a Syndicate is not a public office placed reliance on a Calcutta case reported in Shashi Bhusan Ray v. Pramatha Nath Bandopadhyay, (1966) 70 Cal WN 892. In that case, the appointment of the Principal of the Law College was challenged by a registered graduate of the Calcutta University and an objection was raised on behalf of the respondents that the petitioner had no interest in the affairs of the administration of the University because of his being a University graduate and if he were permitted to pursue the remedy sought by him, then it would extend the right to any and every person to interfere with the affairs of the University. It was also urged by the respondents that the office of a Principal is not a public office and therefore an application for a writ of quo warranto could not lie against the Principal. The counsel for the respondent in support of his argument relied on the statement of law in Ferris on Extraordinary Legal Remedies, and it was contended that according to the learned author (Ferris),

"public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by Law. In other words, it implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose embracing the ideas of tenure, duration, emolument and duties."

20. During the pendency of that writ petition, the respondent who was appointed as a Principal had resigned the post. The learned Judges, after considering the position of a Principal of a Law College, came to the conclusion that the office of a Principal was not a public office as he did not discharge either an executive or a legislative or a judicial function. In my opinion, the Calcutta case is of little avail to the respondents because of the functions assigned to the Syndicate by the legislature itself. As observed above, the most important function of the Syndicate as laid down in Section 22 (a) is to make, amend and cancel Ordinances which is undoubtedly a legislative function.

21. A similar question had arisen before the Madras High Court in *In re G. A. Natesan*, AIR 1918 Mad 763; where it was argued that no relief could be granted under Section 45 of the Specific Relief Act as neither the Syndicate nor its membership fulfilled the character of persons holding a public office. Relying on *Henley v. Mayor of Lyme*, (1828) 5 Bing 91, their Lordships of the Madras High Court held that—

"the Syndicate is a creature of statute with certain duties imposed upon it by statute and those duties are to be carried out for the benefit of the public at large (see the very wide words in the preamble to the Act of Incorporation), and especially for that portion of the public which desires to utilise the educational advantages of the University. It seems to me too plain for argument that where a statute appoints a body of persons to carry out purposes of public benefit, the persons constituting such a body ipso facto become holders of a public office within the meaning of the section. It is not disputed that to hold otherwise would be to go contrary to a vast number of English decisions with regard to the writ of mandamus and that it would also give the go-by to the principle which, if not expressly enunciated, is underlying numerous decisions of the High Courts both of Bombay and Calcutta. I am, therefore, of opinion that the Syndicate is a body amenable to the jurisdiction of Section 45, Specific Relief Act, if the other conditions for that relief are present."

22. These observations, when read in the light of the duties assigned to the Syndicate by the Act itself, make it absolutely clear that the membership of a syndicate in the University is not only an office but it is also a public office and as such the petitioner who is a registered graduate of the University has a right to seek for a writ of quo warranto against the respondents who, according to him, have been declared elected in clear violation of the Ordinances made by the Syndicate for conducting the election of its members. The preliminary objection raised by the respondent is, therefore, rejected.

23. The first ground raised by the petitioner to challenge the validity of the election of the respondents Nos. 6 and 7 is that the Vice-Chancellor illegally removed the name of Shri N. N. Gidwani who was a candidate for the election and whose nomination paper was found to be valid by the committee that scrutinised the nomination papers of the contestants. It is not disputed by the University that Shri N. N. Gidwani was one of the candidates for this election and that his nomination paper which was duly filed was found to be in order. According to the stand taken by the University, the Vice-Chancellor removed his name from the array of the contesting candidates because he found that being an employee of

the University, he was not eligible to contest the election. Reliance has been placed to support this contention on a resolution passed by the Syndicate on the 13th of January, 1969, which reads as follows:

"Resolved that a non-teacher employee in the University or its affiliated colleges be not allowed to contest elections to the Senate or any other authority/body of the University."

24. The nomination paper of Shri Gidwani was scrutinised and found to be valid on 26th August, 1969, and the same was ordered by the Vice-Chancellor to be rejected on the 1st of September, 1969. It is said that the Syndicate made an Ordinance No. 384-B on 27th September, 1969, which is in the following terms:

"O. 384-B. A non-teacher employee of the University or its affiliated colleges/approved institutions shall not seek elections to the Senate or any other authority, body of the University."

25. The petitioner has raised two objections with regard to this ordinance, viz., (1) that the Syndicate had no authority to enact an ordinance which offends Section 21 (vi) of the Act; and (2) that on the date when the nomination paper of Shri Gidwani was rejected, no such ordinance was in force and that the ordinance not being retrospective in nature could not be pressed into service to justify the rejection of Shri Gidwani's nomination paper.

26. Section 21 of the Act deals with the composition of the Syndicate and lays down that the syndicate shall be the executive body of the University and shall consist of the following persons, namely:—

- (i) the Vice-Chancellor,
 - (ii) three Deans nominated by the Vice-Chancellor in rotation:
- Provided that no Dean shall be nominated for two successive terms,
- (iii) the Director of College Education,
 - (iv) three educationists to be nominated by the Chancellor,
 - (v) two University Professors nominated by the Vice-Chancellor:

Provided that no University Professor shall be nominated for two successive terms,

- (vi) two members of the Senate, being non-teachers, elected by the Senate, one of whom shall be a registered graduate,
- (vii) three principals of Colleges to be elected by them from amongst themselves.

27. Clause (vi) of this section empowers the Senate to elect two members of the Senate who are non-teacher members and further requires that one of them should be a registered graduate. This clause (vi) of Section 21 of the Act, therefore, lays down qualifications of the non-teacher members of the Syndicate that they must be the members of the Senate. Thus, from this provision it becomes clear that every non-teacher member of a Senate has a right to contest the election for the membership of

the Syndicate under this clause. This is a qualification prescribed by the Act itself.

28. The Syndicate by making Ordinance No. 384-B has put a rider on the qualification prescribed by the Act that a non-teacher employee of the University or its affiliated colleges/approved institutions shall not seek elections to the Senate or any other authority or body of the University. This question has been posed by the petitioner whether such a rider can be put on the qualification of a member of Senate to seek election to the Syndicate by making such an ordinance.

29. Section 29 of the Act lays down the matters for which the Syndicate can make Ordinances. In the opening portion of Section 29, the Legislature has clearly given a mandate that while making ordinances, the Syndicate shall keep in view that the ordinances are not made inconsistent with the provisions of the Act. Section 21 (vi) provides for electing two persons to the Syndicate and they should be two non-teacher members of the Senate. The only qualification that a candidate should possess for being elected under Section 21 (vi) of the Act is that he should be a member of the Senate and should not be a teacher. The Legislature, however, did not prescribe any other qualification for electing the members under this clause. Ordinance 384-B, however, prescribes that an employee of the University cannot seek election under Section 21 (vi). This restriction takes away the right of a member of the Senate who otherwise fulfils all the qualifications mentioned in clause (vi) of Section 21 of the Act. This provision embodied in Ordinance 384-B is, therefore, inconsistent with the specific provision of Section 21 (vi) and, therefore, such an ordinance cannot be made under Section 29 of the Act. The Ordinance 384-B is ultra vires the power of the University and hence it is void.

30. It may also be mentioned that even if we assume that the Syndicate had such power to prescribe qualifications of the candidates to be elected under clause (vi) of Section 21, the Ordinance 384-B was not on the statute book on the day when the Vice-Chancellor rejected the nomination paper of Shri Gidwani. The language of the Ordinance 384-B does not also suggest that it was given retrospective effect so as to be operative on 1st September, 1969 when the Vice-Chancellor passed the order rejecting Shri Gidwani's nomination paper. In these circumstances, the order of the Vice-Chancellor rejecting the nomination paper of Shri Gidwani was unlawful.

31. It is contended by learned counsel for the respondent that even if Ordinance No. 384-B was not in force on the day the nomination paper of Shri Gidwani was rejected by the Vice-Chancellor he could not seek election because of the resolution of the Syndicate dated 13th of January, 1969 which restricted all the employees of the

University to seek election to any office or authority of the University. It is clear that Resolution No. 10 of 13th January, 1969 cannot be placed at the level of the statutory rule or ordinance. The Syndicate, in order to administer the affairs of the University, had, however, put a condition of service for its employees that they would not be elected to any post or office of the University. If any employee took to his head to violate the mandate of the resolution, then he would at the most expose himself to any disciplinary action if the University authority chooses to take against such employee for not obeying the command of the Syndicate issued by it in its administrative capacity. The resolution cannot have the effect of taking away the rights of a member of the Senate to contest the election for the membership of the Syndicate under Section 21 (vi) of the Act. In my opinion, the resolution cannot be meant to have laid down any qualifications for seeking election under clause (vi) of Section 21 of the Act. The Vice-Chancellor had no authority to reject the nomination paper of Shri Gidwani on that ground when Shri Gidwani, in spite of the administrative direction issued by the Syndicate by adopting Resolution No. 10 on 13th of January, 1969 had filed his nomination paper.

32. Shri Gidwani was nominated for the election of the membership of the Syndicate and his nomination paper was accepted by the committee duly appointed by the Vice-Chancellor for scrutinising the nomination papers. The nomination paper was rejected wrongly by the Vice-Chancellor and thus Shri Gidwani was taken out of the field of election. If Shri Gidwani had been in the field and if his name had found place in the voting papers, nobody knows how the voters would have exercised their right of vote. In these circumstances, the result of the election shall be taken to have been materially affected by the rejection of the nomination paper of Shri Gidwani. This ground alone is sufficient to set aside the election of respondents Nos. 6 and 7 and, therefore, I need not go into the merits of other objections raised by the petitioner.

33. For the reasons mentioned above, the writ petition is allowed, the result of the election of the members of the Syndicate of the University of Rajasthan declared on 8th of October, 1969, is set aside. Respondents Nos. 6 and 7 are hereby directed to quit the office which they are holding by virtue of the aforesaid result of the election. The University authorities shall be at liberty to hold fresh elections under Section 21 (vi) of the Act. No order as to costs.

Petition allowed.

AIR 1970 RAJASTHAN 190 (V 57 C 41)

P. N. SHINGHAL, J.

Smt. Gopi and another, Appellants v. Madanlal, Respondent.

Second Appeal No. 569 of 1966, D/- 30-4-1969, from judgment and decree of Dist. J., Jodhpur, D/- 21-10-1965.

(A) Hindu Adoptions and Maintenance Act (1956), Section 7 — Adoption by male Hindu — Soundness of mind — Nature of evidence — Burden of proof — (Evidence Act (1872), Ss. 101 to 104) — (Contract Act (1872), S. 12) — (Registration Act (1908), Section 35).

Every male Hindu, who is of sound mind, may lawfully take a son in adoption, if he has attained the age of discretion. Soundness of mind is, therefore, an essential requirement of a valid Hindu adoption and has to be proved when challenged. The burden of proof in such a case is quite substantial because it is well settled that the evidence to prove an adoption must be sufficient to satisfy the serious onus which rests upon any person who seeks to displace the natural succession by alleging the adoption. Though an endorsement of the nature contemplated under Section 35 of the Registration Act is admissible in evidence for the purpose of showing that the executant of the deed of adoption was a person of sound mind according to the opinion of the Registrar, it does not shift the burden of proof in regard to the factum of execution in a sound state of mind to the other party. (1865) 10 Moo Ind App 429 (PC) and AIR 1916 PC 81 and AIR 1931 PC 84 and AIR 1959 SC 504 and AIR 1964 SC 136 and AIR 1958 Andh Pra 22, Rel. on. (Paras 8, 12, 21)

It is true that every man may reasonably be presumed to be sane; but such a presumption is not made in all cases. If upon the trial of any such issue the party opposing the adoption puts in evidence an inquisition finding the adopting father to have been a lunatic at a date previous to the making of the adoption, this evidence shifts the burden of proof to the party who asserts the adopting father's sanity. AIR 1917 Mad 265 and AIR 1940 Mad 73 and AIR 1941 Nag 251, Rel. on. (Para 10)

(B) Evidence Act (1872), Section 45 — Evidence of medical experts — Endorsement of Registrar under Sec. 35, Registration Act as to soundness of mind of executant of deed of adoption including opinion of medical expert — Failure to give direct oral evidence under Section 60 though medical expert was alive — Opinion of medical expert cannot be considered — AIR 1950 Cal 173 and AIR 1961 Guj 196 and AIR 1964 SC 1625, Rel. on. (Para 21)

KM/DN/F447/69/YPB/C

(C) Civil P. C. (1908), Sections 100-101 — Second appeal — New point — Secondary evidence — Failure to take objection as to its production — Such objection cannot be taken in second appeal — AIR 1958 Raj 110 and AIR 1943 PC 33 and AIR 1936 Pat 600, Relied on. (Para 33)

(D) Rajput Adoption Rules (1895-96) — Applicability — Applicable to Jagirdars and not merely to Rajputs — Under the Rules principle of "mooris-i-ala" was applicable to adoptions in case of Jagirdars — No person, under that principle, outside the line of Original grantee i.e. Jagirdar could be recognised as his heir — 1958 Raj LW 616, Rel. on. (Para 40)

(E) Transfer of Property Act (1882), Section 8 — Deed, construction of — Suit for partition — Agreement between parties that plaintiff would continue to reside in same property and would get some amount per month for his maintenance, that he would have no other claim in suit property and that defendant would take its income — Document cannot be interpreted as one terminating ownership of plaintiff in property — Arrangement referred to in document was for convenient management of property and distribution of plaintiff's share of income. (Para 42)

(1940) AIR 1940 Mad 73 (V 27) = 50 Mad LW 668, Govindaswami Naicker v. Srinivasa Rao 18
(1938) 1938 MLR 89 (Civil), Bhoora v. Ranulal 16A
(1936) AIR 1936 Pat 600 (V 23) = 17 Pat LT 709, Chhatra Kumari Debi v. Mt. Parbati Kuer 83
(1932) AIR 1932 Mad 198 (V 19) = ILR 55 Mad 40, S. Rama Krishna Pillai v. Tirunarayana Pillai 39
(1931) AIR 1931 PC 84 (V 18) = 33 Bom LR 904, Padmalay Achariya v. Fakira Debya 112
(1917) AIR 1917 Mad 265 (V 4) = ILR 40 Mad 660, Seshamma v. Padmanabha Rao 118
(1916) AIR 1916 PC 81 (V 3) = ILR 44 Cal 201, Diwakar Rao v. Chandan Lal Rao 12
(1865) 10 Moo Ind App 429 = 2 Sar 139 (PC), Tayammul v. Sashachalla Naiker 8, 12, 28
M. M. Vyas and H. N. Kalla, for Appellants; D. P. Gupta and N. C. Rastogi, for Respondent.

JUDGMENT: This appeal was filed by plaintiff Shivchand against the appellate judgment and decree of the learned District Judge of Jodhpur dated October 21, 1965. Shivchand died during the pendency of the appeal and his legal representatives are now on the record.

2. There has been much controversy about the subject matter of the suit and it is necessary to state the facts but before doing so it will be better to mention the genealogy (for genealogy see page 192) of the parties so as to bring out their relationship.

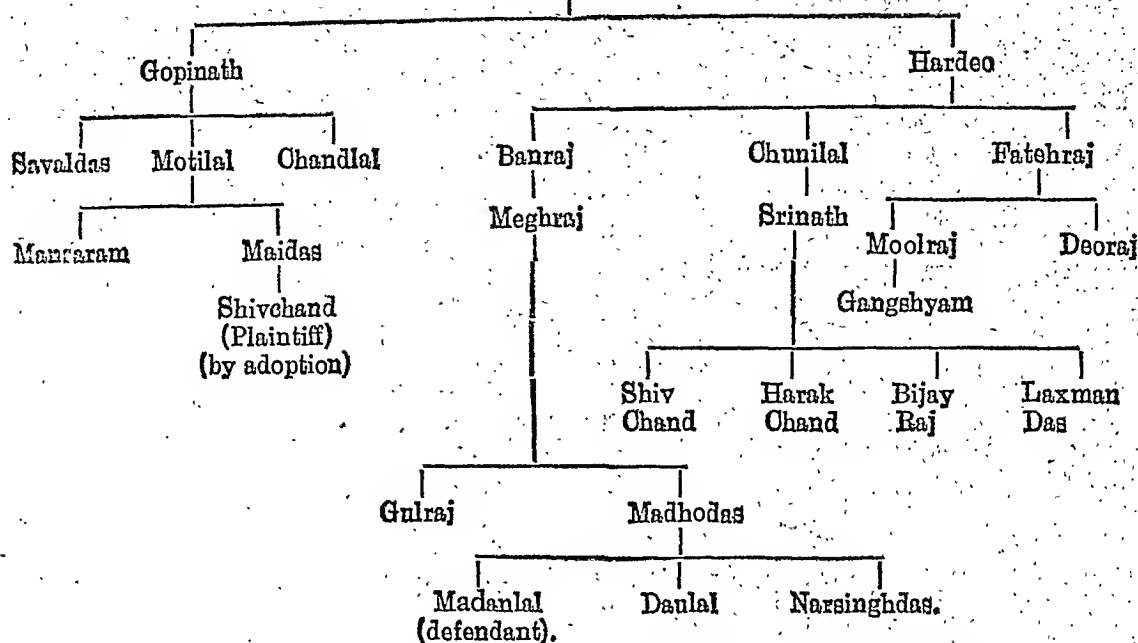
3. Hathi Ram, the common ancestor of the parties, was admittedly the "jagirdar" of village Polawas. He was a Purohit and had two sons, Gopinath and Hardeo. Mansaram and Maidas were the grandsons of Gopinath, being sons of Motilal. The dispute relates to the adoption of Madanlal (defendant), a great great grandson of Hardeo, by Mansaram. That adoption was challenged by plaintiff Shivchand by this suit on May 2, 1950. It was alleged by him that defendant Madanlal's grandfather Meghraj went in adoption to his maternal grandfather Kaniram alias Gunraj Chhangani so that he and his descendants ceased to have anything to do with Hathi Ram's "jagir" or other property, and could not be validly adopted by any of the descendants of Hathi Ram under the law of "mooris-i-ala." It was stated that Mansaram instituted a suit for partition against Maidas, but compromised it by an agreement (Ex. 1) dated March 21, 1917 under which he got only an allowance of Rs. 7 per mensem for his maintenance and made Maidas the exclusive owner of the rest of the "jagir" and the other property.

It was pleaded that Mansaram became a lunatic sometime thereafter, and remain-

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 136 (V 51) = (1964) 2 SCR 933, Raghavamma v. Chenchamma 112
(1964) AIR 1964 SC 1625 (V 51) = 1964 (2) Cri LJ 590, Mohd. Ikram Hussain v. State of Uttar Pradesh 211
(1961) AIR 1961 Guj 196 (V 48), Municipal Corporation of City of Hyderabad v. Gandhi. Shantilal Girdharlal 211
(1959) AIR 1959 SC 504 (V 46) = (1959) Supp (1) SCR 698, Kishorilal v. Mt. Chalti Bai 112
(1958) AIR 1958 Andh Pra 22 (V 45), Subrahmanya Sastry v. Lakshminarasamma 211
(1958) AIR 1958 Raj 110 (V 45) = 1958 Raj LW 275, Mst. Chandanbai v. Jagjiwanlal 33
(1958) 1958 Raj LW 616 = ILR (1957) 7 Raj 373, Prabhulal v. Ratan Singh 40
(1950) AIR 1950 FC 142 (V 37) = 1949 FCR 715, Ratneshwari Nandan v. Bhagwati Saran 29
(1950) AIR 1950 Cal 173 (V 37), Sris Chandra Nandy v. Sm. Annapurna Ray 211
(1943) AIR 1943 PC 83 (V 30) = ILR (1943) Kar PC 69, Gopal Das v. Sri Thakurji 33
(1941) AIR 1941 Nag 251 (V 28) = ILR (1942) Nag 236, Mohanlal Madangopal v. Vinayak Sadasheo 118

HATHI RAM



ed so throughout his life, so that the sum of Rs. 7 which was deposited by Maidas every month under the aforesaid agreement (Ex. 1) was withdrawn by Fatehraj or Moolraj as his guardians. It was the case of the plaintiff that Mansaram was under their influence and was afraid of them, and was not in a position to understand what was good or bad for him. Maidas had no son and his widow adopted the plaintiff on October 14, 1939, under a registered deed of adoption. Thereupon Fatehraj, Moolraj, Gulraj and Madhoda got a deed of adoption written regarding the adoption of Madanlal by Mansaram. That document was presented for registration, but the Registrar held that Mansaram was of unsound mind and refused to register it on January 29, 1940. On appeal, the document was sent back to the Registrar, but he again refused to register it by his order dated July 14, 1940 on the ground that Mansaram was a lunatic.

Madanlal then instituted a suit on September 11, 1940 in the Court of Joint Kotwal No. 1 for the compulsory registration of the deed of adoption. The Joint Kotwal held on January 4, 1944 that Mansaram was a lunatic, appointed Mr. Hukamehand, Advocate, as his guardian ad litem and ultimately dismissed the suit on August 3, 1944. A week thereafter, another deed of adoption (Ex. P. W. 10/1) was got executed by Mansaram. It was presented for registration on October 10, 1944 and was registered the next day in spite of the objection of the plaintiff. As Madanlal gave himself out to be the adopted son of Mansaram on the basis of that document and wanted to take his share in Gopinath's "jagir" and other property, he filed a suit against the plaintiff in the District Court alleging that the plain-

tiff was not the son of Maidas. That suit was opposed by the present plaintiff on the ground, inter alia, that Madanlal was not the validly adopted son of Mansaram. Thereafter the plaintiff himself raised the present suit alleging that the deed of adoption Ex. P. W. 10/1 cast a cloud on his rights and there was reason to apprehend that Madanlal might withdraw his suit and thereby prevent a trial of the dispute regarding the validity of his own adoption by Mansaram.

The plaintiff therefore prayed for a declaration that the defendant had no right to the "jagir" and other property of Gopinath and his descendants and the deed of adoption in favour of the defendant was illegal and inoperative against him.

4. Defendant Madanlal denied the claim altogether. He denied that the plaintiff was the adopted son of Maidas and pleaded that he himself ceased to be the son of Madhoda because of his adoption by Mansaram. He admitted however that Hathi Ram was their common ancestor and was the "jagirdar" of Polawas, but denied Meghraj's adoption by Kaniram alias Gunraj. It was admitted that Mansaram and Maidas were the two descendants of Gopinath and that Maidas died in the life time of Mansaram. It was alleged that Mansaram filed a suit for partition of the property against Maidas which was finally decided on June 29, 1904, and Mansaram was held entitled to a half share. The defendant denied that Mansaram entered into any compromise with Maidas or presented it before any Court. In the alternative, it was pleaded that even if any such compromise was proved, it could not have any effect on Mansaram's descendants and came to an end on his death.

At the same time, it was pleaded that after the death of Maidas, Mansaram became the owner of the entire property. It was denied that Mansaram became a lunatic at any time or remained in that state of mind until his death or that Fatehraj and Moolraj withdrew any money because of his lunacy. So also, it was denied that they had any influence on Mansaram, or that he was afraid of them. It was pleaded that Mansaram was able to think what was good or bad for him and that, on the other hand, any deed of adoption executed by Maidas's widow in favour of the plaintiff under undue influence was not legal and was void and invalid. It was pleaded that Mansaram executed the deed of adoption after taking the defendant in adoption of his own free-will and choice, but the Registrar did not register it and the defendant had to file a suit in the Court of Joint Kotwal No. 1 for its registration.

A question arose whether it was necessary to appoint a guardian ad litem of Mansaram for purposes of that suit and Mr. Jukamchand was appointed as the guardian until the decision of that question. Ultimately, the suit was dismissed on the ground that it was barred by limitation and it could not have any adverse effect on the rights of the defendant. It was pleaded in paragraph 11 of the written statement that thereafter on August 10, 1944, Mansaram took the defendant in adoption and wrote the deed of adoption (Exhibit P.W.-10/1) in his own hand. It was presented for registration and was registered in spite of the objection of the plaintiff. The defendant pleaded that as he wanted to take his share in Gopinath's jagir and other property as the adopted son of Mansaram, he filed a suit against the plaintiff in the Court of the Civil Judge, and that the plaintiff raised the present suit to bring undue pressure on him although all the points in controversy between the parties could well be decided in his own suit. It was, however, admitted that the "mooris-i-ala" law was binding on the parties.

5. Issues were framed on the points in controversy between the parties. The trial Court decided all of them against the plaintiff and dismissed the suit on October 28, 1959. The plaintiff preferred an appeal and as it has been dismissed by the impugned judgment, he has presented this second appeal.

6. It has been argued by the learned counsel for the plaintiff-appellant that the judgment of the lower appellate Court has been vitiated by several substantial errors of law and procedure. This has not been disputed by the learned counsel for the respondent and, as will appear from what follows in this judgment, this is really so.

7. The most disputed point in this case relates to the question whether Mansaram was a lunatic who could not understand what was good or bad for him and could

not take any one in adoption so that adoption deed, Exhibit P.W. 10/1 is void and illegal. This was the subject-matter of issue No. 5 and I shall deal with it first of all.

8. It is well settled that every male Hindu, who is of sound mind, may lawfully take a son in adoption: *Tayammaul v. Seshachalla Naiker*, (1865) 10 Moo Ind App 429 at pp. 434-435 (PC), if he has attained the age of discretion. Soundness of mind is, therefore, an essential requirement of a valid Hindu adoption and has to be proved when necessary.

9. The plaintiff clearly took the plea in paragraph 14 of the plaint that the deed of adoption was inoperative and invalid for the reason, inter alia, that Mansaram was a lunatic who could not understand what was good or bad for him and was not, therefore, entitled to take any one in adoption under the law. It was, therefore, necessary for the defendant to prove that Mansaram was of a sound mind at the time when he is alleged to have taken him in adoption. Mr. Vyas has argued that the burden of proving the unsoundness of Mansaram's mind was incorrectly placed on the plaintiff while framing issues Nos. 4, 5 and 7. The issues were framed on October 24, 1958 and the plaintiff made an application on November 19, 1958, objecting that the burden of proof had incorrectly been placed on him. His application was, however, rejected by the trial Court on November 27, 1958. The mistake was pointed out in the Court of first appeal, but I am constrained to say that it also did not appreciate the implications of the question of burden of proof in such cases and unnecessarily involved itself in the question of lucid interval even though it was not pleaded by any of the parties.

10. It is true that every man may reasonably be presumed to be sane; but such a presumption is not made in all cases. Thus in the case of a will, when the testamentary capacity of the testator is a point in issue, the burden of proving the capacity rests on the propounder who cannot rely on any such presumption. It will be enough to make a reference to the following observation in paragraph 819 of Halsbury's Laws of England, 3rd Edn., Vol. 29, in this connection:

"Every man is presumed to be sane until the contrary is proved, and this presumption holds as well in civil as in criminal cases, though in the case of a will it is the duty of the executors or any other person setting up the will to show that it is the act of a competent testator."

The point has been lucidly stated as follows in Taylor's Treatise on the Law of Evidence, 12th Edn., Vol. I, para 370:

"In all such cases the presumption of sanity holds good to this extent, that if the testamentary instrument was duly and regularly executed, and the terms of it are not unnatural or such as upon the face of the instrument to suggest any unsoundness of

mind, and there is no evidence before the Court of any such unsoundness, sanity will be presumed; but if there is evidence before the Court from which unsoundness of mind may be inferred, or evidence on the one side and upon the other, there is no presumption of law which requires the tribunal to find in favour of the instrument unless it is affirmatively satisfied that the testator was of sound mind. The burden of proof throughout is upon the party propounding the instrument. If, however, upon the trial of any such issue, the party opposing the will puts in evidence an inquisition finding the testator to have been a lunatic at a date previous to the making of the will, this evidence shifts the burden of proof to the party who asserts the testator's sanity. And, indeed, if it be shown by any evidence that a testator was insane, or subject to delusions at any time previous to the alleged will, or subsequently thereto, the presumption of sanity will be displaced."

I have no doubt that this should equally hold good in the case of an adoption, for, as has been stated, soundness of mind is its essential requirement also.

11. It follows, therefore, that as it was specifically pleaded in the plaint that Mansaram was a lunatic, and a reference was made to an earlier finding to that effect, which was not specifically denied in the written statement, the trial Court should have realised that the ordinary principle that every person may reasonably be presumed to be of sound mind, could not apply, and it was necessary for the defendant who relied on the adoption to prove that the adopting father was of sound mind at the time of the adoption.

12. The burden of proof in such a case is quite substantial because it is well settled that the evidence to prove an adoption must be sufficient to satisfy the serious onus which rests upon any person who seeks to displace the natural succession by alleging the adoption. The decisional law on the point is to be found in the pronouncements of their Lordships of the Privy Council and the Supreme Court in *Diwakar Rao v. Chandan Lal Rao*, AIR 1916 PC 81, *Padamalav Achariya v. Fakira Debya*, AIR 1931 PC 84; *Kishorilal v. Mt. Chalti Bai*, AIR 1959 SC 504; and *Raghavamma v. Chenchamma*, AIR 1964 SC 136. The evidence of adoption should, therefore, be free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth.

It was, therefore, for the defendant to prove that Mansaram was of a sound mind at the time of the adoption and the two Courts below erred in failing to appreciate this requirement of the law. But the question is as to what exactly is required to prove the soundness of mind in such cases. The learned counsel for the appellant has made a reference to Section 12 of the Contract Act, but it has been argued by Mr. Gupta

on behalf of the respondent that an adoption cannot be said to be a contract and I agree with him that the section is not applicable in terms. Fortunately for me, however, a similar point arose for consideration in (1865) 10 Moo Ind App 429 (PC). The adoption in that case was disputed and their Lordships of the Privy Council held as follows:

"The question, therefore, will be, not whether certain acts were done which, if unobjectionable in other respects, would have constituted adoption, but whether the alleged adopting father was of sufficient capacity at the time to understand the nature and object of those acts, and voluntarily gave an intelligent consent to their performance."

Their Lordships expressed the view that adoption was an act requiring "judgment and reflection", which could not be established without "the clearest and most cogent evidence to establish their validity" so that interested persons may be precluded from ascribing acts to a person in which he would have been the "merely passive instrument to prolong their own gain and authority". The question is whether there is evidence of this nature to prove that Mansaram had such capacity at the time of the alleged adoption.

13. To reach a conclusion it is natural to examine the state of Mansaram's mind on the date and time of the alleged adoption. But, strangely enough, the defendant has not stated the date, time or place of his adoption either in the written statement or his deposition. It is also surprising that these particulars have not been stated in the deed of adoption (Exhibit P.W. 10/1) and none of the defence witnesses has stated anything about them. In other words, there is not an iota of evidence on the record to show on what date and time and at what place Mansaram adopted the defendant, so that it is impossible to examine whether he had sufficient capacity at the relevant period of time to understand the nature and object of the act of adoption and was in a position to voluntarily take an intelligent part in the adoption or to participate in its ceremonies.

14. A perusal of the written statement shows that the defendant pleaded as follows in para 11 of the written statement:

"Ki tareekh 10-8-44 ko Mansaramji ne prativadi ko unke khole lekar kholapatra likha."

If it was the intention of the defendant to plead that his adoption took place on August 10, 1944, then it must be rejected as false for the simple reason that the defendant has categorically admitted in his statement that he was not with Mansaram throughout that day.

15. Moreover, as I shall presently show by reference to the past history of the litigation, there was a serious dispute until August 3, 1944, about the soundness of

Mansaram's mind and his capacity to take Madanlal in adoption, and the fact that Mansaram is alleged to have taken the defendant in adoption in the teeth of that controversy barely a week thereafter on August 10, 1944, creates a strong suspicion regarding the validity of the adoption.

16. As has been stated, it was not denied in the written statement that Mansaram executed a deed of adoption on an earlier occasion also, in favour of defendant Madanlal and presented it for registration, but the Registrar refused to register it by his order Exhibit 2 dated January 29, 1940, holding that the executant appeared to be a lunatic. The matter was remanded by the Mahakmakhas to the Registrar for recalling Mansaram and deciding the matter afresh. The Registrar did so. He examined Mansaram and passed order Exhibit 3 dated July 14, 1940. It was stated in that order that Mansaram no doubt appeared to be a bit better, but that while at one time he talked like a sane man and gave relevant replies to the questions put to him, he fell into a reverie and was completely lost to the world at the next moment and could not understand the simplest possible question. It was further stated that he took an unreasonably long time and gave partly incorrect answers to the simple questions as to who was the person he was adopting and whether he was married or unmarried.

The Registrar, therefore, refused to register the document. A suit was then brought on September 11, 1940, for the compulsory registration of the deed of adoption in the Court of Joint Kotwal No. 1 which, it is admitted before me, was a regular Civil Court of competent jurisdiction at that time. A written statement (Exhibit 13) was filed in that suit by Mr. Raj Narain on behalf of Mansaram admitting the claim, but its authority was challenged and the learned Chief Justice made order, Exhibit 15, on August 16, 1941, stating that the matter did not appear to be "absolutely clear". He observed as follows:

"What did the defendant mean, by saying that he was an M.A. in English when he did not understand even a simple sentence in that language?"

The learned Chief Justice therefore examined the matter further and made order, Exhibit 18, on December 4, 1941, in the exercise of his revisional powers for the framing of an issue on the question whether Mansaram was of an unsound mind and, therefore, incapable of protecting his interest in the suit. He directed the trial Court to decide the issue after recording the necessary evidence and appointing a provisional guardian ad litem for the purpose of that enquiry.

16-A. Joint Kotwal No. 1, who was trying the suit for compulsory registration, carried out that order of the Chief Court and recorded statement Exhibit 5 of Mansaram on December 14, 1943. In that statement,

Mansaram stated his own age to be 65 years and that of his mother as about 50 years. When the mistake was pointed out to him, he attempted to correct it by saying that his mother might be 70 years old. He also gave the impression that his mother was alive at that time and was living with him, although she had admittedly died much earlier. The Joint Kotwal, therefore, made order Exhibit 4 on January 4, 1944, after examining the medical experts Dr. Madan and Dr. Onkar Singh. He reached the conclusion that he had no hesitation in holding that Mansaram was not of sound mind and capable of protecting his interests in the suit. He formed the impression that Mansaram had been tutored on the question relating to the dispute and looked like a "frightened animal".

A revision petition was filed against the order of the Joint Kotwal, but it was dismissed in limine by order, Exhibit 6, of the Chief Justice dated January 31, 1944 and Mr. Hukamchand was appointed Mansaram's guardian on May 11, 1944, under order Exhibit 21 to defend him in the suit for the compulsory registration of the deed of adoption. That suit was thereafter dismissed on August 3, 1944, by judgment Exhibit A-2 of the Joint Kotwal as he held that it was barred by limitation. It is significant that an argument was made before him, on the basis of an earlier decision of the Jodhpur Chief Court reported in *Bhoora v. Ranulal*, 1938 MLR 89 (Civil) that in spite of the bar of limitation, it was open to a Court, in a proper case, to pass a decree for specific performance by execution and registration of a fresh document in the exercise of its equitable jurisdiction.

The argument was rejected by the Court on the ground that it had found it as a fact that the defendant, who was the executant of the deed of adoption, was of unsound mind which fact was sufficient to dissuade it from passing a decree for specific performance. It is not disputed that this decision was allowed to become final, so that there is clear evidence on the record to show that up to August 3, 1944, a competent Civil Court had taken the view that Mansaram was a man of unsound mind and the deed of adoption executed by him could not be registered.

17. A second deed of adoption (Exhibit P.W. 10/1), which is the subject-matter of the present suit, was, however, written out on August 10, 1944, one week thereafter, and even though it was registered on October 11, 1944, the fact remains that, to say the least, there was at that time sufficient evidence to show that Mansaram was a man of unsound mind. It was not, therefore, possible to raise any presumption of sanity in his favour. On the other hand, as would appear from the following observation in para 820 of Halsbury's Laws of England, 3rd Edn., Vol. 29, it will be presumed that the mental disorder continued thereafter:

"Where a person has been proved or is admitted to have been so mentally disordered as to be incapable for purposes of contract or disposition, the law presumes such a condition to continue until it is proved to have ceased; and the burden of proving recovery or a lucid interval, as the case may be, lies on the person alleging it. The evidence to prove a recovery or a lucid interval must be as strong and demonstrative of the fact as when the object is to prove mental disorder."

There is no reason why this rule of evidence should not apply equally in the case of an adoption. But as it is, it is not the case of the defendant that Mansaram made any recovery or that he executed the deed of adoption in a lucid interval, and there is also no evidence at all to this effect, so that it will be fair and reasonable to presume that the mental unsoundness of Mansaram continued to persist.

18. Reference may, in this connection, be made to *Seshamma v. Padmanabha Rao*, AIR 1917 Mad 265, which was also a case of adoption. The adopting father was found a lunatic under Act 35 of 1858 in 1903, and although their Lordships rejected the argument that the effect of the order appointing a manager of the properties of the lunatic was to incapacitate him from making the adoption until the order was set aside, they held that in such a case there was a presumption that he continued to be of unsound mind until the contrary was shown and that if an adoption was made by such a person, the onus was on those who asserted it to prove that he was of sound mind when he made the adoption. A similar view has been taken in *Govindaswami Naicker v. Srinivasa Rao*, AIR 1940 Mad 73 and *Mohanlal Madangopal v. Vinayak Sadasheo*, AIR 1941 Nag 251.

19. It was, therefore, for the defendant to prove that the mental disorder of Mansaram ceased to exist on August 10, 1944, when he is said to have executed deed of adoption Exhibit P.W. 10/1. But there is no evidence at all to that effect.

20. All that has been argued is that the Registrar registered the document on October 11, 1944, after making the necessary enquiry about the soundness of the executant's mind and that his endorsement should be sufficient to prove the recovery of Mansaram as the endorsement falls within the purview of Section 35 of the Registration Act and all its contents, including the opinion of the medical expert, are admissible in evidence.

21. It is true that an endorsement of the nature contemplated under Section 35 of the Registration Act is admissible in evidence for the purpose of showing that the executant was a person of sound mind according to the opinion of the Registrar, but, as has been held in *Subrahmanya Sastry v. Lakshminarasamma*, AIR 1958 Andh Pra 22, it does not shift the burden of proof in re-

gard to the factum of execution in a sound state of mind to the other party. Moreover, there is no force in the argument of Mr. Gupta that this Court should read in evidence that part of the order of the Registrar in which he has made a reference to the certificate of Dr. Madan and its contents. It has not been disputed before me that Dr. Madan was alive during the course of the trial, and it was, therefore, necessary for the defendant, if he wanted to rely on his opinion, to lead direct oral evidence under Section 60 of the Evidence Act. As this was not done, it is not possible for me to consider the opinion of Dr. Madan referred to in the Registrar's endorsement for that would be the violative of the rule excluding hearsay evidence. Such a view may operate harshly in certain cases, but it is embodied in the law and has to be observed.

I may refer here to the following observation, in para 571 of Taylor's Treatise on the Law of Evidence, 12th Edn.:

"It cannot, however, be denied that rule excluding hearsay evidence, though in general admirably calculated for trials before popular tribunals, may in many instances work considerable injustice. For example, on a question respecting the competency of a testator, the conduct of his family, or relations taking the same precautions in his absence as if he were a lunatic, or his election in his absence to some high and responsible office, or the conduct of a physician who permitted him to execute a will—all these, when considered with reference to the matter in issue, are mere instances of hearsay evidence, mere statements expressed in the language of conduct instead of the words, and, consequently, they are inadmissible in a Court of justice, although in the ordinary transactions of life they would deservedly be considered as cogent moral proof."

In *Sris Chandra Nandy v. Smt. Annapurna Ray*, AIR 1950 Cal 173, such evidence has been held to be the "worst form of hearsay evidence". Similarly in *Municipal Corporation of City of Ahmedabad v. Gandhi Shantilal Girdharlal*, AIR 1961 Guj 196, the certificate of the doctor was held to be inadmissible in evidence. This is also the view taken in *Mohd. Ikram Hussain v. State of Uttar Pradesh*, AIR 1964 SC 1625. The reason is that what was inadmissible in evidence could not become admissible simply because it was incorporated or mentioned in an endorsement like the one envisaged for purposes of Section 35 of the Registration Act.

22. It follows, therefore, that the Registrar's endorsement on document Exhibit P.W. 10/1 was not sufficient to displace the presumption that the unsoundness of Mansaram's mind continued at the time when the document is said to have been executed by him.

23. That this was really so, will appear from the subsequent events as well. A suit was raised by the present plaintiff Shiv-

chand and Mansaram in the Court of Joint Kotwal No. 2 against Fatehraj for the recovery of some property of the "Jagir" village. The Joint Kotwal held in his judgment Exhibit 20 dated April 4, 1945, with reference to an issue regarding the unsoundness of Mansaram's mind and the claim of Shivchand to act as his next friend, that Mansaram was not a lunatic although he was certainly below the average. The matter went up in appeal to the Court of the Judicial Superintendent, who decided it by his judgment Exhibit 22 dated November 8, 1945. On a consideration of the entire evidence, that Court reversed the finding of the Joint Kotwal and held that plaintiff Mansaram was of an unsound mind and plaintiff Shivchand was entitled to file the suit as his next friend. It is, therefore, quite apparent that a few months after the alleged execution of adoption deed, Exhibit P.W. 10/1, a competent Civil Court again held that Mansaram was a man of unsound mind.

A second appeal was preferred to the High Court, and a dispute arose there regarding Mansaram's legal representative on account of his death. The matter was referred to the District Judge who gave his report Exhibit 10 on July 6, 1948. He also took the view that Mansaram was incapable of forming a rational judgment as to the effect of the adoption deed executed by him and held that Madanlal was not entitled to substitution as his legal representative on its authority. When the report was received by the High Court, it made order Exhibit A-1 on August 26, 1948, which however left open the question of the correctness of the finding of the District Judge contained in his report Ext. 10 for the matter was disposed of on another ground. The fact, however remains that even as late as July 6, 1948, the District Judge took the view that Mansaram was a man of unsound mind who could not validly take any one in adoption.

24. I may make it quite clear that I have not relied on these subsequent events for the purpose of deciding the state of Mansaram's mind at the time when he is said to have executed the deed of adoption Exhibit P.W. 10/1, but I have referred to them, merely to show that in another case there was a similar dispute and controversy. I have already dealt at length with the documentary evidence which has left me in doubt that the Courts of law had taken the view up to as late as date as August 3, 1944, that Mansaram was a man of unsound mind, and the presumption that he continued in that state of mental disorder is quite justified when there is no plea or evidence of recovery and it is nobody's case that the deed of adoption was executed in a lucid interval.

25. Reference has, however, been made to the parol evidence on the record and I may examine it as well.

26. Moolraj, D.W. 9, has stated that Mansaram wrote document Exhibit P.W.

10/1 in his presence and at his house, and that he was not a lunatic. The witness, however, admitted that Mansaram lived jointly with him for a period of about 20 years and that he (witness) himself purchased the stamp paper on which document Exhibit P.W. 10/1 was written. The witness claims that he attested it at a time when no other witness was present. Moolraj, however, admitted that there was litigation between him and the plaintiff for the last 20 or 25 years and I have no doubt that he is a highly interested witness. Besides, he had to admit during the course of the cross-examination that he was present with Mansaram when the document was presented for registration, and there is evidence to show that he was with him on every important occasion. I do not, therefore, find it possible to rely on the statement of this witness. Then there is the statement of Somdatt, D.W. 2. He also claims to have attested document, Exhibit P.W. 10/1 at the instance of Mansaram, and much to the same effect is the statement of Bal Kishan, D.W. 7.

A question arose in my mind whether these witnesses really attested the document at the instance of Mansaram? As Dr. Umraomal, D.W. 10, was also produced as a witness to prove the attestation, I have examined his statement carefully. Even though Dr. Umraomal admitted that he was a friend of defendant Madanlal, he frankly stated that he attested the document at the instance of defendant Madanlal, and I am not inclined to place reliance on the statements of Somdatt and Bal Kishan to the contrary. The attestation of the document was, therefore, quite unreliable. Moreover, Dr. Umraomal examined Mansaram only for 15 or 20 minutes on the date when he attested the document and never had any occasion to see him earlier. He could not even remember whether he questioned Mansaram about his previous history and he admitted that he might have considered two or three "points" to examine his mental alertness. Any opinion based on such perfunctory examination cannot inspire confidence.

The statement of Mr. Raj Narain, D.W. 6, is quite useless because he talked to Mansaram only once or twice and was hardly in a position to express any opinion about the soundness of his mind. The rest of the evidence has not been relied on before me. It would thus appear that the parol evidence of the defendant is quite unsatisfactory. At any rate it does not serve the purpose of rebutting the presumption regarding the continuance of Mansaram's unsoundness of mind and cannot be said to be strong and demonstrative evidence of recovery.

27. The plaintiff has examined his witnesses to prove the mental incapacity of Mansaram, but it is hardly necessary to read it here in view of the overwhelming documentary evidence mentioned above. Even

a reading of Exhibit P.W. 10/1 shows that it suffers from certain inherent defects. For instance, it does not state the date, time or place of the alleged adoption. So also, there is no mention of any ceremony of adoption or the consent of the natural father. It is, therefore, difficult to take the view that Exhibit P.W. 10/1 is at all a deed of adoption, and it may even be said with some justification that it has no evidentiary value beyond furnishing an admission of Mansaram that he had taken the defendant in adoption on some earlier date or time. There is also no evidence on the record to show that it was a contemporaneous document. Mansaram used to live with Moolraj and it has been admitted by Madanlal that he never lived with his adoptive father after the adoption. There is nothing in Exhibit P.W. 10/1 or in the other evidence on the record to show why such a helpless man should have thought of taking a son in adoption. All these are inherent defects in the document and they cannot be ignored merely because Moolraj has stated that the document was written by Mansaram in his own handwriting and some witnesses claim to have attested it.

28. At any rate I have no hesitation in holding that the evidence on the record is not sufficient to prove that Mansaram was of sufficient capacity at the time to understand the nature and object of the act of adoption and that he voluntarily took an intelligent part in such an act which requires the exercise of both judgment and reflection. The standard of proof mentioned in *Tayammul's case*, (1865) 10 Moo Ind App 429 (PC) has not, therefore, been furnished. It is quite apparent that some interested persons tried to over-reach the findings of the Courts of law regarding Mansaram's incapacity to make a valid adoption and ignored even the latest pronouncement of the Joint Kotwal dated August 3, 1944, in Exhibit A-2 by bringing about the execution of a second document (Exhibit P.W. 10/1) barely a week thereafter. It is only reasonable that the infirmities so unscrupulously brushed aside by those persons should have overtaken them completely.

29. Before leaving this point of controversy I may as well refer to the argument of Mr. Gupta that there are various degrees of insanity and that a person may have sufficient amount of reason still left in him which may enable him to understand the ceremonies of adoption and take an intelligent part in them, and that such a state of mind, when proved, would be sufficient to uphold an adoption. The learned counsel has placed reliance on *Ratneshwari Nandan v. Bhagwati Saran*, AIR 1950 FC 142, to support his argument. But that case dealt with the question of the validity of a Hindu marriage and cannot be said to be directly in point. Even so, the test laid down in that case for the validity of a Hindu marriage was that the person concerned should

have sufficient amount of reason still left in him to enable him to understand the ceremonies of marriage and take an intelligent part in them. But if this test is applied to Mansaram's case, it will not avail the defendant for there is no evidence at all to show that Mansaram understood the ceremonies of adoption and took an intelligent part in them.

30. There is, therefore, no escape from the conclusion that the evidence on the record does not prove that Mansaram was a man of sound mind at the time of the alleged adoption or when he executed document P.W. 10/1. The learned District Judge committed a serious error of law in taking the view that, in the facts and circumstances of this case, the onus of proving that Mansaram was a man of unsound mind lay on the plaintiff. The learned Judge appears to have realised that this would not be the correct legal position, for he tried to retrieve the error in the later part of his judgment. But I am constrained to say that he committed another serious error of law in going into the question of lucid interval while considering the question of Mansaram's mental recovery ignoring the fact that no such plea had at all been taken in the written statement, there was no issue in regard to it and the parties did not lead any evidence on it so much so that the defendant did not cross-examine any of witnesses of the plaintiff for the purpose of proving the lucid interval. The finding of the learned District Judge cannot, therefore, be upheld. I have no hesitation in setting it aside and in holding that the defendant has not succeeded in proving that Mansaram was of a sound mind when he is alleged to have taken Madanlal in adoption.

31. The next point for consideration is whether Meghraj, grandfather of defendant Madanlal, went in adoption to his maternal grandfather Kaniram alias Gunraj Chhanganani. This was the subject-matter of issue No. 1 and, as I shall presently show, the plaintiff has led sufficient documentary evidence to prove that this was so.

32. Exhibit 8 dated February 28, 1906, is an important document in this connection. It is a certified copy of a copy of a 'kai-fiat' of Mahakma Alia Khas and it shows that there was an ancestral grant in favour of Gunraj. The document states that Meghraj had reported that his 'father' Gunraj, who was drawing Rs. 14-15-3 per month from the treasury, had died and that his name may be substituted in his place. An order was made that since the grant was ancestral and 'there had been villages in their family in the past', Meghraj's name may be substituted in the place of Gunraj and the allowance paid to him. The document has been proved by the statement of the plaintiff. It is, therefore, quite sufficient to prove that Meghraj got the allowance on a voluntary representation that he was the son of Gunraj and because of the acceptance of the correctness of that repre-

sentation by the State Government. The document dates back to 1906 and furnishes satisfactory evidence that Meghraj had gone in adoption to his maternal grandfather.

33. An objection has, however, been raised that Exhibit 8 is the certified copy of a copy and cannot be admissible in evidence. A perusal of the record shows however that there is no substance in this objection. Plaintiff Shivchand, who proved and produced the document, clearly stated that what he produced was the copy of the order granting the allowance to Meghraj, and no objection was taken that it was not a copy but a copy of a copy. A perusal of the record explains why such an objection was not raised at that time. A certified copy of the "kaifiat" was then available in the file of Civil Original Case No. 55 of 1939-40 between Shivchand and Mansaram on the one hand and Fatehraj on the other. Exhibit 8 was prepared from that copy, and it may well be that while the certified copy was referred to during the course of the evidence, the mark of exhibit was placed on the certified copy of the copy as a matter of convenience.

At any rate there is no doubt that the parties knew that the certified copy was available in the connected file, and that appears to be the reason why no objection was made about the admissibility of Exhibit 8. If an objection had then been raised, the plaintiff would easily have got the certified copy marked as an exhibit and that mark would not have been placed on the certified copy of the copy. The defendant cannot, therefore, be allowed to raise the objection at a later stage and I may refer in this connection to *Mst. Chandan Bai v. Jagjivanlal*, 1958 Raj LW 275 = (AIR 1958 Raj 110), which was based on a decision of their Lordships of the Privy Council in *Gopal Das v. Sri Thakurji*, AIR 1943 PC 83. It was held in that case in somewhat similar circumstances that a copy of a copy would be sufficient evidence and any objection regarding its admissibility should be deemed to have been waived because, if it had been raised, it would have been perfectly possible for the party concerned to have prayed for the very copy of the document which was on the record to be taken and marked as an exhibit.

A similar view has been taken in *Chhetra Kumari Debi v. Mst. Parbati Kuer*, AIR 1936 Pat 600. I have no doubt therefore that an objection as to the form of the secondary evidence cannot be allowed to be raised when it was not taken at the time when it was offered at the trial, and the learned Judge of the lower appellate Court undoubtedly committed a serious error of law in excluding such an important piece of evidence from consideration.

34. The next important document is Ex. 9. It is a certified copy of the application of Madhodos, father of defendant Madanlal, by which he applied for the grant

of the allowance of Rs. 14/15/3 to him because of the death of his father Meghraj. It will be recalled that Meghraj had secured the same allowance on the death of his father Gunraj under document Ex. 8. In application Ex. 9 also, Gunraj was stated to be the grandfather of Madhodos. It is another important piece of evidence which proves that Meghraj had gone in adoption to Gunraj. The learned District Judge failed to notice that the document had been proved by the plaintiff and had not been rebutted and he therefore committed another serious error of law in leaving it out of consideration.

35. Then I come to document Ex. 14. It is the certified copy of the proclamation for sale of the property of Madhodos dated November 26, 1933 and in it Madhodos has been mentioned as a "Chhangani" and not a "Purohit", so that it is also evidence of the fact that Madhodos had ceased to belong to the family of Hathi Ram. Another connected document is Ex. 7 dated December 14, 1933. It is the certified copy of the receipt by which the sale proceeds were deposited in the Court. In it also Madhodos has been mentioned as a "Chhangani" and the document has been proved to relate to the defendant's father by the statement of the plaintiff.

36. The above documentary evidence is quite sufficient to prove the adoption of Meghraj by his maternal grandfather Kanimaram alias Gunraj, but I shall refer to the parol evidence also.

37. Shrinath P. W. 1 is the natural father of the plaintiff. He was 81 years old when his statement was recorded on December 6, 1958, and has stated that Meghraj was taken in adoption by Gunraj before he (witness) attained the age of discretion. This shows that the adoption took place some time before 1895. Being a close relation, Shrinath had special means of knowledge on the subject and his statement that Meghraj performed the funeral rites of Gunraj and Gunraj celebrated the marriage of Meghraj's son Madhodos at his own house and the members of the "Chhangani" family participated from the paternal side in that marriage, lends support to the documentary evidence mentioned above. Then there is the statement of Daulal P. W. 5 about the adoption. He has further stated that Meghraj lived with his maternal grandfather, and so also his sons.

38. In rebuttal Mr. Gupta has invited my attention to certain portions in the statements of Srinath P. W. 1, Badri Das P. W. 2 and Shivchand P. W. 11 for the purpose of showing that Gulraj son of Meghraj and Madanlal lived in Hathi Ram's house, and it has been argued that this could not be so if Meghraj had gone in adoption to Gunraj. But the argument is futile because it has been proved by Exs. 14 and 7 that Gunraj's house had been sold in execution of a decree in 1933 and it is therefore not surprising that his descendants were allow-

ed to live in Hathi Ram's house in such circumstances. Madanlal D. W. 1. and Moolraj D. W. 9. have denied the adoption of Meghraj, but they are highly interested witnesses and their testimony cannot be considered to be sufficient to rebut the documentary evidence mentioned above.

39. It has to be remembered that the adoption of Meghraj took place near about 1895, while the dispute in regard to it was raised after the institution of the present suit on May 2, 1950 i.e. some 55 years later. It has been held in somewhat similar circumstances in *S. Rama Krishna Pillai v. Tirunarayana Pillai*, AIR 1932 Mad 198, that every allowance for the absence of evidence to prove the adoption should be favourably entertained in such cases. While therefore this is a case in which one cannot be expected to give direct parol evidence of the adoption, the documentary evidence is quite sufficient to prove that Meghraj, grandfather of the defendant, went in adoption to his maternal grandfather Kaniram alias Gunraj Chhangani. The learned Judge of the lower appellate Court committed an error in reaching a contrary decision and the error arose because he did not correctly read documents Exs. 7 and 14 in evidence and ruled out Exs. 8 and 9 altogether. He also committed the mistake of insisting on evidence regarding the ceremony of giving and taking of the boy in adoption in the case of such an old adoption.

40. Defendant Madanlal is the grandson of Meghraj and the next question for consideration is whether he could be lawfully taken in adoption by Mansaram. This was the subject-matter of issues No. 1 (b) and 2. Its answer depends on the provisions of the Rajput Adoption Rules, 1895-96. Same controversy was raised before me whether the Rules could apply to the present case because the parties are not Rajputs. But I need not go into the controversy in any detail for the point has been considered and answered by a Division Bench of this Court in *Prabhulal v. Ratan Singh*, 1958 Raj LW 616. In that case also, the parties were not Rajputs and the question arose whether the Rules were applicable to them. After considering the matter from all points of view this Court held that the Rules applied to Jagirdars and not merely to Rajputs as such because they were meant to operate with respect to grantees of "jagirs" from the State irrespective of their caste. It was further held that it had been satisfactorily proved that the law relating to adoptions in the case of "jagirdars" was laid down in the Adoption Rules of 1895-96 and according to those Rules, the principle of "mooris-ala" applied to such adoptions so that no person outside the line of the original grantee could be recognised as heir.

Besides, it will be recalled that the defendant clearly admitted in the written statement that the "mooris-ala" law was binding on the parties. It follows therefore that

as Meghraj went away in adoption to his maternal grandfather Kaniram alias Gunraj Chhangani, he ceased to belong to the line of the original grantee Hathi Ram, and his grandson Madanlal could not be taken in adoption by Mansaram so as to affect the succession to the "jagir." Since such an adoption has been alleged and it has been claimed that it affected Mansaram's "jagir", it must be rejected as invalid according to the law then in force in the Jodhpur State.

41. It now remains to consider whether Mansaram ceased to have any share in Hathi Ram's property by virtue of document Ex. 1 dated March 21, 1917. This was the subject-matter of issue No. 3.

42. A perusal of Ex. 1 shows that Mansaram brought a suit for partition against Maidas and it was ultimately agreed that while Mansaram would continue to reside in the same property in which he was residing earlier and would get Rs. 7 per month for his maintenance, he would have no other claim to the suit property and that defendant Maidas would take its income as well as the income of the village and the rent. This agreement was verified by the Court, which further directed that it should be acted upon by the parties. It was therefore a binding arrangement and the learned Judge of the lower appellate Court committed an error of law in rejecting it altogether. All the same, it appears to me that the arrangement referred to in the document was for the convenient management of the property and the distribution of Mansaram's share of the income of the "jagir" and the other property and it could not be interpreted as a document terminating the ownership of Mansaram in the property which was the subject-matter of the compromise.

43. The upshot of the above discussion is that the plaintiff is entitled to succeed in his claim in the suit. The appeal is therefore allowed, the judgment and decree of the lower appellate Court are set aside and it is declared that deed of adoption Ex. P. W. 10/1 in favour of defendant Madanlal is invalid and inoperative against the plaintiff and that Madanlal has no right to the "jagir" and the other property of Gopinath and his descendants. The appellant will be entitled to his costs throughout.

Appeal allowed.

AIR 1970 RAJASTHAN 200 (V 57 C 42)

JAGAT NARAYAN C. J. AND L. N.

CHHANGANI J.

Hari Narain Natani, Appellant v. Regional Transport Authority, Jaipur and another, Respondents.

Civil Special Appeals Nos. 92 and 98 of 1969, D/-29-1-1970, against judgment of Single Judge of this Court in Civil Writ Petn. No. 638 of 1967, D/- 10-9-1969.

DN/EN/B976/70/HGP/C

(A) Motor Vehicles Act (1939), Ss. 47 and 64 — Procedure for grant of stage carriage permits — Permits granted by R.T.A. without limiting number of stage carriages— Remedy of aggrieved person is by way of appeal under S. 64, Civil Spl. Appeal No. 113 of 1969, D/-28-1-1970 (Raj.), Rel. on. (Para 8)

(B) Constitution of India, Art. 226—Other remedy open—Practice of Rajasthan High Court — Writ Petition challenging appealable orders directly — High Court will not entertain unless such orders are without jurisdiction. Civil Writ Petn. No. 638 of 1967, D/-10-9-1969 (Raj.), Reversed. (Para 8)

(C) Motor Vehicles Act (1939), S. 47 — Procedure for grant of stage carriage permits — R.T.A. should dispose of all such pending applications as actually become ripe for hearing by the time it decides to convene a meeting for consideration of such applications — Civil Writ Petn. No. 66 of 1968 (Raj.), Reversed; 1968 Raj LW 461 and Civil Writ Petn. No. 469 of 1968 D/-31-7-1969 (Raj.) and Civil Writ No. 676 of 1967, D/- 4-11-1969 (Raj.), Rel. on. (Para 18)

Cases Referred: Chronological Paras

(1970) Civil Special Appeal No. 113 of 1969, D/-28-1-1970 (Raj.), Smt. Shakuntala Devi v. T. A. T., Jaipur 8

(1969) Civil Writ No. 676 of 1967, D/-4-11-1969 (Raj.), Lallu Narain Yadav v. Regional Transport Authority, Jaipur 17

(1969) Civil Writ Petn. No. 469 of 1968, D/- 31-7-1969 (Raj.), Surendra Pratap v. Regional Transport Authority 17

(1968) 1968 Raj LW 461 = ILR (1968) 18 Raj 694, Shivcharan Lal v. Regional Transport Authority, Jaipur 17

D. P. Gupta, for Appellant; J. P. Jain, for Kanhaiyalal, Respondent in Special No. 92 of 1969 and Govind Narain, Respondent in Special Appeal No. 98 of 1969.

JAGAT NARAYAN, C. J.: These two special appeals against a judgment of a learned Single Judge can conveniently be disposed of by one judgment.

2. The Regional Transport Authority, Jaipur, formed a route called Jaipur-Sikar amalgamated route consisting of numerous routes in 1955 and granted 56 permits on this route. Some of the unsuccessful applicants filed appeals and the Transport Appellate Tribunal granted 6 more permits on this route in 1956. There were thus 62 permits on this route. Seven of the permit-holders ceased to ply their vehicles on this route and since the year 1962 or near about only 55 buses had been running on it.

3. On 21-1-1965 the Regional Transport Authority published a general notification (Annexure 2) expressing an intention to increase the limit of permits on all

routes within the Jaipur Region and invited objections. The operators of the Jaipur-Sikar amalgamated route filed objections. But no decision was taken on these objections and the limit was not revised at that time.

4. Applications were filed for grant of fresh permits on the Jaipur-Sikar amalgamated route from time to time. The following applications were published on the dates mentioned against each:—

1. Abdul Aziz	29-9-1966
2. Hari Narain	23-2-1967
3. T. C. Soni	9-3-1967
4. Radhey Shyam Goel ..	10-6-1965
5. Mohammad Yusuf ..	7-9-1967

Several other persons applied for grant of permits and their applications were also published, but it is not necessary to give the dates of their publication.

5. These applications were considered at a meeting of the Regional Transport Authority on 19-10-1967, and 5 permits were granted to the above-named 5 persons. Kanhaiyalal, an existing operator on the Jaipur-Sikar amalgamated route, who had filed an objection against the grant of fresh permits on this route, filed S. B. Civil Writ Petn. No. 638 of 1967 (Raj.) against the grant of permits to the above five persons. He did not file any appeal to the Transport Appellate Tribunal against the grant of permits.

6. The Regional Transport Authority had not passed any order under Sec. 47 (3) fixing the limit of permits to be granted on this route before granting the above 5 permits. On this ground the learned Single Judge held that the grant of permits by the Regional Transport Authority was a nullity and he entertained Kanhaiyalal's writ petition even though he had not availed of the alternative remedy by way of filing an appeal. He quashed the permits granted to the above 5 persons. During the pendency of the writ petition the Regional Transport Authority passed an order under Section 47 (3) fixing the limit of permits at 60. The learned Single Judge took this fact into consideration and directed the Regional Transport Authority to reconsider the applications of the 5 persons whose permits had been quashed by him along with the applications of all other applicants which might be ripe for consideration, after fixing a proper agenda.

7. Against the above judgment Hari Narain has filed Special Appeal No. 92 of 1969. The first contention on his behalf is that the Regional Transport Authority should be deemed to have fixed 62 as the limit of permits under Section 47 (3) and it was not necessary for the Regional Transport Authority to take a fresh decision while filling in the seven vacancies on the route. The second contention is that the grant of permits to the 5 persons was not a nullity and the writ petition of Kanhaiya Lal should not have been entertained by the learned Single Judge as he had not filed an appeal

against the order before the Transport Appellate Tribunal.

8. In Smt. Shakuntala Devi v. T. A. T. Jaipur Civil Special Appeal No. 113 of 1969, D/- 28-1-1970 (Raj.), we have held that even if permits are granted on a new route by the Regional Transport Authority without fixing the limit under Section 47(3), the grant of permits is not a nullity and the remedy of the aggrieved persons is to challenge the grant of permits by filing an appeal under Section 64 before the Transport Appellate Tribunal. In view of this decision it is unnecessary to go into the question as to whether or not it was necessary for the Regional Transport Authority to refix the limits in the present case before granting further permits to the 5 persons. It is not the practice of this Court to entertain writ petitions challenging appealable orders directly unless the orders are without jurisdiction. The writ petition filed by Kanhaiya Lal should not have been entertained.

9. We accordingly allow the Special Appeal No. 92 of 1969, set aside the order of the learned Single Judge and dismiss the writ petition so far as Hari Narain, appellant, is concerned.

10. It is necessary to state some further facts for the disposal of Special Appeal No. 98 of 1969. One Govind Narain filed an application for the grant of a permit on the Jaipur-Sikar amalgamated route on 13-4-1967. This application was published on 13-7-1967 and objections were invited. Before the time for filing these objections had expired, the Regional Transport Authority decided to convene a meeting for the consideration of 8 applications for grant of permits on this route, namely, those of Abdul Aziz, Hari Narain, T. C. Soni and five others. The agenda for the meeting was published on 1-7-1967 (Annexure P/2). It was mentioned in this agenda that any person, who claims that his application has been pending prior to the applications included in the agenda, may also attend the said meeting and represent his case.

11. The meeting was to be held on 4th, 5th and 7th August, 1967. This meeting was not held on those dates and was adjourned to 15th September 1967. On 11-9-1967 Govind Narain filed an application (Annexure P/3) before the Regional Transport Authority praying that his application should also be considered at the time of granting fresh permits on the Jaipur-Sikar amalgamated route. No order was passed on this application at that time, but another agenda was published on 5-10-1967 (Annexure P/4) in which it was mentioned that the applications published on 5-1-1967, 9-3-1967, 23-2-1967, 11-11-1966, 9-3-1967 and 13-7-1967 for the Jaipur-Sikar amalgamated route will be considered at a meeting of the Regional Transport Authority on 6th, 7th and 8th November, 1967. The applications of Hari Narain, T. C. Soni and

Govind Narain were published on 23-2-1967, 9-3-1967 and 13-3-1967, respectively, and were thus included in this agenda.

12. The meeting fixed for 14th, 15th and 16th September 1967 was adjourned to 19th October 1967 and on the latter date 5 permits were issued to Abdul Aziz, Hari Narain, T. C. Soni, Radhey Shyam Goel and Mohammad Yusuf.

13. Govind Narain whose application was not considered at the meeting held on 19-10-1967 filed S. B. Civil Writ Petition No. 66 of 1968 challenging the grant of the above 5 permits. This writ petition was allowed by the learned Single Judge and all these 5 permits were quashed. A direction was issued to the Regional Transport Authority to consider the applications of these 5 persons along with that of the petitioner and all other persons whose applications might become ripe for hearing.

14. Against the above judgment Hari Narain has filed Special Appeal No. 98 of 1969.

15. It is contended on behalf of Hari Narain, appellant, that when the Regional Transport Authority published the agenda on 1-7-1967 for the meeting to be convened on 4th, 5th and 7th August 1967 to consider the applications for grant of fresh permits on Jaipur-Sikar amalgamated route the application of Govind Narain was not ripe as it had not even been published by them and, therefore, Govind Narain was not entitled to have his application considered at the meeting to be held on 4th, 5th and 7th August 1967 or the adjourned meetings which were a continuation of that meeting.

16. On behalf of Govind Narain it is contended that as on 19-10-1967, when the applications were actually considered, Govind Narain's application had also become ripe it should also have been considered along with the other applications. Further, it is argued that on 5-10-1967 agenda for the meeting to be convened on 6th, 7th and 8th November 1967 was published and in this agenda it was mentioned that the application of Govind Narain, Hari Narain and T. C. Soni would be considered along with other applications and he was misled by it and, therefore, did not attend the meeting of the Regional Transport Authority held on 19-10-1967 to represent his case.

17. The question which arises for determination in this case is what applications the Regional Transport Authority is bound to consider at a particular meeting. In Shivcharan Lal v. Regional Transport Authority, Jaipur, 1968 Raj LW 461, Kan Singh J. expressed the opinion that the Regional Transport Authority should dispose of all such pending applications as actually become ripe for hearing by the time it decides to convene a meeting for the consideration of such applications. We are respectfully in agreement with this view. Although the observation is obiter in Shiv-

charan Lal's case, the decision in Surendra Pratap v. Regional Transport Authority (S. B. Civil Writ Petn. No. 469 of 1968, D/- 31-7-1969 (Raj.)) is based on this criterion. This view is consistent with the view taken by a Division Bench of this Court of which one of us was a member in Lallu Narain Yadav v. Regional Transport Authority, Jaipur, on a reference by Kan Singh J. (in Civil Writ No. 676 of 1967, D/- 4-11-1969, Raj.).

18. Applying the above principle to the present case, the application of Govind Narain was not ripe for hearing on 1st July 1967 when the agenda for the meeting which the Regional Transport Authority convened for consideration of applications for fresh permits on the Jaipur-Sikar amalgamated route was published. Govind Narain was, therefore, not entitled to get the permit of Hari Narain quashed. We accordingly allow Special Appeal No. 98 of 1969 and quash the order of the learned Single Judge so far as Hari Narain is concerned.

19. We may mention here that 3 appeals were filed before the Transport Appellate Tribunal against the grant of 5 permits mentioned above. The Transport Appellate Tribunal allowed these appeals and set aside all the 5 permits by its order dated 7-10-69 and directed the Regional Transport Authority to reconsider the applications of the appellants and the respondents before it along with other pending applications which might become ripe for consideration. Hari Narain has filed Writ Petition No. 74 of 1970 against the decision of the Transport Appellate Tribunal. This writ petition has not yet been admitted.

20. We have mentioned above that the Regional Transport Authority fixed the limit on the Jaipur-Sikar amalgamated route at 60 on 27-11-1968. A revision application was filed against the fixation of this limit to the State Transport Authority, which was dismissed. Now Writ Petition No. 1458 of 1969 has been filed in this Court against the fixation of the limit. A stay order has been passed in that writ petition.

21. In the circumstances of the case, we leave both the parties to bear their own costs.

Order accordingly.

AIR 1970 RAJASTHAN 203 (V 57 C 43)

L. S. MEHTA, J.

Johri, Petitioner v. The State, Opposite Party.

Criminal Revn. No. 271 of 1968, D/- 15-10-1969, from order of S. J., Alwar, D/- 9-5-1968.

Penal Code (1860), S. 429 — Mischief by killing maimed cattle — Essential ingredient of offence under — Existence of requisite

intention or knowledge necessary — Accused throwing stone towards complainant and not towards calf to cause wrongful loss or damage to complainant — Calf sustaining injury on its nasal region and dying — Essential ingredient being absent, section did not apply. AIR 1958 Raj 347 and AIR 1953 Sau 158, Ref. to. (Paras 5, 6)

Cases Referred: Chronological Paras (1958) AIR 1958 Raj 347 (V 45) =

1957, Raj LW 642 = 1959 Cri LJ

87, Arjunsingh v. The State

(1953) AIR 1953 Sau 158 (V 40) =

1953 Cri LJ 1350, Bhagwan v.

State

(1901) Cri. Revn. Case No. 434 of

1901 = 1 Weir Cr R 502, In the

matter of Obammal

P. N. Dutt, for Petitioner; A. K. Mathur,

Dy. Govt. Advocate, for Opposite Party.

ORDER: On June 16, 1966, the complainant Ratna's cow entered the house of the accused Johri at about noon. This led to altercations between Ratna and Johri. The accused Kishanlal and Rewaria sided Johri. The accused Johri is said to have thrown a stone towards Ratna. The stone accidentally fell on Ratna's calf tethered nearby as a result of which it sustained an injury on its nasal region and died soon after. A report of this incident was made at the police station, Rajgarh, district Alwar. The police investigated the matter and put up a challan against the accused Johri, Kishan and Rewaria for offences under Sections 429, 448 and 323, I. P. C., in the Court of the Munsiff Magistrate, Rajgarh (Alwar). The prosecution examined six witnesses, including P.W. 5, Veterinary Assistant Surgeon, Dr. Parmeshwar Sahai.

The accused denied to have committed the offence in their statements recorded under S. 342, Cr. P. C. They did not produce any evidence in their defence. The trial Court by its judgment dated January 29, 1968, acquitted the accused Kishanlal and Rewaria of all the charges. He also acquitted Johri for offences under Sections 448 and 323, I. P. C. He, however, convicted Johri under Section 429, I. P. C., and sentenced him to rigorous imprisonment for two months and to pay a fine of Rs. 50, in default to further suffer rigorous imprisonment for 15 days. An appeal was taken against that judgment by the accused Johri in the Court of Sessions Judge, Alwar. The appellate Court by its judgment, dated May 9, 1968, partially accepted the appeal and, while maintaining the conviction of the appellant under S. 429, I. P. C., reduced the substantive sentence of two months' rigorous imprisonment to one till the rising of the Court and kept the sentence of fine of Rs. 50 intact. Hence, this revision.

2. Learned counsel for the petitioner submits that the judgment of the Court below is in direct conflict with the provisions of Section 429, I.P.C., as the prosecution has failed to bring home intention or knowledge of the accused to commit mischief.

3. In this case from the statement of P.W. 2 Parbhata, P.W. 3 Kanni and P.W. 4 Ratna, it is clear that when Ratna's cow entered Johari's house, there were altercations between Ratna and Johari. The cow was driven out by Johari. Ratna's calf was also found tethered on Ratna's 'Chabutari'. The calf was untied by Johri. Ratna objected to this and again tied the animal. Thereupon Johri wanted to pelt stones towards Ratna, but accidentally the stone fell on the calf on its nasal region, resulting in its death.

4. Section 429, I. P. C., necessitates three things: (1) intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person, (2) causing the destruction of some property or any change in it or in its situation, and (3) such change must destroy or diminish the property mentioned in the section itself. In this case, evidence shows that the calf died as a result of the stone falling upon it accidentally. The question remains whether it should be inferred from the circumstances of the case that the accused had had the intention or knowledge of likelihood of causing wrongful loss or damage to the public or to any person. There is not an iota of evidence on the record from which such an intention or knowledge can be gathered. The only evidence is that the accused wanted to throw stone towards Ratna and not towards the calf with a view to cause wrongful loss or damage to Ratna. Since the first and the most important ingredient of the offence under Section 429, I. P. C., is totally absent, the Court below went wrong in holding that Section 429, I. P. C., was applicable to this case.

5. In *Arjun Singh v. The State*, 1957 Raj LW 642 = (AIR 1958 Raj 347), it has been observed by this Court:

"In order to prove an offence of mischief, it is necessary for the prosecution to establish that the accused had an intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person."

It has further been observed in this case that if an animal is killed accidentally, whatever may be the responsibility of the accused to compensate its owner for the loss of property caused to him in a Civil Court, it cannot be said with any justification that he committed a criminal offence under Section 429, I. P. C. A Division Bench of the Saurashtra High Court consisting of Shah, C.J. and Baxi, J., reported as *Bhagwan v. State*, AIR 1958 Sau 158, has held that the offence of mischief under Section 429, I. P. C., is committed if the offender commits mischief by killing, poisoning, maiming or rendering useless any buffalo, etc. Under Section 425, I. P. C., a person is said to commit mischief with intent to cause or knowing that he is likely to cause wrongful loss to a person causes the destruction of any property. The exist-

ence of the requisite intention or knowledge is, therefore, an essential ingredient to the offence and the accused cannot be convicted under Section 429, I. P. C., unless it is established that the act of killing, etc., was with the requisite intention or knowledge.

There is another relevant citation found in Criminal Revision Case No. 434 of 1901 = 1 Weir 502, in the matter of Obammal, accused. In that case the accused Obammal was convicted under S. 429, I.P.C., and sentenced to pay a fine of Rs. 20 or, in default, to undergo rigorous imprisonment for 20 days. The mischief consisted in throwing a stone at a young buffalo and thereby causing its death. The stone was thrown to drive the animal out of the backyard and the animal after running some distance fell down and died. The prosecution witnesses stated that the accused threw a brick at the buffalo and caused its death. There was, however, nothing to show that the accused had in throwing the stone, any intention to cause injury to the animal or reasonable cause to suppose that loss or damage was likely to be caused. The Madras High Court held that in these circumstances the conviction was wrong.

6. In this case, as has been said above, there is nothing to show that the accused had in throwing the stone intention to cause injury to the animal or that he had the knowledge that his act would result in damage to the complainant Ratna. There is also no evidence to suggest what the size of the stone was. The sole intention of the accused appears to have been to throw a stone towards Ratna. The stone accidentally fell upon the calf. Under these circumstances, the conviction made by the Court below was bad in law.

7. In the result, the conviction of the accused Johri is set aside and he is acquitted of the offence under Section 429, I. P. C. The amount of fine, if levied, must be refunded to him.

Conviction set aside.

AIR 1970 RAJASTHAN 204 (V 57 C 44)
JAGAT NARAYAN, J.

Sohan Raj Taparia, Appellant v. Mahendra Singh, Respondent.

Ex. First Appeal No. 27 of 1965, D/- 29-10-69, from order of Dist. J., Pali, D/- 17-9-1965.

(A) Civil P. C. (1908), S. 48-A (Rajasthan) (as modified by Council Resolution dated 1-12-1914) — Bar of execution — Decree of 1885 A.D. — Period of 24 years, how to be computed.

At the time of passing of decree against Kurki Thikana, there was no period of limitation for execution of decree. Thikana was under management of Haisiyat Court from 1909 to 1915 and from 21-7-1938 to

DN/EN/C21/10/VSS/G

21-7-1958. By virtue of Sections 1(5) and 9(1)(b) of Marwar Jagirdars Encumbered Estates Act, 1922, the decree could not be executed between 1909 and 1915. Under Section 31(2)(c) of the said Act, in computing period of limitation, the period during which decree-holder could not execute decree on account of Thikana being under management of Haisiyat Court was to be excluded. Therefore, excluding the period from 21-7-1938 to 21-7-1958, an application for execution filed on 18-11-1958 is within 24 years of date when Thikana was released from Haisiyat Court in 1915.

(Paras 4, 5, 6)

(B) Civil P. C. (1908), O. 21, R. 16 — Application for execution by transferee of decree — Assignee of part of decree — His share was defined — Assignee could execute decree in respect of his share. AIR 1965 Raj 258 and AIR 1954 Bom 273, Rel. on; AIR 1953 Bom 137, Disting.

(Paras 10, 13, 14)

(C) Civil P. C. (1908), O. 2, R. 2 — Relinquishment of part of claim — Not applicable to execution proceedings. (Para 9) Cases Referred: Chronological Paras

(1965) AIR 1965 Raj 258 (V 52) =

Ex-Second Appeal No. 27 of 1962,

D/-15-10-1965, Durga Prasad v.

Gouri Shankar

(1963) Ex-Second Appeal No. 31 of

1962, D/-10-1-1963 (Raj.), Champal

v. Ghisulal

(1954) AIR 1954 Bom 273 (V 41) =

ILR (1954) Bom 873, Motilal Shiv-

narayan v. Santaram Bala

(1953) AIR 1953 Bom 137 (V 40) =

ILR (1953) Bom 356, Valchand v.

Manekbai

(1938) AIR 1938 Bom 364 (V 20) =

ILR 57 Bom 468, Panaji v. Ratan-

chand

Roshan Lal Maheshwari, for Appellant;

L. R. Mehta, for Respondent.

JUDGMENT: This is an execution first

appeal, by one Sohan Raj Taparia, decree-

holder.

2. Two contentions were raised before the

executing Court. One was that the decree

was barred by limitation and the other was

that an assignee of a part of a decree could

not put it into execution. The executing

Court held that the decree was within limita-

tion. But at the same time it was of the

view that an assignee of a part of a decree

could not execute it. The execution appli-

cation was accordingly dismissed.

3. On behalf of the assignee-decree-

holder Sohan Bai Taparia it is contended

that the decision of the executing Court on

the second point is erroneous and on behalf

of the judgment-debtor it was contended

that its decision on the question of limita-

tion was erroneous.

I shall first consider the question of limita-

tion. I am of the opinion that the exe-

cution application is within time. The

decree was passed in 1885 A.D. by a Court in the erstwhile State of Jodhpur. At that time there was no period of limitation prescribed for execution of decree either under any law of limitation or under any law of civil procedure. Limitation Act and Code of Civil Procedure were first enacted on 1-6-1913. Under these Acts the limitation for executing a decree was 12 years. These Acts were modified, vide Council Resolution dated 1-12-1914 under which the limitation was enhanced to 24 years. Under Council Resolution dated 6-4-1921 it was provided that in special cases the decree could be executed even up to 30 years.

4. The decree was passed against Kurki Thikana which was under the Haisiyat Court from 1909 to 1915. In 1922 the Marwar Jagirdars Encumbered Estates Act, 1922, was passed. By Section 1(5) of it, the Act was applied retrospectively to all jagirs taken under the Haisiyat Court before the passing of the Act. Under Section 9(1)(b) of the Act no decree could be executed against a Thikana which had been taken under the management of the Haisiyat Court. Section 31(2)(c) of the Act laid down that in computing the period of limitation for execution of a decree the period during which the decree-holder could not execute the decree on account of the Thikana being under the management of the Haisiyat Court was to be excluded. The executing Court has discussed in detail the evidence on the basis of which it held that the Thikana was under the Haisiyat Court from 1909 up to the end of 1915. I agree with its finding on the point. The period of 24 years would, therefore, reckon from the end of 1915 so far as execution of this decree is concerned. Before the expiry of this period the Thikana was again taken under the Haisiyat Court under the Marwar Jagirdars Encumbered Estates Act, 1922, on 21-7-1938 and was only released on 21-7-1958. The present execution application was filed on 18-11-1958. Under Section 48-A of the Code of Civil Procedure as inserted by the State of Rajasthan, this decree which was passed before 25-1-1950, when the Civil Procedure Code which was applicable provided a period of 24 years for execution of decree, will be deemed to have been passed on 25-1-1950. It could have been put into execution up to 25-1-1962. The Thikana was released from the superintendence of the Haisiyat Court only on 21-7-1958. The period from 21-7-1938 to 21-7-1958 has been rightly excluded under Section 31(2)(c) of the Marwar Jagirdars Encumbered Estates Act, 1922.

5. It may be mentioned here that the Thikana was under attachment for realising Government revenue from 1915 to 1938. It was taken over by the Haisiyat Court by the order of the Revenue Minister dated 21-7-1938 (at p. 74 of the Paper-book). After the formation of Rajasthan the Jagirdars who were under the Haisiyat Court were placed under the superintendence of

the Court of Wards Department which was formed under the Rajasthan Court of Wards Act, 1951. Jagir Kurki was released from the Haisiyat Court with effect from 21-7-1958 by a notification of the Revenue Board (Court of Wards), Rajasthan, published in Rajasthan Gazette, dated March 19, 1959 (at p. 78 of the paper-book). Excluding the period from 21-7-1938 to 21-7-1958, the present execution application filed on 18-11-1958 was within 24 years of the date when the Thikana was released from the Haisiyat Court in 1915.

6. I accordingly hold that the present execution application is within limitation.

7. Coming now to the second point as to whether it is open to the present decree-holder Sohan Raj Taparia to execute the decree it may be stated that a decree for Rs. 43,088-11-6 was passed in 1885 A.D. in favour of Seth Gulabchand Nathmal. The original decree-holder assigned Re. 0-4-9 share in the decree to Sohan Raj Taparia and Re. 0-4-9 share to Jai Narayan, Daulat Ram and Kishan Gopal. The remaining share of the decree was also assigned to different persons whose names need not be mentioned. As has been stated above, the decree was under attachment from 1915 to 1938 till it was again taken over by the Haisiyat Court. During the period of attachment it was under the Hawala Department. When the jagir was under the Hawala Department, the decree-holder could make an application for execution to the Court and if any surplus money was available with the Hawala Department it was sent for by the Court from there and paid to the decree-holder. During the period the jagir was under the Hawala Department execution applications were made from time to time to the Chief Court of Jodhpur. The order-sheet of the Chief Court (at p. 4 of the paper-book) goes to show that Sohan Raj, Jai Narayan, Daulat Ram and Kishan Gopal filed an application alleging that Sohan Raj had purchased Re. 0-4-9 of the decree and Jai Narayan, Daulat Ram and Kishan Gopal had also purchased Re. 0-4-9 share in the decree and praying that their names may be entered in the decree. At this, notice was issued to the judgment-debtor, namely, Kurki Thikana as well as the decree-holder Gulab Chand Nathmal. On 8-3-1937, Gulab Chand Nathmal's Mukhtar Simrathmal and Mutha Deepraj, Perokar of Kurki Thikana appeared and stated that they had no objection to the prayer of Sohan Raj Taparia, Jai Narayan, Daulat Ram and Kishan Gopal being granted. The Chief Court thereupon passed an order granting this prayer. The share of Sohan Raj in the decree was thus defined under the order of the Chief Court, Jodhpur. The notice issued by the Haisiyat Court dated 30-10-39, which is at page 5 of the paper-book, goes to show that Sohan Raj's share in the decree was defined as Rs. 12,825-1-6. At page 6 of the paper-book is the "rank list" prepared by the Haisiyat Court defining

shares of all the assignees of the decree. In this also the share of Sohan Raj Taparia has been shown as Rs. 12,825-1-6. This "rank list" was prepared on 6-3-1942. At page 7 of the paper-book is a copy of the ledger account of Sohan Raj mentioned by the Haisiyat Court. It shows that out of the decretal amount of his share a sum of Rs. 1,474-11-0 was realised leaving a balance of Rs. 11,350-6-6. This was the amount for which execution application was filed by Sohan Raj on 18-11-1958 in the Court of the District Judge, Pali.

8. In holding that the assignee of a share of a decree could not execute it the learned District Judge relied on an observation of Peacock, C.J., in *Haro Shankar Sandyal v. Tarak Chandra Buttacharjee* to the following effect:—

"Suppose there was a decree for a lakh of rupees, it could not be contended that the decree-holder could assign it to a lakh of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. Otherwise, there might be a lakh of executions under the decree, a lakh of seizures and a lakh of sales under each one of which there can be no doubt that the judgment-debtor would suffer loss. If this were allowed, the judgment-debtor must necessarily be ruined."

9. The learned District Judge has not given the citation of the case in which the above observation was made. The illustration given by the learned Chief Justice is an extreme one. He has failed to take into consideration that a decree-holder who wishes to execute a decree is himself subjected to lot of irrecoverable expenditure and harassment. The Bombay High Court has been taking the view that piecemeal execution of a decree is not permissible except when it grants separate and distinct reliefs. This view has not been followed by this Court. In *Champalal v. Ghisulal* (Ex. Second Appeal No.-31 of 1962, D/- 10-1-1963) the Bombay view was not followed. The decision in *Panaji v. Ratanchand*, AIR 1933 Bom 364 was referred to in that case. The learned Judge based his decision on the proposition that nothing is permissible which is not expressly permitted by the Code of Civil Procedure. This opinion was not accepted by this Court as it has been laid down in a number of cases that the Code is not exhaustive. It is settled law that Order 2, Rule 2, C. P. C., is not applicable to execution proceedings. It may be that in certain cases there are circumstances from which it can be inferred that a decree-holder executing a decree for a lesser sum can be taken to have waived his right to levy execution for the balance. That is not the case here. Sohan Raj is an assignee of Re. 0-4-9 share of the decree.

10. In *Durga Prasad v. Gauri Shankar* Ex. Second Appeal No. 27 of 1962, D/- 15-10-1965 = (reported in AIR 1966 Raj 258), the same view was again taken. It was observed that although there

is no express provision in the Code of Civil Procedure laying down that separate and successive execution applications can be made but there is no prohibition against it either and that the Court ought not to act on the principle that every procedure is prohibited unless it is expressly provided for, but should proceed on the opposite principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. The Code is not exhaustive of all forms of procedure necessary to be used in the administration of justice.

11. In *Motilal Shivnarayan v. Santram Bala*, AIR 1954 Bom 273, this very principle was followed and it was held that partial transfer of a decree in favour of an assignee is permissible because Order 21, Rule 16 does not prohibit it expressly.

12. The other reason given by the learned District Judge for holding that Sohan Raj cannot execute his decree for his share was that the decision of the Bombay High Court in *Valchand v. Manekbai*, AIR 1953 Bom 137, supported the objection raised by the judgment-debtor in this behalf. I have carefully gone through this decision. Far from supporting the objection of the judgment-debtor in Para. 6 it is stated—

“If the shares of the decree-holders are apparent on the face of the decree either expressly or by necessary implication, it is not strictly speaking a joint decree. In such a case as Mr. Justice Shah has pointed out each decree-holder can take out execution in respect of his own share.”

13. I have already pointed out above that the share of Sohan Raj was defined by the order of the Chief Court on 8-3-37 after notice to the judgment-debtor who raised no objection. Payments were made by the Haisiyat Court to Sohan Raj on the basis of this definition of his share in the decree by the Haisiyat Court without any object on behalf of the judgment-debtor. The facts of the present case are thus distinguishable from the facts of the case in AIR 1953 Bom 137.

14. I am accordingly of the opinion that Sohan Raj is entitled to execute the decree in respect of the share assigned to him. I therefore allow the appeal, set aside the order of the executing court and direct it to execute the decree in accordance with law. The appellant is entitled to recover the costs of both the Courts from the respondent.

Appeal allowed.

AIR 1970 RAJASTHAN 207 (V 57 C 45)

D. M. BHANDARI C. J. AND
SOHAN NATH MODI, J.

The Commissioner of Income-Tax, Rajasthan, Jaipur, Applicant v. Messrs Indra and Co., Jodhpur, Respondent.

Income-Tax Reference No. 35 of 1967,
D/- 18-9-1969.

Income-tax Act (1961), S. 271 (1) (a) — Failure to furnish return — Penalty — Notice issued to assessee to show cause why penalty should not be imposed for failure to submit return under Section 139 (1) — Order imposing penalty — Held order was not tenable in law.

(Paras 4, 9)

S. C. Bhandari, for the Income-Tax Department; S. K. Kadar and P. K. Bhansali, for Opposite Party; Sohan Lal Choudhary as an Intervener.

BHANDARI C. J.: This is a reference by the Income-Tax Appellate Tribunal, Delhi Bench 'A', hereinafter called the 'Tribunal', under Section 256 (1) of the Indian Income-Tax Act, 1961, hereinafter called the Act, made at the instance of the Commissioner of Income-Tax.

2. Messrs. Indra and Company, Jodhpur, a registered firm under the Act and one of its partners Shri Jiwanlal Maheshwari had to submit their income-tax returns under Section 139 (1) of the Act by or before 30th June, 1962. Both of them made applications to the Income-Tax Officer, A Ward, Jodhpur, for extending the time for filing their returns and the time was extended upto 31-8-62 in both the cases. Again, applications were made for extension of the time and they were granted time upto 20-9-62 and further extension was granted upto 30-9-62, but the returns were not filed even on that day. The said Income-tax Officer then served notice on the assessee under Section 139 (2) of the Act calling upon them to file returns within thirty days and the returns were then filed on 25-4-63. During the course of assessment proceedings, the Income-Tax Officer issued notices against the assessee to show cause why penalty should not be imposed for failure to submit the returns under Section 139 (1) of the Act.

The assessee submitted applications showing cause for delay but the Income-Tax Officer did not hold their explanation to be reasonable and imposed penalties on both of them under Section 271 (1) (a) of the Act. Both the assessee preferred appeals before the Appellate Assistant Commissioner raising two contentions. The first contention was that as soon as notices under Section 139 (2) of the Act were issued, it must be taken that the delay in filing the returns under Section 139 (1) was condoned by the Income-Tax Officer and as such no action could be taken for not filing the returns in time as laid down under Sec-

tion 139 (1). The other contention was that the Income-tax Officer had not mentioned in the assessment order that the penalty proceedings were being initiated for default under Section 139 (1) and as such penalty proceedings could not be said to be initiated during the course of the assessment proceedings.

The Appellate Assistant Commissioner rejected both the arguments and confirmed the orders of the Income-tax Officer. The assessee then preferred appeals before the Tribunal and the Tribunal took the view that as in each case the assessment proceedings had been initiated and completed on the basis of the returns submitted under Section 139 (2), it was not permissible under law that penalty should be imposed for any default committed in not submitting the returns under Section 139 (1). On application by the Commissioner of Income-tax the Tribunal has submitted the following question for the opinion of this Court:

"Whether the Tribunal rightly held that the orders of penalties in question under Section 271 (1) (a) of the Income-tax Act, 1961, were not tenable in law?"

In order to appreciate the argument of the Tribunal for taking the view that penalty could not be imposed on the assessee for any default committed in furnishing the returns as required under Section 139 (1), it is necessary to set-out the following relevant portions of Sec. 271 (1) (a) of the Act and Section 28 of the Indian Income-Tax Act, 1922:—

"Section 271 (1). If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-sec. (1) of Section 139 or by notice given under sub-section (2) of Section 139 or Sec. 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 139 or by such notice, as the case may be, or

(b) he may direct that such person shall pay by way of penalty,—

(i) in the cases referred to in clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent of the tax;

(ii) Section 28. (1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which

he was required to furnish by notice given under sub-section (1) or sub-section (2) of Section 22 or Section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) (c) he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any payable by him, a sum not exceeding one and a half times, that amount....."

The Tribunal contrasted the language of Section 271 (1) (a) of the Act with the language of Section 28 (1) (a) of the old Act and noticed that the words "as the case may be" were added in clause (a) of sub-section (1) of Section 271 of the Act and these words substantially modified the corresponding provisions of Section 28 (1) (a) of the old Act. The Tribunal proceeds to say that under the Act minimum penalty is provided and that minimum penalty is to be calculated for every month during which default continued and this calculation is possible only when the limits of time during which the default continued can be determined. The Tribunal took the view that so far as the time of commencement of the default is concerned, it was known and definite in the instant case. It was, however, not possible to determine the point of time when the default ceased in either of these two cases, for the simple reason that the defaults in these cases never ceased as none of the assessee had filed any return as required under Section 139 (1). We have, to examine whether this reasoning is correct.

3. The addition of the words "as the case may be" at the end of Section 271 (1) (a) of the Act presents us with no problem in interpretation. Under this section, the defaults contemplated are of four kinds:—

1. any person who without reasonable cause has failed to submit return of total income which he was required to furnish under sub-section (1) of Section 139; or

2. any person who without reasonable cause has failed to furnish the return of total income which he was required to furnish by notice given under sub-sec. (2) of Section 139 or Section 148; or

3. any person who without reasonable cause has failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 139; or

4. any person who without reasonable cause has failed to furnish it within the time allowed and in the manner required by notice given under sub-section (2) of Sec. 139 or Sec. 148.

The words "as the case may be" have been put because all these four cases have been condensed in one paragraph and these words only mean that, whichever the case may be, the person shall be deemed to

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